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

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

REPORTS

OF CASES RELATING TO

MARITIME LAW:

CONTAINING ALL THE

DECISIONS OF THE COURTS OF LAW AND EQUITY

IN

The United Kingdom.

EDITED BY

BUTLER ASPINALL, K.C., and JOHN BRIDGE ASPINALL,

BARRISTERS-AT-LAW.

VOL. X., NEW SERIES.

From 1905 to 1908.

LONDON: HORACE COX, BREAM'S BUILDINGS, E.C.

1908

LONDON :
PRINTED BY HORACE COX, WINDSOR HOUSE, BREAM'S BUILDINGS, E.C.

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REPORTS

OF

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MARITIME LAW.

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COURT OF APPEAL.

Tuesday, Aug. 9, 1904.

(Before Collins, M.R., Stirling and Mathew, L.JJ.)

Turner, Brightman, and Co. *v.* Bannatyne and Sons Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Demurrage — Lay days—Grain cargoes—London Corn Trade Association Contract—Construction.

The London Corn Trade Association Contract, which was incorporated in a charter-party, provided that the time for discharge of a cargo of grain should be: "One running day for every 400 tons up to 2800 tons, and, for all quantities in excess, 500 tons per day; but in no case less than five days."

Held (affirming the judgment of Walton, J.), that, upon the true construction of the contract, the time to be allowed for discharge of a cargo, whatever its size, was one day for every 400 tons up to 2800 tons, and one day for every 500 tons in excess of 2800 tons.

Appeal of the plaintiffs from the judgment of Walton, J. at the trial of a preliminary question in the action.

The plaintiffs brought this action to recover the sum of 121*l.*, being demurrage for two and a half days, under a charter-party.

The plaintiffs were the owners of the steamship *Zodiac*.

The defendants were the holders of a bill of lading for a cargo of maize laden upon the *Zodiac* at Buenos Ayres, under which they took delivery of the cargo at Limerick.

By the terms of the bill of lading, freight and all other conditions were as per charter-party dated the 17th Nov. 1902.

The charter-party provided that: "Demurrage as above shall be payable for any detention in taking delivery of cargo at port of discharge, the same having to be discharged as per London Corn Trade Association Contract, No. 22."

The London Corn Trade Association Contract, No. 22, provided as follows:

Sufficient days to be left for unloading (Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted). Sufficient days (counting quarter days) shall be as follows: One running day for every 400 tons up to 2800 tons of grain, and, for all quantities in excess, 500 tons per day (as provisionally invoiced), whether for direct port or for orders, but in no case less than five days, Sundays, Good Friday, Easter Monday, Whit Monday, and Christmas Day excepted.

The provisional invoice for the cargo showed an amount of 3839 tons.

The plaintiffs contended that the meaning of the contract was that one day should be allowed for every 500 tons of cargo, the cargo being over 2800 tons, and they alleged that, the time being so computed, the time for the discharge of the cargo had been exceeded by two days and a half.

The defendants contended that the meaning of the contract was that one day should be allowed for every 400 tons up to 2800, and one day for every 500 tons above that amount; and they alleged that, in that view, the cargo had been discharged in time.

The preliminary question as to the true construction of the contract was tried before Walton, J. without a jury, and the learned judge gave judgment in favour of the contention of the defendants (9 Asp. Mar. Law Cas. 495; 89 L. T. Rep. 507).

The plaintiffs appealed.

Scrutton, K.C. and *A. A. Roche* for the appellants.—The learned judge's decision as to the true construction of the clause in the contract as to the time for discharge was wrong. The meaning of that clause is that, if a cargo exceeds 2800 tons, it is all to be discharged at the rate of 500 tons a day, but that cargoes which do not exceed 2800 tons are to be discharged at the rate of 400 tons a day, in each case subject to the minimum of five days. The reason why the larger cargoes are to be discharged at a faster rate is that in the case of larger vessels cargoes can usually be more quickly and easily discharged. The word used in the contract is "quantities," in the plural, and that clearly refers to whole cargoes, and not merely to a quantity in excess of 2800 tons.

Clavell Salter, K.C. and *E. Bray*, for the respondents, were not called upon to argue.

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

Collins, M.R.—I am of opinion that we cannot differ from the judgment of Walton, J. as to the meaning of this contract The clause in question provides as follows: "One running day for every 400 tons up to 2800 tons of grain, and, for all quantities in excess, 500 tons per day (as provisionally invoiced), whether for direct port or for orders; but in no case less than five days." That, in its *primâ facie* meaning, says nothing at all about the size of ships; it refers solely to the number of tons of grain carried by a ship. It is impossible for anyone to say that the construction given to that clause by Walton, J. is not a possible construction. In my opinion it seems to be not only a possible construction, but the natural construction. There would, I think, be just as many anomalies if the construction suggested by the appellants were adopted as those which it is said would follow from the construction adopted by Walton, J. In his judgment the learned judge has made some valuable observations. He said: "Again, it is plain, and there is no dispute about it, that at least five days are to be allowed, and it is suggested, and probably rightly suggested, that this is stipulated for because there is always certain work preliminary to the actual discharge which has to be done, and which, speaking generally, will very likely occupy more or less the same length of time in the case of a small ship as in the case of a larger ship." It seems to me that the longer time is given for the discharge of the first part of the cargo by reason of the preliminary work which has to be done in any case. In my opinion this appeal fails, and must be dismissed.

Stirling, L.J.—I agree.

Mathew, L.J.—I am of the same opinion.

Appeal dismissed.

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

Solicitors for the respondents, *J.* and *A. A. Tilleard.*

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Thursday, July 14, 1904.

(Before Lord Alverstone, C.J., Kennedy and Phillimore, JJ.)

Rex (on the prosecution of the Board of Trade) (app.) *v.* Goldberg (resp.). (*a*)

Offence—Going on board ship at end of voyage without authority — Liability to six months' imprisonment—Offence to be "prosecuted summarily" — Right to trial by jury—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 218, 680, *sub-s* 1 (*b*)—*Summary Jurisdiction Act* 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17.

Sect. 680. *sub-sect.* 1 (*b*), *of the Merchant Shipping Act* 1894 *provides that an offence under the Act made punishable with imprisonment for a term not exceeding six months, or by a fine not exceeding* 100*l.*, "*shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts*"

Held, that this sub-section does not exclude sect. 17 *of the Summary Jurisdiction Act* 1879, *under which a person charged before a court of summary jurisdiction with an offence in respect of which he is liable to imprisonment for a term exceeding three months, has a right to be tried by a jury; and consequently, if a person is charged under sect.* 218 *of the Merchant Shipping Act with unlawfully going on board a ship which has arrived at the end of her voyage, whereby he becomes liable under that section to a fine not exceeding* 20*l.*, *or, at the discretion of the court, to imprisonment not exceeding six months, such person has the right upon being charged before the court of summary jurisdiction, to claim to be tried by a jury.*

Case stated by the stipendiary magistrate for the borough of West Ham.

At a court of summary jurisdiction held at the Police-court, Stratford, in the borough of West Ham, in the county of Essex, and within the metropolitan police district, on the 2nd June 1904, an information preferred by the solicitor to and on behalf of the Board of Trade (hereinafter called the appellant) against Abraham Goldberg (hereinafter called the respondent) for an offence against sect. 218 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) was heard and determined by the magistrate, and upon such hearing the magistrate at the request of the respondent pursuant to sect. 17 of the Summary Jurisdiction Act 1879, committed the respondent for trial at the adjourned borough sessions.

The facts were as follows:—

The appellant was the solicitor to and on behalf of the Board of Trade, and the respondent was Abraham Goldberg, a tailor, carrying on business at Victoria Dock-road, E.

The information laid by the appellant charged that the respondent, on the 30th May 1904, in the borough of West Ham, not then being in His Majesty's service, and not being duly authorised by law for the purpose, did unlawfully go on board the British ship *Acanthus*, lying at D. Jetty, Victoria Dock, which vessel had arrived at the end of her voyage, without the permission of the master of the ship, before the seamen lawfully left the ship at the end of their engagement or were discharged, contrary to the form of the statute in such case made and provided: (sect. 218 of the Merchant Shipping Act 1894).

On the hearing of the information before the magistrate, on the 2nd June 1904, as it appeared to him that the respondent was liable on summary conviction of the offence, to be imprisoned in the first instance for a term exceeding three months, after the charge had been read to him and before the same was gone into, the magistrate addressed the respondent to the following effect, as required by sect. 17 of the Summary Jurisdiction Act 1879: "You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily to be tried by a jury. Do you desire to be tried by a jury?" and the magistrate added to such address the statement suggested by the section.

The respondent, who was not represented, claimed to be so tried.

Upon this counsel for and on behalf of the appellant objected to the option being given to the respondent, of being tried by a jury. In support of his objection he contended: First, that

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

sect. 680, sub-sect. 1 (*b*), of the Merchant Shipping Act 1894, which prescribes the manner of prosecution of offences against sect. 218 of the Act, required that the charge must be dealt with summarily, and that the magistrate ought therefore to have heard the case, and not to have sent it to the borough sessions; and that any provisions of the Summary Jurisdiction Acts which give an option to the defendant in certain cases to claim to be tried by a jury did not apply to prosecutions governed by sect. 680, sub-sect. 1 (*b*), of the Merchant Shipping Act 1894. Secondly, that sect. 17 of the Summary Jurisdiction Act 1879 did not apply to a charge which was punishable by "a fine, or, at the discretion of the court, to imprisonment for a term exceeding three months," such as a charge under sect. 218 of the Merchant Shipping Act 1894, which is punishable with a fine not exceeding 20*l.*, or at the discretion of the court with imprisonment for any term not exceeding six months.

In support of his contention he quoted the cases of *Carle* v. *Elkington* (56 J. P. 359) and *Williams* v. *Wynne* (52 J. P. 343), but the magistrate considered that these cases were not in point, and did not support the appellant's contention, inasmuch as in *Carle* v. *Elkington* (*ubi sup.*) it was held that sect. 17 did not extend to a case where more than three months' imprisonment could be given for nonpayment of a fine, but only applied where the offence was punishable, as in this case, by imprisonment in the first instance, and in *Williams* v. *Wynne* (*ubi sup.*) the punishment by imprisonment in the first instance only extended to three months.

The magistrate overruled the appellant's first objection, because he was of opinion that as sect. 680, sub-sect. 1 (*b*), of the Merchant Shipping Act directed that the offence should be prosecuted summarily in manner prescribed by the Summary Jurisdiction Acts, such Acts applied in their entirety to this prosecution, and that sect. 17 of the Summary Jurisdiction Act 1879 laid imperatively on him the duty of informing the respondent of his right to a trial by a judge and jury (see *Reg.* v. *Cockshott*; *Ex parte Rickaby*, 62 J. P. 325), and he overruled his second objection because he was of opinion that such last-mentioned section applied to all cases in which he had the discretion to impose in the first instance more than three months' imprisonment for the offence, and he therefore ruled that the respondent was entitled to be tried by a jury.

The evidence for the appellant was then heard by the magistrate, and on that evidence he committed the respondent to trial at the adjourned borough sessions, and he bound him over in his own recognisances in 20*l.* to appear at the sessions.

The question for the opinion of the court was: Whether upon the facts stated the magistrate was right in determining that the respondent was entitled to claim the right to be tried by a jury under sect. 17 of the Summary Jurisdiction Act 1879, and in committing him to take his trial at the adjourned sessions for the borough of West Ham, or whether he ought to have heard the case summarily without giving the respondent the option to go for trial.

If the court should be of opinion that the magistrate was right, then the committal to the sessions was to stand; but if he was wrong in determining that the respondent was entitled to be tried by a jury, and that the magistrate ought to have heard the case summarily, then the court were to remit the case to the magistrate with such directions as they might think fit to give, or were to make such other order in the matter as the court might think fit.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 218. Where a ship is about to arrive, is ariving, 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 exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months; and the master of the ship or any officer of the Board of Trade may take him into custody, and deliver him up forthwith to a constable to be taken before a court capable of taking cognisance of the offence.

Sect. 680 — (Under the heading "Prosecution of Offences")—(1) Subject to any special provisions of this Act, and to the provisions hereinafter contained with respect to Scotland—(*a*) An offence under this Act declared to be a misdemeanour shall be punishable by a fine or by imprisonment not exceeding two years, with or without hard labour, but may, instead of being prosecuted as a misdemeanour, be prosecuted summarily in manner provided by the Summary Jurisdiction Acts, and if so prosecuted, shall be punishable only with imprisonment for a term not exceeding six months, with or without hard labour, or with a fine not exceeding one hundred pounds; (*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. (2) Any offence committed or fine recoverable under a by-law made in pursuance of this Act may be prosecuted or recovered in the same manner as an offence or fine under this Act.

Sect. 681 (1). The Summary Jurisdiction Acts shall, so far as applicable, apply—(*a*) to any proceeding under this Act before a court of summary jurisdiction, whether connected with an offence punishable on summary conviction or not; and (*b*) to the trial of any case before one justice of the peace, where, under this Act, such a justice may try the case.

The Summary Jurisdiction Act 1879 (42 & 43 Vict. c. 49) provides:

Sect. 17 (1). A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the court, and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence shall as respects the person so charged be deemed to be an indictable offence, and, if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly, and the expenses of the prosecution shall be payable as in cases of felony. (2) A court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section

applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: "You are charged with an offence in respect of the commission of which you are entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?" with a statement, if the court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury.

The *Attorney-General* (Sir Robert B. Finlay, K.C.) (*Henry Sutton* and *H. Stuart Moore* with him) for the appellant.—The question is whether the defendant was entitled to claim to be tried by a jury, or whether, as the Board of Trade allege, he was liable to be tried summarily. It turns on sect. 680 of the Merchant Shipping Act, and sub-sect. 1 (*b*) is the important clause, and sect. 681 also throws some light on the matter. The offence charged against the defendant was the offence under sect. 218 of the Act, known as crimping. The right to a trial by jury is claimed under sect. 17 of the Summary Jurisdiction Act 1879. [Lord Alverstone, C.J.—There being the liability to imprisonment for a term exceeding three months, why is the defendant not entitled to be tried by a jury?] Because sect. 680, sub-sect. 1 (*b*), says that the offence "shall be prosecuted summarily," and in the "manner provided by the Summary Jurisdiction Acts." This being a case in which it is vital that the proceeding and the trial should be taken at once, the Legislature has provided that the accused shall be tried summarily and at once in the way provided by the Summary Jurisdiction Acts. It is conceded that there being a liability to imprisonment for six months, sect. 17 of the Summary Jurisdiction Act 1879 would apply apart from the provision in sect. 680 of the Merchant Shipping Act, which is substantially the same as the corresponding provision in sect. 518 (3) of the Merchant Shipping Act 1854. Effect must be given to the words "shall be prosecuted summarily"; and it is essential that it should be so, as otherwise if the ship were to depart there would be a failure of justice. It is important for shipping purposes that the matter should be quick. In sub-sect. 1 (*a*) of sect. 680, under which the accused may receive imprisonment up to two years, the word "may" is used—the offence "may" be prosecuted summarily; whereas under (*b*) the word "shall" is used—the offence "shall" be prosecuted summarily. The use of the word "may" in the first clause makes all the difference, and the fact that in the second clause—clause (*b*)—the Legislature change the language into the imperative form, and say that for offences under clause (*b*) the offence "shall" be prosecuted summarily, makes all the difference. Under that clause the necessities of the prosecution are more in view, and it would not be giving effect to the whole of the language and to the difference in the language in these two clauses to uphold the magistrate's decision. Sect. 681 also tends to show that the intention was to have the whole proceeding summarily disposed of. The Act has said that the defendant "shall" be dealt with summarily, but the magistrate has said that he shall be dealt with summarily only at his option; and the Act has said that the offence shall be prosecuted summarily. "Prosecution" means a great deal more than charging a person, as the magistrate has found; it includes everything up to the final result. [Lord Alverstone, C.J.—If your contention is correct, then I do not see the necessity of having both clauses (*a*) and (*b*).] There are cases on this point as to the summary jurisdiction, but they do not throw much light on the question, as the word used is "may"; but in sect. 144 of the Factory and Workshop Act 1901, we have an instance of the word "shall" being used.

Colam for the respondent.—The decision of the magistrate was right. If a statute merely prohibits an act, then the proceeding is by indictment, and not by summary conviction, as summary conviction is merely a creature of statute. There is the contrast between the use of the words "may" and "shall" in clauses (*a*) and (*b*), and whereas under clause (*a*) the proceedings may be begun under the Summary Jurisdiction Acts, under clause (*b*) they must be begun under these Acts. To the words in clause (*b*): "shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts," the learned Attorney-General wants to read in the words "with the exception of sect. 17 of the Summary Jurisdiction Act of 1879." If the Legislature had meant or intended that sect. 17 should not apply in this case, then they would have put in some such words as "with the exception of sect. 17 of the Summary Jurisdiction Act 1879," which they have not done. [He was stopped.]

Lord Alverstone, C.J.—The point raised in this case is certainly one of importance, and I can see many grounds for supposing that it is a very desirable thing to legislate from the point of view that at any rate many of the offences under the Merchant Shipping Act should be dealt with in a summary manner; but it seems to me that to effect that object requires clearer language than is used in this section—sect. 680. There existed at the time the Merchant Shipping Act of 1894 was passed, and had been existing for some fifteen years before that Act was passed, the procedure of the Summary Jurisdiction Act of 1879, which, in sect. 17, gives a right to any person charged before a court of summary jurisdiction with an offence, for the commission of which he is liable on summary conviction to be imprisoned for more than three months, with certain exceptions, a right to demand trial by jury. Before the charge is gone into in respect of an offence to which that section applies, the defendant must be addressed by the court of summary jurisdiction for the purpose of informing him of his right to be tried by a jury in pursuance of that section, and we have had to decide in accordance with previous cases, that if the defendant is not so addressed by the court, and is convicted by the court of summary jurisdiction, the conviction is bad. In the year 1894 the Legislature, in sect. 680 of this Act, adopted somewhat new language, because I do not think that any argument can be founded upon the comparison of this section with the corresponding section—sect. 518, sub-sect. 3—of the Merchant Shipping Act of 1854, and in sub-sect. 1 (*a*) of sect. 680, said that an offence under the Act, declared to be a misdemeanour, should be punishable with a punishment not exceeding two years'

imprisonment, but might, instead of being prosecuted as a misdemeanour, be prosecuted summarily in manner provided by the Summary Jurisdiction Acts, in which case the punishment should be brought down to a term of imprisonment not exceeding six months. Then the section provides in general terms in clause (*b*) that an offence under the Act punishable with imprisonment not exceeding six months, or by a fine not exceeding 100*l*., shall be prosecuted summarily in manner provided by the Summary Jurisdiction Acts; or, in other words, that the proceedings in such cases shall be commenced in the way contemplated by those Summary Jurisdiction Acts. The Attorney-General has pressed upon the court that the words "prosecuted summarily" mean that the prisoner or the person charged with the offence shall be prosecuted summarily to the final result, and shall not get the benefit of sect. 17 of the Summary Jurisdiction Act 1879, but that the prosecution must go on to the end summarily. However desirable that result may be, and I do not deny that it may be desirable, I think in a matter relating to a code of criminal prosecution or procedure, which is imported by reference, and properly so, it would require stronger words than are used in sect. 680 to deprive a person of a right to be tried by a jury, which he only has in case of offences where the punishment exceeds three months' imprisonment. I cannot myself think that the words in sect. 681 enable us to limit or rather to give to the word "shall" the meaning which the learned Attorney-General contends for; but I think that that section is clearly required for the purpose of applying the Summary Jurisdiction Acts to certain classes of offences and proceedings and trials which require special legislation. In my opinion, therefore, the language of sub-sect. 1 (*b*) of sect. 680 is not sufficient to prevent sect. 17 of the Summary Jurisdiction Act of 1879 from applying to summary prosecutions under that sub-section. I bear in mind the answer given — no doubt properly — by the Attorney-General in answer to a question put by me, that sub-sect. (*b*) was required in order to make these offences triable by a court of summary jurisdiction. Therefore I think that the words "shall be prosecuted summarily" are not sufficient to deprive the prisoner of the right to be tried by a jury, which the learned magistrate decided he had in this case. In my opinion, therefore, the case has been properly dealt with in being sent to be tried at quarter sessions.

Kennedy, J.—I am of the same opinion.

Phillimore, J.—I agree. *Appeal dismissed.*

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

Solicitors for the respondent, *C. V. Young* and *Son.*

Thursday, July 14, 1904.

(Before Lord Alverstone, C.J., Kennedy and Phillimore, JJ.)

Solicitor to the Board of Trade (app.) *v.* Abrahams (resp.). (*a*)

Crimping — Foreign ship—Unauthorised person going on board—Foreign ship arriving at British port, though not at end of voyage—"End of their voyage"—Order in Council—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 218, 219.

Sect. 218 *of the Merchant Shipping Act* 1894 *makes it an offence, where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, for any unauthorised person to go 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"; and sect.* 219 *enables the Crown, where an arrangement has been made between this country and a foreign country whose government is desirous that the provisions of sect.* 218 *should apply to unauthorised persons going on board ships of that foreign country within the British territorial jurisdiction, by an Order in Council to 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."*

Held, that a foreign ship to which the above provisions have been applied by an Order in Council, arrives at the end of her voyage within the meaning of the section and comes within the above provisions, when in the course of her voyage she arrives at any British port, although that may not be the end of the voyage for which the crew signed articles.

Case stated by the metropolitan police magistrate sitting at Thames Police-court.

On the 22nd Dec. 1903 complaint was made by the Solicitor to the Board of Trade (hereinafter called the appellant), on behalf of that board against Frank Abrahams (the respondent) for that the respondent at the Regent's Canal Dock, otherwise known as the Limehouse Basin, not then being in His Majesty's service and not being duly authorised by law for the purpose, unlawfully did go on board the Norwegian ship the *Sognedalen*, then being within British territorial jurisdiction, without the permission of the master of the ship, contrary to the form of the statute in such case made and provided, to wit, the Merchant Shipping Act 1894, ss. 218 and 219, and an Order in Council dated the 25th Oct. 1881.

The cause was duly heard and determined by the magistrate, who upon such hearing, dismissed the complaint.

Upon the hearing of the complaint the magistrate found the following facts:—

(1) The Norwegian ship *Sognedalen* of Frederikstad arrived from that port at the Regent's Canal Dock, or Limehouse Basin, in the port of London, within British territorial jurisdiction on the 18th Dec. 1903.

(2) On the same day the respondent, who was not a person in His Majesty's service, nor was duly authorised by law for the purpose, went on board the ship without the permission of the master before the seamen lawfully left the ship at the end of their engagement, or were discharged.

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

(3) The agreement relating to the service of the crew on board the ship rendered into the English language was as follows: "Crew list for barque *Sognedalen* belonging to Frederikstad, of 596 tons register, bound from here to London and further."

(4) An Order in Council, dated the 25th Oct. 1881, reciting sects. 5 and 6 of the Merchant Seamen (Payment of Wages and Rating) Act 1880, and declaring that the 5th section of that Act should apply to Swedish and Norwegian ships was proved. A copy of the order was attached to and was part of this case.

(5) By sect. 5 of the Merchant Seamen (Payment of Wages and Rating) Act 1880, it was enacted as follows: "Where a ship is about to arrive, is arriving, or has arrived at the end of her voyage, every person not being in Her Majesty's service, or not being duly authorised by law for the purpose, who 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, shall for every such offence be liable on summary conviction to a fine not exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months."

(6) Sect. 6 of the same Act was as follows: "Whenever it is made to appear to Her Majesty (1) that the Government of any foreign country has provided that unauthorised persons going on board of British ships which are about to arrive or have arrived within its territorial jurisdiction shall be subject to provisions similar to the provisions contained in the last preceding section as applicable to persons going on board British ships at the end of their voyages; and (2) that the Government of such foreign country is desirous that the provisions of the said section shall apply to unauthorised persons going on board of ships belonging to such foreign country within the limits of British territorial jurisdiction, Her Majesty may by Order in Council declare that the provisions of the said last preceding section shall apply to ships of such country, and thereupon, so long as the order remains in force, those provisions shall apply and have effect as if the ships of such country were British ships arriving, about to arrive, or which had arrived at the end of their voyage."

The Order in Council, dated the 25th Oct. 1881, was as follows:

"Whereas by sect. 5 of the Merchant Seamen (Payment of Wages and Rating) Act 1880 it is provided that where [the section was then set out.]

"And whereas by sect. 6 of the said Act it is further provided that [sect. 6 was then set out.]

"And whereas it has been made to appear to Her Majesty—That the Government of Sweden and Norway has provided as aforesaid, and is desirous that the provisions of the said fifth section shall apply to unauthorised persons going on board of Swedish and Norwegian ships within the limits of British territorial jurisdiction;

"Now therefore, Her Majesty, by virtue of the power vested in her by the said recited Act, and by and with the advice of her Privy Council, is pleased to declare that the provisions of the said recited 5th section of the Merchant Seamen (Payment of Wages and Rating) Act 1880 shall apply to Swedish and Norwegian ships."

(7) The above recited sections have been repealed by the Merchant Shipping Act 1894, but by sect. 745 thereof the aforesaid Order in Council continues in force as if it had been made under the last-mentioned Act.

(8) Sects. 218 and 219 of the Merchant Shipping Act 1894 are to the same effect and almost in the same words as sects. 5 and 6 of the repealed sections of the aforesaid Act of 1880, save that the concluding words of sect. 219 read: "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."

(9) It was contended on behalf of the respondent that as the crew had signed for a voyage to London and further, the *Sognedalen* had not arrived at the end of her voyage within the meaning of sects. 218 and 219 of the Merchant Shipping Act 1894, for that the voyage therein mentioned must be construed to mean the full or round voyage for which the crew had agreed to serve, and on the completion of which they would be paid off and not as the ship's passage from one port to another, and that therefore no offence had been committed by the respondent.

(10) It was contended by counsel on behalf of the appellant: (*a*) That the word "voyage" must be construed to mean the voyage or passage of a ship from one port to another, and that the arrival of a ship, whether British or foreign, at one port from another was the end of the voyage contemplated by sects. 218 and 219 of the Merchant Shipping Act 1894, irrespective of the voyage in relation to which the crew had signed articles; (*b*) that as regards foreign ships, at all events, the Legislature intended the word "voyage" to have the aforesaid meaning, otherwise, as a foreign ship never or rarely finished her round voyage within the territorial jurisdiction, the Act with regard to them would be inoperative. Further, that such intention was manifest from the words of the aforesaid Order in Council—to wit: "Those provisions shall apply and have effect as if the ships of such country were British ships arriving, about to arrive, or which had arrived at the end of their voyage." (*c*) That having regard to sect. 219 (*a*) of the Merchant Shipping Act 1894, where the words territorial jurisdiction are mentioned, and that the same words appeared in sect. 6, sub-sect. 1, of the Merchant Seamen (Payment of Wages and Rating) Act 1880, and also that the Act of 1894 was one for consolidating and not for amending the Acts relating to merchant shipping, and as by the aforesaid Act the validity of the aforesaid Order in Council was saved, it was the intention of the Legislature to have re-enacted verbatim the concluding words of sect. 6 of the Act of 1880—to wit the words "as if the ships of that country were British ships arriving, about to arrive, or which had arrived at the end of their voyage," and that the concluding words of sect. 219 of the Act of 1894 should be construed accordingly, that is to say, by reading the words "were British ships" before the word "arriving." (*d*) That the respondent had committed an offence within the meaning of sect. 218 of the Merchant Shipping Act 1894.

The magistrate was of opinion that the words "end of their voyage" in sect. 219 of the Merchant Shipping Act 1894 must be held to mean, both as regards British and foreign ships, the completion of that voyage for which the crew had signed articles, and on the completion of which they would be paid off, and as the crew of the *Sognedalen* had signed articles "for a voyage to London and further," the arrival of that vessel at the Regent's Canal Dock, although within British territorial jurisdiction, was not an arrival at the end of her voyage within the meaning of sect. 219 of the Merchant Shipping Act 1894, and that consequently no offence had been committed contrary to the provisions of sect. 218 of that Act, and he accordingly dismissed the complaint, as hereinbefore mentioned.

The question for the opinion of the court was whether the determination of the magistrate based on his construction of the aforesaid sections of the Merchant Shipping Act 1894 was correct in point of law.

If the court should answer this question in the affirmative, his determination was to stand; otherwise the case was to be remitted to him to convict the respondent.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60)—which was "an Act to consolidate Enactments relating to Merchant Shipping"—provides:

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 exceeding twenty pounds, or, at the discretion of the court, to imprisonment for any term not exceeding six months; and the master of the ship or any officer of the Board of Trade may take him into custody, and deliver him up forthwith to a constable to be taken before a court capable of taking cognisance of the offence.

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.

Sect. 745 (1). The Acts mentioned in the twenty-second schedule to this Act—amongst them being the Merchant Seamen (Payment of Wages and Rating) Act 1880—are hereby repealed to the extent specified in the third column of that schedule. Provided that (*a*) any Order in Council, licence, certificate, by-law, rule, or regulation made or granted under any enactment hereby repealed shall continue in force as if it had been made or granted under this Act. (*c*) Any document referring to any Act or enactment hereby repealed shall be construed to refer to this Act, or to the corresponding enactment of this Act.

The *Attorney-General* (Sir Robert B. Finlay, K.C.) (*Henry Sutton* and *Howard Smith* with him), for the appellant.—The case raises an important question under sect. 219 of the Merchant Shipping Act 1894, which supplements the 218th section, for the purpose of applying the provisions of the latter section to foreign ships; and also a question as to the effect of an Order in Council made under the Merchant Seamen (Payment of Wages and Rating) Act 1880, before the Act of 1894 was passed, which it is important to observe was merely a consolidation Act. It is necessary to refer to the terms of the Act of 1880, of the Order in Council, and of the Act of 1894. The charge was one of improperly boarding a foreign ship and crimping on board a foreign ship; and if the contention of the respondent that the offence can be committed with regard to a foreign ship only if the foreign ship is going to end its voyage in this country is sustained, it will reduce sect. 219 to a nullity. The Act of 1880 was repealed by the Act of 1894, but it is necessary to refer to sects. 5 and 6 of that Act. Sect. 5 simply refers to British ships, and it was in the case of foreign ships that the Order in Council was made under sect. 6, and under that section it is expressly said that so long as an Order made under that section remains in force, the foreign ships of that country are to be treated in the same way as British ships arriving at the end of their voyage. Under sub-sect. 1 of sect. 6, which deals with British ships arriving in foreign countries, it is obvious that that cannot relate to the end of their voyage; it is the case of a British ship going to a foreign port, and the words of the sub-section are, British ships which are about to arrive or have arrived "within its territorial jurisdiction," and under that sub-section British ships which have arrived "within the territorial jurisdiction" of the foreign country are to be dealt with as if they were British ships arriving "at the end of their voyages," which are the words used in sect. 5. The Order in Council being made under sect. 6, it is perfectly clear that under that Order, until the Act of 1894, as soon as the foreign ships, to which the Order applied, got within British territorial waters, they were dealt with as if they were British ships arriving at the end of their voyage. Then coming to the Act of 1894, it is submitted that the Act of 1894 has not altered the law in this respect. The title of the Act is an "Act to consolidate enactments relating to merchant shipping." It was not an Act to consolidate and amend, but it was an Act to consolidate simply. Sect. 218 is for all purposes identical with sect. 5 of the Act of 1880; and sect. 219 is in substance the same as sect. 6 until the last sentence is reached. The last sentence runs thus: "As if the ships of that country arriving, . . . at the end of their voyage, were British ships." The last sentence in sect. 6, sub-sect. 2, of the Act of 1880, ran thus: "As if the ships of such country were British ships arriving, . . . at the end of their voyage." There is thus a transposition of the words "were British ships"; and instead of having the words "as if the ships of such country were British ships arriving at the end of their voyage," we now have in the Act of 1894 "as if the ships of that country arriving at the end of their voyage were British ships," the words "were British ships" coming at the end of the sentence. It is said that this transposition has the effect of preventing the Order in Council from applying unless the foreign ships arriving at the British port are there ending their voyage. It is submitted that the transposition of those words has made no difference, and that the two sentences mean the same thing; and the Order in Council has been continued in force by sect. 745, sub-sect. 1 (*a*), no further Order in Council being made. We have still got in sect. 219, sub-sect. (*b*) the words "shall apply to unauthorised persons going on board ships of that foreign country within British territorial jurisdiction." The words "within British territorial jurisdiction" are a governing test as to the meaning of the latter part. It is impossible, having regard to what is left in the earlier part of sect. 219, to read that incidental allusion at the end of the section as having entirely emasculated the section, and as having cut down the effect of the earlier part of the section, to a class of foreign ships which were arriving or were about to arrive at the end of their voyage. It is submitted, first, that to giv such effect to that transposition would be t

nullify all that has gone before in the section, and that the section must be read so as to make sense of it, and that the transposition cannot have the far-reaching effect attributed to it in contradiction to the earlier part of it; and, secondly, even if we are to read it so as to give the fullest effect to the transposition, we are forced to the conclusion that the word "voyage" is not used in this section in the sense of a complete voyage, but merely in its popular sense, say, of a voyage between two places.

Colam for the respondent.—The words "at the end of their voyage" at the latter end of sect. 219, must have reference to sub-sect. (*a*) of sect. 218, which creates the offence. The very essence of sub-sect. (*a*) is that the person is unlawfully going on board at the end of the engagement of the seamen and just before the seamen are paid off, and are therefore about to receive their wages, and so going on board to induce the seamen to enter into unfair contracts. Sub-sect. (*b*) deals with the case of a man who stays on board and refuses to go off when requested. The very essence of the whole of these provisions is that the seamen are about to receive their wages at the end of their engagement, and the object was to prevent persons from unlawfully going on board ships at the end of their voyage, and so obtaining by unfair means the wages of the seamen. In this case we have to bear in mind the fact that these seamen were not being paid off in London, and there is no reason why in the case of a foreign ship, where the seamen are not going to get their wages in this country, the seamen should require any protection. That point is quite independent of the Order in Council, and that was the point which the magistrate meant to make. The words "end of the voyage" mean the place where the seamen are going to be paid off and discharged; and seamen do not need protection at intermediate ports if they are not going to receive their wages there. The object of the statute is perfectly satisfied, and the seamen fully protected by the construction the magistrate has put upon it. The offence really is not the going on board at the end of the voyage, but unlawfully going on board at the end of the voyage "before the seamen have left the ship at the end of their engagement, or are discharged"; and what the statute means to do is to protect the seamen at the end of the voyage where they will be discharged, and where the crimps can have power over them. If British ships are within foreign jurisdiction, and if the seamen are there paid off and discharged, then the protection of the statute applies, but if they are not discharged there they do not require protection, and the sections do not apply. With regard to the Order in Council, no doubt, sect. 745 has kept it alive, but only subject to the modification or the transposition of the language in sect. 219. The effect of the section and of the order is to place British and foreign ships on the same footing, and as regards foreign ships the only offence is going on board at the time when the men are about to be discharged at the end of their voyage.

The Attorney-General was not called upon to rep'y.

Lord Alverstone, C.J.—I am of opinion that the view taken by the learned magistrate in this particular case is too narrow. I think a great deal might be said on the point that, whatever view we might take with regard to sect. 219, the Order in Council, made by an agreement between the two countries under a statute then existing—namely, the Merchant Seamen (Payment of Wages and Rating) Act 1880—and kept alive by sect. 745 of the Merchant Shipping Act 1894, was a perfectly good Order in Council, and ought to be applied for the purposes of this statute. I do not understand that counsel for the respondent really did contest or could contest that point, but what he says is that the construction of sect. 219, being narrower than the Order in Council, the Order in Council must in some way or other be construed in reference to the narrower construction in sect. 219. I am desirous of not putting my decision on the Order in Council only, because I think the Attorney-General is right upon the construction of sect. 219. But at the same time I do not want to be understood as saying that I should have acceded to the contention that, for the purpose of applying the Act of 1880, an Order in Council validly made, and having the effect of a statute when made for the purpose of dealing with foreign ships, would be a bad Order, because there had been subsequent legislation in the year 1894 dealing with the matter. That does not arise on this case, but I only wish to guard myself against it being thought that I acceded to the argument that the Order in Council could be got rid of in that way. If the language of this section—sect. 219—in the Consolidation Act of 1894 had been quite clear, the Attorney-General does not contend that we are allowed to construe it differently because the Act is a consolidation Act; but what he says is, and to that extent he is well-founded, that in a consolidation Act you are entitled, at any rate where there are doubtful expressions, to look at the previous Act of Parliament *in pari materiâ*, and see how the matter was there dealt with; and all I say with regard to sect. 6 of the Act of 1880 is that I do not think there is any doubt about the matter, so far as that section is concerned, that a foreign ship, coming into British territorial waters was to be deemed to be a British ship which was ending her voyage. Now it is said that the latter part of sect. 219 of the Act of 1894 has altered that view of the law. I need not read sub-sect. (*a*) and sub-sect. (*b*) of that section, because they correspond to sub-sects. 1 and 2 of sect. 6 of the Act of 1880. I only desire to point out that in sub-sect. (*a*) we have still got the enactment which was contained in sub-sect. 1 of sect. 6 of the Act of 1880 as to a foreign country making provision that unauthorised persons going on board British ships which are about to arrive or have arrived within its territorial jurisdiction should be subject to the provisions of the preceding section, which are applicable to persons going on board British ships at the end of their voyages. And we have got the provision in sub-sect. (*b*) of sect. 219 that the foreign country 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." Those being the governing principles of both sections—sect. 6 of the Act of 1880 and sect. 219 of the Act of 1894—we cannot shut our eyes to the fact that vessels go to and call at various ports, and that that has been and was a common

incident of navigation for many years before the years 1880 and 1894. I cannot for a moment think that it ever could have been supposed that that provision was only to be applied in the case of the foreign ship which was in fact to end that particular voyage in the United Kingdom.

I ought also, perhaps, to say that I do not accede to the argument of counsel for the respondent that there are no evils to be guarded against, because unauthorised persons get on board foreign ships that are only going to sea for a few days, and are not going to end their voyage at the particular place. Then sect. 219 goes on: "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. Sect. 219, although not so clearly stated as the previous section—sect. 6 of the Act of 1880—still means again to say that the foreign ship coming into British territorial waters is to be taken as a British ship ending her voyage, and, of course, it is quite possible also to read the word "voyage" as indicating a voyage to British territory, notwithstanding the fact that when she goes out again from the British port the seamen will go under the same contractual regulation as before. But whatever view we may take of the section, whether as regards the arriving of a British ship within foreign territorial jurisdiction, or of a foreign ship within British territorial waters, I think that the words at the end of sect. 219: "the ships of that country arriving, about to arrive, or having arrived at the end of their voyage," were not intended to show that the only class of foreign ships intended to be brought within the scope of this legislation were foreign ships which had to end their voyage in a British port. I therefore think that the construction of sect. 219 of the Act of 1894, when the section is fairly construed, is the same as the construction of sect. 6 of the Act of 1880; and counsel for the respondent candidly said that he did not dispute the Attorney-General's contention with regard to the construction of sect. 6. I think that the appeal must be allowed, and the case must be remitted to the magistrate with a direction to convict the respondent.

Kennedy, J.—I am of the same opinion, and I only desire to add that any other construction of the latter part of sect. 219 than that which we are now adopting would, as it seems to me, practically nullify the earlier parts of the same section—subsects. (*a*) and (*b*)—in which the provisions are to be made applicable to ships which are about to arrive or have arrived in territorial jurisdiction.

Phillimore, J.—I agree in the decision of the court and in the expressions of my Lord. With regard to the probable continuance in force of the Order in Council, it is not necessary now to decide that in this case. I suspect that the reason why there is no provision of this kind applicable for British ships touching at British ports, but not ending their voyage there, is because the other sections of the Act enable a master to reclaim, if necessary by force, a seaman abandoning his ship improperly during a voyage. The law will always protect British ships during their touching at British ports, but there is probably no similar protection, at any rate equally efficacious, accorded to the masters of foreign ships, and there is no equal protection accorded to the masters of British ships in foreign countries. Therefore it is desirable when dealing with a British shipmaster touching at the port of a foreign country, or a foreign shipmaster coming to a British port, that this provision should apply. The end of the voyage means, in my opinion, for this purpose, the end of the voyage into British territory.

Appeal allowed. Case remitted to the magistrate with a direction to convict.

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

Solicitors for the respondent, *C. V. Young* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 8 *and* 19, 1904.

(Before Sir F. Jeune, President.)

The Friesland. (*a*)

Salvage — Agreement to render services between owners of salving and salved vessels—Service begun before agreement entered into — Independent right of master and crew of salving vessel to salvage.

The owners of a vessel resident in Liverpool learnt that their vessel was disabled, and agreed with the owners of a tug resident in Liverpool, which was thought to be in the neighbourhood of the disabled vessel, that the tug should tow the disabled vessel to Liverpool on the usual towage terms per tide; before the agreement was made or the owners of the tug could communicate with the tug master, the tug master had picked up the disabled vessel, and had begun to tow her to Liverpool.

In an action for salvage brought by the owners, master, and crew of the tug against the disabled vessel, her cargo and freight:

Held, that the owners of the tug were bound by the towage agreement; but that her master and crew had an independent right to salvage remuneration.

The Inchmaree (8 *Asp. Mar. Law Cas.* 486; 80 *L. T. Rep.* 201; (1899) P. 111) *followed.*

Action for salvage instituted by the owners, master, and crew of the steam-tug *Cruizer* against the owners of the *Friesland*, her cargo and freight.

The *Friesland* was a four-masted screw steamship of 7100 tons gross register, owned by the Société Anonyme de Navigation Belge Américaine and manned by a crew of 130 hands all told.

About 11.15 p.m. on the 17th May 1904, when the *Friesland* was about eleven miles S.E. by S. of Mine Head, in the course of a voyage from Philadelphia to Liverpool with a general cargo and 140 passengers, her tunnel shaft broke. The wind at the time was a moderate breeze from the W.N.W., the weather was fine and clear and the sea smooth.

The *Friesland* drifted slowly before the wind, and at 4 a.m. on the 18th May the Cunard liner the *Aurania* was sighted and spoken, and the master of the *Aurania* undertook to communicate

(*a*) Reported by Lionel F. C. Darby, Esq., Barrister-at-Law.

with the shore by wireless telegraphy and give the owners of the *Friesland* information as to her position.

The message was received by the Liverpool manager of the Belgian Company about 9 a.m. on the 18th May. He at once communicated with the owners of the *Cruizer*, a steam-tug of 379 tons gross register, manned by a crew of thirteen hands all told, and fitted with engines of 1000 horse-power nominal.

The *Cruizer* was thought to be lying at anchor at Dunmore, co. Waterford, Ireland, and about 9.15 a.m. her owners agreed with the owners of the *Friesland* that the tug should proceed to the *Friesland* and tow her to Liverpool upon the usual tide terms—namely, 20*l.* per tide, with 5*l.* extra per tide while actually towing, and 5*l.* per tide for the use of the tug's hawser.

The owners of the tug at once sent a telegram to the tug master at Dunmore telling him to proceed in search of the *Friesland*.

The telegram never reached the tug master, for he had observed the *Friesland* about eighteen miles S.S.W. of Dunmore, and had proceeded to her assistance about 9.30 a.m.

The evidence as to what occurred when the tug reached the *Friesland* was contradictory. The plaintiffs alleged that it was agreed between the two masters that the tug should render assistance to the *Friesland* on salvage terms. The defendants alleged that they agreed to accept the services offered, but that the remuneration was to be left to be settled by the respective owners.

The wind and sea had increased, and the tug only made fast after some difficulty, and at 11.30 a.m. the towage began for Liverpool, the tug using her own rope.

During the 18th May the wind continued to blow strongly, but it moderated towards evening, and about 2.30 a.m. on the 19th May the tug *Kingfisher* came up and made fast, and the two tugs towed the *Friesland* till 9 p.m. on the same day, when the *Friesland* was brought to a position of safety in the river Mersey, having been towed about 200 miles.

The value of the *Friesland* was 50,000*l.*; of her cargo, 44,000*l.*; and of the freight, 808*l.*; making in all 94,808*l.* The value of the *Cruizer* was 10,000*l.*

The plaintiffs in par. 6 of their statement of claim alleged that

> After the *Cruizer* had left Dunmore to go to the assistance of the *Friesland*, but before the services were rendered, the owners of the *Friesland*, by their representative at Liverpool, informed the owners of the *Cruizer* that the *Friesland* was reported to be lying off Mine Head disabled, and they asked the owners of the *Cruizer* if the *Cruizer* would tow the *Friesland* to Liverpool upon the usual towage terms, to which the owners of the *Cruizer* agreed, but such agreement was made conditional upon the *Cruizer* being still at Dunmore and not having proceeded to the assistance of the *Friesland*, and such agreement was subject to the master of the *Cruizer* not making any agreement with the master of the *Friesland* for remuneration on the basis of salvage.

The defendants denied that the services rendered by the plaintiffs to the *Friesland* were salvage services, and they alleged "that at the time when the same were rendered the *Cruizer* had been engaged to perform the said services by agreement between the respective owners upon the terms mentioned," and in satisfaction of the plaintiffs' claim they paid 120*l.* into court, that being the sum which was due to her if she was bound by the terms of the agreement stated above.

Carver, K.C. and *Crawford* for the plaintiffs, the owners, master, and crew of the steam-tug *Cruizer*.—The *Friesland* was in a position of some danger, her shaft was broken, the weather was bad, and the towage was a hard one. The *Cruizer* therefore rendered a salvage service to property of a considerable value, and the service was rendered promptly. The owners of the *Cruizer* cannot be bound by the conditional agreement, for the services began to be rendered before the agreement was entered into. The masters of the tug and the *Friesland* had agreed that the former should tow the *Friesland* on the basis of salvage before the tug master had received any instructions from his owners and before the master of the *Friesland* knew that any conditional agreement had been made. Even supposing that the owners of the *Cruizer* are bound by the agreement the master and crew are not bound by it, for the salvage services had in fact been partly performed by them before the agreement was entered into. [THE PRESIDENT.—No point as to the independent right of the master and crew to recover salvage is taken in the pleadings.] Leave may be given to amend. [THE PRESIDENT.—To raise that point leave will be given to amend the pleadings.]

Aspinall, K.C. and *Dawson Miller* for the defendants, the owners of the *Friesland*, her cargo and freight.—The services rendered by the *Cruizer* were towage services performed under the agreement; the services occupied four tides, and so the only sum due from the defendants to the plaintiffs is that tendered—120*l.* The tug got to the *Friesland* about 11 a.m., the agreement between the owners was made about 9.30 a.m. before the services were rendered. The agreement is binding, for the owners of the tug knew all the facts as to the condition of the vessel. That being so, even supposing the tug master and the master of the *Friesland* had entered into an agreement that the *Cruizer* should work on salvage terms such an agreement could not be enforced, for neither master had any authority to vary the agreement come to between the owners. The owners of the *Cruizer* can bind the master and crew by an agreement such as that entered into with the owners of the *Friesland*. The nature of their employment and the necessity of the case assumes their acquiescence to such an agreement.

Crawford in reply.—The rights of the owners, master, and crew of the *Cruizer* to salvage are quite independent. The owners could no doubt bind themselves by a contract, but in their case the contract was conditional. The owners, however, had no right to bind the master and crew by a towage agreement, and so deprive them of a right to salvage which had already accrued and was in existence when the agreement was made. The acquiescence of the master and crew in a contract such as that cannot be assumed:

The Margery, 9 Asp. Mar. Law. Cas. 304; 86 L. T. Rep. 863 (1902) P. 157.

Cur. adv. vult.

July 19.—The PRESIDENT.—The first question of fact to be decided is whether the master of the tug agreed with the master of the *Friesland* that the service to be rendered was to be considered a salvage service. I do not think that that question is very material, because it was, I think, a salvage service, though not one of great or special difficulty; but I do not think that there is evidence enough to show that any such agreement was in fact made. There can, however, be no question that on the pleadings there was an agreement made between the owners of the tug and the representative of the owners of the *Friesland* in Liverpool that the services should be rendered on towage terms, and therefore were not salvage but towage. On the evidence, I confess, I should have had great doubt whether that contract had been actually made out; the evidence as to it differed, and having regard to some of the probabilities I do not think it would have been easy to say that that contract was made out. On the pleadings, however, the contract is admitted, though it is said to have been conditional, and par. 7 of the statement of claim alleges that "the owners of the *Cruizer* will contend that the said agreement never became binding upon them on the ground that the *Cruizer* proceeded to the assistance of the *Friesland* before the said agreement was made, and that the master of the *Cruizer* did agree with the master of the *Friesland* to receive remuneration on the basis of salvage before he had received any instructions from the owners of the *Cruizer*, and before he knew that any such conditional agreement had been made," so the agreement is admitted, but it is said that it was made conditional upon the *Cruizer* being still at Dunmore, and not having proceeded to the assistance of the *Friesland*, and subject to the master of the *Cruizer* not making any agreement with the master of the *Friesland* for remuneration on the basis of salvage. I do not think that there is evidence enough to show that those conditions were made. Some phrase was used, no doubt about the *Cruizer* rendering these services if she could get there, but that falls far short of making an agreement upon the conditions alleged. I think the condition was that the *Cruizer* was able to render the services; it was natural such a contion should be made, for the owners did not intend to guarantee that the *Cruizer* was still in Dunmore Harbour. I think, therefore, that the agreement existed, but that there were no such conditions as are suggested. The order of events was that the *Cruizer* started independently of any order to perform the services, and gets up to the *Friesland*, and I think gets hold of her, and about that time the bargain is made between the owners at Liverpool. The bargain was made, I think, during the performance of the salvage service—the salvage had begun. Thus the state of things was that while the salvage service was in course of performance by the master of the *Cruizer* and the tug herself, the owners, elsewhere, make a bargain with the owners of the *Friesland* that the services should be on towage and not on salvage terms. That, I think, fairly binds the owners; they were *sui juris*, and I cannot see any reason why that agreement should be set aside. It may, of course, be said that they made it at Liverpool in ignorance of the facts, and that therefore the agreement is not binding. If it could be shown that they did make it in ignorance of the real facts of the case, thinking that the *Friesland* had nothing the matter with her, then I am not sure under those conditions that the agreement would stand; but that cannot be said. They knew that the *Friesland* was lying with her shaft broken. Therefore they must have known all the material facts, and I am unable to say that the owners are not bound by the agreement. I think they are.

Then comes another and more difficult question. It was said that even if the owners of the *Cruizer* were bound by the agreement, the master and crew have independent rights, and, although they join with the owners in this action, they can amend their pleadings. I thought at first there was little authority for such a contention, but I find there is authority which, I think, is conclusive, the question being whether an owner can bind his master and crew without any acquiescence on their part, in fact, as to the reward to be paid for their services. The effect of the authorities appears to me to be this, that before such a service is performed the owners have authority to bind the master and crew. On what principle that rests I am not very careful to inquire. It may be that it is to be put down to the principle that in the particular circumstances, if a contract is to be made, it must be made by the owner without communication with the master and crew, because no communication can be made with them; and, therefore, it is like a bargain made by a master *ex necessitate*, which binds the owner in the particular circumstances of the case. That may be the principle which enables the owner to bind the master and crew in respect of services to be rendered in the future though they in no way acquiesce. Again, the principle may be that when the master enters into the service of an owner there is an implied condition in his contract of service that the owner may bind him when entering into such a contract as this. It can only apply, however, to ordinary services. Where there is something special, out of the course of a man's ordinary employment, I confess I should be very slow to think there could be any authority of that kind, and I am not sure whether or no all salvage would not be considered to be outside an ordinary contract of service. Whatever be the principle, I think the authorities are pretty clear that, as regards future services, the owners can bind the master and crew by an agreement to which the master and crew are no parties, but I think it is otherwise as to past services. Here services had been rendered, or partly rendered, of a salvage nature, giving rise to independent rights, and the owners cannot bargain away the vested rights of the master and crew by a bargain in which the master and crew do not acquiesce. That is the result of the authorities of which there are several which bear upon the point. In the case of *The Britain* (1 Wm. Robinson, 40), decided by Dr. Lushington, the headnote runs: "In cases of salvage, the master of the salving vessel may bind his own interest, and the interest of his own employers, by an agreement with the owner of the vessel salved, as to the quantum of salvage to be paid, but such agreement will not be conclusive upon the rest of the crew if made without their sanction and concurrence." That, it will be observed, applies to future and not to past services. The learned judge there gave the crew an award on the basis of their not being bound by

the agreement which had been made by the master, and which professed to bind them; but it is to be observed that that was an agreement as regards services which had been performed. Then there is the case of *The Sarah Jane* (2 Wm. Robinson, 110), also decided by Dr. Lushington, The headnote is as follows: "Owners of vessels which have received salvage assistance cannot safely enter into a settlement of salvage compensation, which includes the interests of all persons concerned in the salvage, without procuring a general release in the first instance." The principle is there laid down broadly, and in that case also the services had already been rendered. In *The Nasmyth* (52 L. T. Rep. 392; 5 Asp. Mar. Law Cas. 364; 10 P. Div. 41), decided by Butt, J., the facts stated in the headnote were: "An agreement was made between the masters of the *W.* and the *N.*, which was in need of assistance, that the *W.* should tow the *N.* to Queenstown for the sum of 200*l.* There was no evidence at the trial to show that the master of the *W.* consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the *W.* brought an action of salvage against the *N.* The defendants pleaded, *inter alia*, that they had tendered 200*l.* to the owners of the *W.*, but this sum had not been paid into court." There the learned judge upheld the agreement on the ground that when a fair salvage agreement had been made in a *bonâ fide* manner by the masters of the salving and salved vessels, the officers and seamen of the salving ship ought not to bring an action of salvage. The plaintiffs, therefore, were ordered to pay the costs of the action, Butt, J. saying that it was "a fair agreement made in a *bonâ fide* manner, and one by which the master of the *Wordsworth* had authority to bind his owners and crew." There the services were rendered after the agreement was made. Therefore the learned judge held that the agreement made in that case was binding not only upon the owners but also upon the crew. In the case of *The Inchmaree* (80 L. T. Rep. 201; 8 Asp. Mar. Law Cas. 486; (1899) P. 111) Phillimore, J., who had had great experience in Admiralty matters, decided that "where the services of a salvor were discontinuous, and an amount was tendered and paid into court representing the sums agreed upon by the master of the salving vessel with the master of the salved vessel, as the reward to cover valuable services rendered prior to the agreement, as well as the successful services subsequently rendered," a tender made was to be rejected and "a salvage award made in respect of the services prior to the agreement, as the owners and crew of the salving vessel had acquired vested rights which the master of the salving vessel had no authority to bargain away, but that the amount fixed by the agreement must stand in respect of the subsequent services." So a line is there clearly drawn between services rendered prior and subsequent to an agreement, and the learned judge laid down that there is authority in the owner or master to bind with regard to future services but not with regard to services already rendered. Then there is the subsequent case of *The Margery* (*ubi sup.*), decided by Barnes, J. and myself. In that case there was a special arrangement made to bind all cases, and we held it would not bind the master and crew unless they had acquiesced in it. The whole of that case turned upon whether they had acquiesced in the arrangement, and in the event, we thought they had not, and therefore were not bound. That was a very special arrangement, and it cannot be said to cover the case of an implied agreement. I think the law is clear; it only remains to apply it to the facts. Was this a discontinuous service in the sense that there was a discontinuance at the time the agreement between the owners was made, and did the agreement apply only to the future, and not to what had happened in the past? I do not think that one can say that in this case. It seems to me to be a continuous service in fact, of which a substantial part had been performed before the agreement was made. As far as I can make out, the agreement was made at the time when the tug had got out to the *Friesland*, and had probably begun to render salvage services by trying to get, or having got, hold of her. At any rate, it seems to me that a substantial part of a continuous service had been performed, and that the tug in ignorance of the agreement went on performing it as part of a continuous service. In these circumstances I think the master and crew had an independent right, apart from the agreement, to be paid for the salvage service which they rendered.

I have to consider what is the value of the service. The total value of the *Friesland*, her cargo and freight, was 94,808*l.*, and, having said that, one has mentioned the strongest point in the case in favour of an award. These services, though salvage services, were of no great difficulty. The *Friesland* had broken her shaft, but I do not think that she was in any imminent peril, although glad to get the services of a powerful tug such as the *Cruizer* undoubtedly is. The danger to the tug was extremely small, and the weather was on the whole fair. With the assistance of the Elder Brethren I have come to the conclusion that the total sum which it would have been proper to award had there been no agreement, but which I do not award having regard to the circumstances, is 1200*l.* I mention that figure only for the purpose of showing why I think the proper sum to give to the master and crew is 400*l.*—150*l.* to the master and 250*l.* to the crew—with such costs as were necessarily incurred in proving the claim for salvage made by the master and crew.

Solicitors for the plaintiffs, *Miller* and *Son*, Liverpool.

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

July 25 *and* 26, 1904.

(Before Sir F. JEUNE, President.)

THE LONDON. (*a*)

Collision—Steam vessel trawling—Fog signals—Duty of vessel in fog to stop on hearing whistle forward of the beam—Regulations for Preventing Collisions at Sea 1884 *and* 1897—*Art.* 10 (*g*), 1884—*Arts.* 9 (*g*), 15, 16, 1897.

A steam trawler, whilst fishing in a fog, is bound by the provisions of art. 10 (*g*) *of the Regulations for Preventing Collisions at Sea* 1884, *and*

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

must sound a foghorn and ring a bell alternately at intervals of not more than two minutes.

ACTION by the owners of the steam trawler *Anson* to recover the damage sustained by them by reason of a collision between their vessel and the Danish steamship *London*.

The plaintiffs' case was that shortly before 2 a.m. on the 5th June 1904, the *Anson*, an iron screw trawler of 154 tons gross register, manned by a crew of nine hands all told, was trawling about eighty-five miles E. ½ S. of the Spurn, on a course E. by compass, and was making about two knots. The weather was thick fog, the wind N.E. a light breeze, and there was a heavy sea from the N.E. The regulation lights for a steam trawler at work were being duly shown and were burning brightly, and a good look-out was being kept on board her, and her whistle was being regularly sounded at intervals of less than two minutes.

In these circumstances, the whistle of a vessel, which proved to be the defendants' steamship the *London*, was suddenly heard broad on the starboard bow close to, and at the same moment the loom of the vessel was seen close to the trawler and broad on the starboard bow, and the whistle of the *Anson* was again sounded, and orders were given to stop the engines, but before the order could be obeyed the steamer, coming on at considerable speed, with her stem struck the *Anson* a heavy blow amidships on the starboard side, doing such damage that the *Anson* sank almost at once.

The plaintiffs charged the defendants with a bad look-out, with failing to keep clear of the *Anson*, with failing to stop her engines, with proceeding at an improper speed, with failing to sound their whistle, and with improperly porting.

The defendants' case was that shortly before 3.15 a.m. on the 5th June 1904 the *London*, a screw steamship belonging to the port of Copenhagen, of 1475 tons gross register, and manned by a crew of eighteen hands all told, was in the North Sea, about eighty miles to the eastward of the Spurn, in the course of a voyage from Bremen to Grimsby in water ballast. The wind was about N.N.E. light, and the weather was foggy. The *London* was on a course of W. by N. ½ N. making about three and a half knots. She carried the regulation lights for a steamship under way and a stern light, which were being duly exhibited and were burning brightly. Her steam whistle was being duly sounded in accordance with the regulations for fog, and a good look-out was being kept on board of her. In these circumstances those on board the *London* heard a long blast of a steam whistle on the port side a long way off. The whistle of the *London* was kept sounding, and no further blast was heard. Some considerable time afterwards a single long blast of a steam whistle of a vessel which proved to be the *Anson* was heard on the port bow and apparently not far off. The engines of the *London* were immediately stopped and her whistle was kept sounding at short intervals. Shortly afterwards, as no further signal was heard from the *Anson*, the engines of the *London* were reversed full speed astern, and shortly afterwards a bright light on the *Anson* came into view distant about two lengths and bearing about two points on the port bow. The engines of the *London* were kept reversing and her helm was put hard-a-port to try to keep her straight on her course, but the *Anson*, whose green light had now come into sight, although loudly hailed, came on, and with her starboard side amidships struck the stem of the *London*, doing her considerable damage, for which her owners counter-claimed.

The defendants charged the plaintiffs with a bad look-out, with failing to sound their whistle in a fog, with failing to stop their engines on hearing the whistle signal of the *London*, with failing to keep out of the way of the *London* and of attempting to cross ahead of her, with failing to slacken speed or stop, and with improperly starboarding their helm.

Art. 10 (*g*) of the Regulations of 1884 is now in force as art. 9 (*g*) of the Regulations of 1897. The material parts of it are as follows:

The following portion of this article applies only to fishing vessels and boats when in the sea off the coast of Europe laying north of Cape Finisterre: (*g*) In fog, mist, or falling snow, a drift net vessel attached to her nets, and a vessel when trawling, dredging, or fishing, with any kind of drag net, and a vessel employed in line fishing with her lines out, shall at intervals of not more than two minutes make a blast with her foghorn and ring her bell alternately.

The material parts of arts. 15 and 16 of the Regulations for Preventing Collisions at Sea 1897 are as follows:

Art. 15. All signals prescribed by this article for vessels under way shall be given: (1) By "steam vessels," on the whistle or siren. (2) By "sailing vessels and vessels towed," on the foghorn. The words "prolonged blast" used in this article shall mean a blast of from four to six seconds' duration. A steam vessel shall be provided with an efficient whistle or siren, sounded by steam, or some substitute for steam, so placed that the sound may not be intercepted by any obstruction, and with an efficient foghorn, to be sounded by mechanical means, and also with an efficient bell. A sailing vessel of twenty tons gross tonnage or upwards shall be provided with a similar foghorn and bell. In fog, mist, falling snow, or heavy rain-storms, whether by day or night, the signals described in this article shall be used as follows: (*a*) A steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast.

Art. 16. 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.

The report of the arguments of counsel is restricted to the question of the sound signals to be given by a steam trawler in a fog.

Aspinall, K.C., *Batten*, and *Dunlop* for the plaintiffs.—Those on the *Anson* were right in sounding their steam whistle in accordance with art. 15 (*a*). Art. 9 (*g*) is overruled by art. 15 (*a*), and art. 9 (*g*) only applies to sailing trawlers. The *Anson* is a steam vessel and is under way within the meaning of the regulations. Art. 9 (*g*) has local limitations; it only applies to vessels off the coast of Europe lying north of Cape Finisterre; the *Anson* was lying north of Cape Finisterre, but it is submitted that she cannot be described as being off the coast of Europe. Those words must be construed in a popular sense and mean somewhere in the neighbourhood of the coast.

Robson, K.C. and *Balloch* for the defendants.—Art. 15 (*a*) does not apply to the case at all. Special provisions are made for vessels trawling

and fishing, and they are contained in art. 9 (*g*). Special provisions for fishing vessels were in existence in 1863, and appear in the collision regulations of 1880 and 1884. *The Dunelm* (51 L. T. Rep. 214; 5 Asp. Mar. Law Cas. 304) clearly shows that former and similar articles have been applied to every kind of vessel attached to its net, and that they have been applied to steam trawlers. If the argument for the plaintiffs is right, steam trawlers, although they are fishing vessels, have no special provisions applicable to them. It is admitted that the master of the trawler never sounded a bell or a foghorn as required by art. 9 (*g*); he thought he was acting in accordance with art. 15 (*a*), but the evidence is conclusive that he was not doing even that; the whistle was only being sounded every two and a half minutes at the best. It ought, if art. 15 (*a*) had been complied with, to have been sounded at intervals of not more than two minutes. It is suggested that the limitation off the coast places the *Anson* outside the scope of the rule, but *The Orion* (65 L. T. Rep. 500; 7 Asp. Mar. Law. Cas. 88) shows that a similar rule has been applied to a vessel eighty miles E. by N. of the Spurn; this collision occurred about the same distance away from and about east of the Spurn.

The PRESIDENT.—This case turns upon a question of whistling, and as regards the trawler it is unfortunately complicated by some doubt as to what the real obligations in that respect are. For the purposes of this case I am obliged to say what the meaning of the rules is, although it is a matter upon which an opinion can be expressed only with hesitation, because it may well be that the practice of vessels does not altogether correspond to what, in my view, are the obligations imposed by the rule. One can only decide as to the meaning of the rule on the language used as it now stands. I regret very much that the rules both as to signals and lights which have been made for the purposes of these fishing vessels are not expressed in quite clear and simple language. In a matter of this kind, and especially in the case of rules which are to affect a class of vessels which are obviously not manned by the same class of men as man vessels of greater size and value, it is of importance that such rules should be as clear as possible; and they should be international rules, so as to bind the vessels of other nations as well as our own; and it is desirable they should extend not only to vessels lying off the coast of Europe, but also to vessels navigating the coast of America, nor should they be limited to fishing vessels and boats when off the coast of Europe lying to the north of Cape Finisterre. I say this in the hope that those in authority will see their way before long to make clear and efficient international rules on this important subject.

As the matter stands, I must take the rules as they are, and I entertain no doubt that the obligations of art. 9 (*g*) apply to a steam vessel engaged in trawling. The words appear to me to be plain. [The learned judge then read the article set out above, and continued:] It is said that the rule does not in terms apply to a steam vessel, but only to a sailing vessel engaged in trawling. I do not think such a construction is possible, for there is nothing in the language of the rule which limits it to sailing vessels. It is suggested that the use of the word "foghorn" shows that sailing vessels only are meant, but by art. 15 of the collision regulations of 1897 a steam vessel is directed to carry, not only an efficient whistle, but an efficient foghorn and an efficient bell. Again, it is suggested that art. 15 (*a*) overrules art. 9 (*g*). The words are "a steam vessel having way upon her shall sound, at intervals of not more than two minutes, a prolonged blast." It does not appear to me that that overrides the special provisions contained in art. 9 (*g*) as regards steam vessels engaged in trawling, because the general words of the later article are not, I think, intended to overrule the special words of art. 9 (*g*). It is a case to which the maxim *Generalia specialibus non derogant* appears to me to be applicable. Therefore I am compelled to say that a steam trawler under way, engaged in trawling in a fog, must sound her foghorn and ring her bell alternately at intervals of not more than two minutes. What exactly the word alternately with reference to the interval between the sounding of the foghorn and bell means I am not sure, and in this case I do not think it is necessary to determine. It is clear there was no ringing of the bell at all on board the *Anson*, and even supposing I held, which I do not, that the bell need not be used at all under the circumstances, it is difficult to say, on the evidence, that the *Anson* was complying with the rule. She was employing a whistle which had, I dare say, something in the way of a trumpet mouth, but she was not employing a foghorn. It is quite clear that she was not acting in accordance with the rule. She was not ringing a bell and, according to her own story, she was not whistling every two minutes, because, although her witnesses managed to get pretty near to it by talking of two and a half minutes, and so on, it is clear to me that there was no whistling every two minutes. I think, therefore, that the *Anson* must be held to have violated the rule from whatever aspect you look at it. It may be said in this case that it is immaterial because the *London* did not hear any whistle from the *Anson* until a late period, and then only one, but I am not strongly impressed by that, because if a vessel is not whistling according to the rule it is very difficult for her to argue that it did not matter, because even if it had been sounded properly it would not have been heard. No one can say that. When a whistle was heard in fact—when other whistles were heard in fact—I am not prepared to say that if the *Anson* had been whistling regularly every two minutes, and, still more, if she had been ringing her bell, the *London* would not have had, at any rate, opportunity of hearing more than she did, with the result that her action would have been different. I do not mean to say that I think the rule which requires a whistle to be sounded and a bell rung alternately is a good rule, because I think that the mixing of two different signals —one being the signal for a vessel under way and the other for a vessel at anchor— is unwise; but that is not material in this case, for all I have to consider is whether, if a vessel does not perform her obligations under that rule, she can say it is immaterial whether she did or not, because nothing could have happened if she had which would have tended to prevent this collision. If the *Anson* had obeyed this rule I think it might have been the case that the *London* would have had earlier information of the *Anson*,

and would have been able to act accordingly. Therefore the *Anson* must be held to blame for not obeying the rule and for sounding improper fog signals.

Then comes the further question as to the *London*. I have had to consider her case very carefully, to see whether any charge is made out against her. The first charge made against her is that she did not stop at the whistle on hearing which she ought to have stopped. I think from this point of view it is immaterial whether the whistle at which she did not stop was the whistle of the *Anson* or whether it was not, because it is the clear duty of a vessel which hears a whistle forward of her beam, in a position which is not ascertained, to stop her engines and then proceed with caution. The question is whether she did that or not. According to the account of her master there were three whistles. The first whistle was a little forward of the starboard beam, and he says he stopped the engines at once for that, and did not put them on ahead again until that vessel had passed, and they saw that vessel. Then, after that, the vessel's engines were rung to half speed, then the second whistle was heard—it may or may not have been the whistle of the *Anson*—but the captain says he heard the whistle abaft the beam. He admits that he did not stop the engines for that whistle, and, if his story is true, there was no obligation on him to do so, because he heard it abaft the beam. There was then an interval of some six minutes, and then a whistle was heard on the port bow, which was undoubtedly the whistle of the *Anson*, and for that he says he stopped at once, and after a short time reversed. The only whistle with regard to which fault can be found is the second, which he says was abaft the beam. I have very great difficulty in saying that the rule was violated in that respect, because although I agree it is immaterial whether it was the whistle of the *Anson* or not, still, if it was the *Anson's* whistle it was abaft the beam, and there would be no obligation on him to stop. Therefore I cannot think that the *London* ought to be held to blame for any failure to stop her engines. Then comes the question of the speed of the *London*. [The learned judge then dealt with the evidence on the question of speed, and proceeded :] Therefore I cannot hold that the *London* had an excessive rate of speed. That I think exhausts the case. I do not think anything turns upon the helm action of the vessel. I agree that in regard to large vessels like the *London* it is not desirable to have a look-out only on the bridge, not so much because the bridge may not be a good place from which both to see and hear, but because it seems to me extremely important that the man on the look-out should be doing that and nothing else, but I cannot think that there was any real effect produced in this case by that inefficient look-out, if it was inefficient. The *Anson* was certainly seen as soon as she could be seen having regard to the fog, and as regards hearing, it is impossible to say that bad look-out produced any inappreciation of what the *Anson* was doing, because as the *Anson* was not giving proper signals it is impossible to say whether, if given, they would have been heard. Therefore I think bad look-out is not a matter upon which the case should be allowed to turn. The result is that the *Anson* must be held alone to blame.

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

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

July 29 *and* 30, 1904.

(Before Sir F. H. JEUNE, President.)

THE MILLWALL. (*a*)

Collision between tow and vessel at anchor—Negligence of tug—Damage to cargo in tow—Action by cargo owner against tug and tow owners — Contract between tug and tow—Indemnity of tug owner by tow owner.

A barge in tow of a tug came into collision with a barge at anchor. The collision was caused by the negligence of those on the tug. The cargo on the barge which was being towed was damaged. The cargo owners brought an action for tort against both the barge and tug owners for the damage, and also brought their action against the barge owners alternatively for breach of contract to carry safely and deliver the cargo. In that action the claim of the cargo owners against the owners of the barge was dismissed with costs, but the owners of the cargo recovered against the owners of the tug in tort, with costs, and the tug owners were also ordered to pay to the cargo owners the costs of the cargo owners' unsuccessful action against the barge owners.

The tug owners had contracted to tow the barge on the following terms : "They will not be answerable for any loss or damage which may happen to any barge or its cargo while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged upon the terms that they are to be held harmless, and indemnified from any such loss or damage, and against the faults or defaults of their servants or any claim therefor, by whomsoever made. And the customers of the said Gaselee and Sons undertake and agree to bear, satisfy, and indemnify them accordingly." The tug owners claimed to be indemnified by the barge owners for the damages and costs which they had paid to the cargo.

Held, that the barge owners were liable under the contract to indemnify the tug owners even against the results of the tug owners' negligence and that the barge owners should pay to the tug owners the amount of the damages and costs recovered by the cargo owners from the tug owners, including the costs paid to the barge owners by the cargo owners, and which the cargo owners had in the first instance recovered from the tug owners.

CHARLES PAGE AND CO. having to send some sulphate of ammonia to the steamship *Iago*, instructed Darling Brothers on the 18th Jan. 1904 to send a barge to Becton Gas Works on the river Thames to carry the sulphate of ammonia to the *Iago* which was in the Thames loading for Venice.

As the *Iago* was expected to sail shortly Charles Page and Co. told Darling Brothers to employ a tug to tow the barge to the *Iago*.

Darling Brothers sent the barge *Millwall* to

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law

Becton Gas Works and loaded her with 572 bags of sulphate of ammonia.

Darling Brothers ordered Gaselee and Son to send a tug to tow the barge to the *Iago*, and on the 21st Jan. Gaselee and Son sent the tug *Bee* to Becton for that purpose.

The barge *Millwall*, manned by one of Darling Brothers' men, after being taken in tow by the tug *Bee*, manned by Gaselee and Son's men, was, through the negligence of the latter firm's men, brought into collision with the sailing barge *Hughes Hallet* which was at anchor. The *Millwall* began to make water, and as her pump was unable to keep it under she was beached at Trinity Wharf, and the cargo sustained damage.

The sound value of the cargo was 643*l.* 15*s.*; in its damaged condition it was worth 87*l.* 18*s.* and the owners, Charles Page and Co., sought to recover the difference, 555*l.* 17*s.* from the barge owners and tug owners.

The cargo owners framed their action against both the barge owners and tug owners jointly and severally in tort and alternatively against the barge owners in contract.

The contract alleged was a verbal one made by telephone by the agent of the cargo owners giving instructions to Darling Brothers to send a barge for the ammonia and sending a delivery order for the goods to the office of Darling Brothers upon which they collected the cargo.

Darling Brothers by their defence denied that they had been guilty of negligence and denied the contract alleged. In the alternative they alleged that if the goods were received by them for carriage they were received on terms established by the course of business and dealing between the parties—viz., that Darling Brothers should not be liable for any loss of or damage to the goods, which could be or in fact was covered by insurance, whether such loss or damage did or did not arise from the negligence of them or their servants or agents and on the terms that Charles Page and Co. should insure against loss of or damage to the goods, and that the under writers should in no case have recourse against Darling Brothers. That in pursuance of that arrangement Charles Page and Co. did insure the goods and had been paid by their underwriters in respect of their loss, and that therefore Darling Brothers were not liable. The tug owners, Gaselee and Sons, put in a defence by which they denied that they had been guilty of the negligence alleged, and did not admit that the collision had taken place or that the goods had been injured, and alternatively alleged that the damage was not caused by their negligence.

Before the trial of the action the tug owners served a third party notice on the barge owners claiming to be indemnified by them against any sum which Charles Page and Co., the plaintiffs, might recover in the action against the tug owners for damages and costs, and against the costs the tug owners might incur in defending the action, and against the costs of and incidental to the third party notice, and the necessary proceedings consequent thereon upon the ground that the towage in respect of which Charles Page and Co. alleged negligence was being performed by the tug owners on their usual terms, which were as follows:

Gaselee and Sons hereby give notice that they will not be answerable for any loss or damage which may happen to any barge or its cargo while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults and defaults of their servants, or any claim therefor by whomsoever made. And the customers of the said Gaselee and Son undertake and agree to bear, satisfy, and indemnify them accordingly.

The barge owners put in a defence to the claim of indemnity by the tug owners, denying that they employed the tug on those terms, or that the alleged terms entitled the tug owners to the relief claimed, and alternatively alleged that if the tug was employed on the terms alleged she was employed at the verbal request of Charles Page and Co., who were at all times material well aware of the tug owners' terms of towage.

On the hearing of the case between the cargo owners and the barge and tug owners, which was before the court on the 27th, 28th, and 29th July, the learned judge held that the damage to the cargo was occasioned by the negligence of the crew of the tug, and judgment was given for the amount claimed, with costs against the tug owners.

The claim of the cargo owners against the barge owners was dismissed with costs, but the learned judge, following the cases of *The River Lagan* (58 L. T. Rep. 773; 6 Asp. Mar. Law Cas. 281), *The Mystery* (86 L. T. Rep. 359; 9 Asp. Mar Law Cas. 281), and *Sanderson* v. *Blyth Theatre Company* (89 L. T. Rep. 159), directed that the taxed costs recovered by the barge owners against the cargo owners were to be added to the costs recoverable by the cargo owners against the tug owners.

During the trial of the action evidence was given showing that the barge owners frequently employed the tug owners to tow their barges, and received a discount from the tug owners on the amount paid for the hire of the tugs, but that they did not allow this discount to the cargo owners when debiting them with the hire of the tug.

Upon the evidence the learned judge held that the barge owners had entered into the contract of towage with the tug owners as principals and not as agents for the cargo owners.

The question of the indemnity of the tug owners by the barge owners then came before the court.

Bailhache (with him *J. A. Hamilton*, K.C.) for the tug owners.—The indemnity clause forms part of the contract between the tug owners and the barge owners, and under that clause the tug owners are entitled to be indemnified by the barge owners, both in respect of damages and costs. The only point open to argument on the clause is whether the words cover a case of negligence on the part of the tug owners' servants; if they do, there can be no answer to a claim made under it. In the case of *Corporation of York* v. *Rowbotham* (*Shipping Gazette*, 14th March, 1901) a tug towed a vessel into collision with another at anchor, and the tug owners then attempted to recover from the tow owners the damages and costs which they had had to pay to the owners of the vessel at anchor, and it was held in that case that the tug owners were entitled to

recover them. In that case the words of the contract were that the tug owners were not to be answerable or accountable for any loss or damage whatever which might be occasioned by the tow while she was in tow of the tug, arising from, or occasioned by, any supposed negligence or default of the tug owners or their servants, and the owners of the tow undertake to bear, satisfy, and indemnify the tug owners against all such loss or damage." Such contracts may appear onerous, but they are usual, and the towage rates are of course less where such claims are inserted.

Laing, K.C. and *Balloch* for the barge owners. —The wording of the clause is involved, and must be considered word by word; it does not cover the loss sought to be recovered, and has been held not to do so. The words "give notice" at the beginning of the clause can only refer to notice given to the customers of the tug owners, as it is impossible for the tug owners to give a notice such as this to the world at large: "Any loss or damage which may happen to any barge or its cargo" must also refer to damage done to their customers barge, or cargo, and so the contract made between the tug owners and the barge owners denies the customer the right to recover against the tug owners any damage which the customer may sustain. When the contract proceeds to say that the tug owners are to be held harmless and indemnified from any "such" loss or damage it refers to claims which might have been made by the customers. This claim does not come within the loss or damage mentioned in the clause. In the case of *The Louise* (18 Times L. Rep. 19) the contract between the barge owners and tug owners provided that the tug owners would "not be answerable or accountable for any loss or damage by collision or otherwise which may happen to or be occasioned by any vessel or craft or any of the cargoes on board of the same while such vessel is being towed and (or) transported, whether arising from or occasioned by any accident, or by any omission, breach of duty, mismanagement, negligence or default of the joint committee or their servants, or any transporting men supplied: . . . and the owners or persons interested in the vessel or craft towed and (or) transported, or of the cargo on board the same, shall and do undertake to bear, satisfy, and indemnify the joint committee against all liability for the above-mentioned matters; . . . and the master and crew of the tug or tugs so towing and any transporting men supplied shall be deemed to be the servants of the owners, master, and crew of the vessel or craft towed or transported, the joint committee being in no way liable for any of the acts or for any of the consequences of the causes above excepted." Under that contract the court held that the indemnity given by the customer only covered cases of damage done to or by the vessel being towed and her cargo, and in no way provided that the tug owners should be indemnified by the barge owners for damage done by the negligence of the tug. In the present case, too, it is submitted that the barge owners have not given an indemnity to the tug owners in respect of the negligence of the tug owners' servants. This case differs from that of *Corporation of York* v. *Rowbotham* (*ubi sup.*), because there the servants of the barge owners were to blame as well as the servants of the tug owners. The barge owners being bailees may sue for damage done to the cargo:

The Winkfield, 9 Asp. Mar. Law Cas. 259; 85 L. T. Rep. 668.

It is against such an action that the clause applies so far as it deals with cargo. If the clause is as wide as is contended for, it is not clearly worded, and in cases of careless and ambiguous phraseology the court should not assume the construction most advantageous to the person putting forward the clause:

The Waikato, 8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 326; (1899) 1 K. B. 56.

Apart from the construction of the clause the words "fault or default" are not sufficient to cover the negligence of the tug owners' servants. As to the claim of the tug owners for costs, they claim that the barge owners are to pay them the costs recovered by the barge owners from the cargo owners. It cannot be right that the barge owners should pay those, for they were paid by the tug owners to the barge owners in consequence of the tug owners raising issues in the action which they ought not to have raised.

J. A. Hamilton, K.C. in reply—The words of the clause are plain; they are words of bargain and contemplate that every risk that can be insured against shall be. It is suggested that the wording of the clause is ambiguous, but the ambiguity arises from an attempt to insert words in the clause which are not there, it is suggested that as far as the cargo is concerned, the words, "loss or damage which may happen," refer only to the barge owners' liability for the cargo as bailees, but it is well-known that the barge owners are practically never liable for damage to cargo owing to the contract between them and the cargo owners. The damage which has been recovered from the tug owners is precisely that which the indemnity covers, and the difficulty is where the words are so clear, to put in others in argument to make them clearer. The only difference between this case and that of the *Corporation of York* v. *Rowbotham* (*ubi sup.*) is that in the latter the damage was done to something outside the tow, here it is done to cargo in the tow. In the case of *The Louise* (*ubi sup.*) the tug owners were asked why they did not, in plain language, say that the tow owners were to be liable for the faults of the servants of the tug; here they have done so, for they are to be indemnified against the faults of their servants. The clause is absolutely devoid of ambiguity. It is true that costs are not mentioned in the clause, but the word damage includes them, for the damage consists of the taxed costs which have to be paid as well as the actual deterioration of the cargo, and there is no limitation as to the kind of costs which may be recovered under the indemnity. If the conditions of the contract are onerous the barge owners remedy is to refuse to enter into the contract.

THE PRESIDENT.—This is a difficult case, but having had an opportunity of considering this clause, I cannot, without putting an interpretation upon it which I do not think it is meant to bear, give it other than its literal meaning. The first part of the clause applies to an action which is brought or might be brought against the tug owners by a customer of theirs. The word

"answerable" means, I think, answerable to the customer, and the first part of the clause means that the customer—that is, the barge owner—cannot bring an action against the tug owners for any loss or damage which may happen to any barge or its cargo while in tow. That means, of course, any barge belonging to the customer, while in tow, and the cargo carried on such barge, "however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise." That is limited to the case of an action which the customer himself might bring against the tug owners, and the tug owners would not be liable. That does not, however, deal with any action which might be brought against the tug owners by a third person. Then comes the second part of the clause, and the difference between the two parts of the clause is this: that the first relates to actions which might be brought by the customers against the tug owners and the second to actions which might be brought by a third person. The customer, of course, is bound by the first part, because he cannot bring an action, and is bound by the second part by the express undertaking that the tug owners are to be indemnified, as the customer agrees "to bear, satisfy, and indemnify them accordingly." I think it is clear that the second part of the clause relates and was intended to relate to actions brought against the tug owners by third persons. Who are the third persons, and what is the loss or damage? The loss or damage is the same loss or damage as is referred to in the first part of the clause—that is to say, loss or damage which may happen to any barge or its cargo while in tow. There is no other limitation than that in this particular case the damage is damage done to cargo whilst in tow. For that damage the owners of the cargo could, of course, bring an action if there was nothing to restrain them. There is in this case nothing to restrain them from bringing an action against the tug owners, and it appears to me quite clear that the customer is to indemnify the tug's owners against an action for such loss or damage, including damage which is done to the cargo whilst in the barge and whilst that barge is in tow, and it is not limited in any way to exclude negligence on the part of the tug owners, because the words "fault or default" appear to me necessarily to cover it. Default must, I think, be equivalent to negligence; and, although the word negligence is not used, I think the meaning of the clause is the same as though the indemity was expressly given against the negligence of the tug owner's servants.

The second part of the clause has the result that the negligent tug owners are to be indemnified in respect of their negligence by the innocent barge owners, and I tried to see if the words harmless and indemnified could not be read in a sort of distributory way, so that it might be said that harmless only applied to damage done to a barge and indemnified to damage done by a barge. The answer to any such attempt appears to me to be that those are not the words of the clause, and to express that you would require much more elaborate language and quite different language than that which has been used. I wish I could have given this clause some fair meaning without arriving at the conclusion which I have come to. I can see none, and, although the case of *Corporation of York* v. *Rowbotham* (*ubi sup.*) is not precisely similar to this, still it shows thas this clause has a broader meaning than that suggested by the barge owners, and that the indemnity covers the case of an action brought by somebody else than the customers against the tug owners by reason of the negligence of those on the tug. I think this clause applies, and that the tug owners are entitled to be indemnified against the loss or damage which has arisen. Then as to the costs, I should have been glad to have separated the costs from the other damage caused by this accident, and to have given them a different destination, but I do not see my way to do so. I thought it might be possible to say that the costs which have arisen in this case are not costs arising from damage done to the cargo, because another circumstance comes in—namely, the conduct of the action—and the real cause of the costs falling in the way they did was not the direct result of the collision, but was the result of circumstances which supervened—namely the conduct of the tug owners in regard to the conduct of the litigation. No doubt what influenced my mind in deciding the matter of costs was that I thought that the tug owners wrongly defended the action, and contended they were not in fault. That was sufficient to render them liable for costs. No doubt that was the direct cause of their being held liable for costs, but I cannot put the matter upon that narrow ground. I must look at the matter a little more broadly, and say that the costs which have fallen upon the owners of the tug in this action are part of the loss or damage which has arisen by reason of the injury done to this cargo, and I am therefore compelled to say that this clause gives an indemnity to the tug owners both in respect of the damages and of the costs of this action.

Solicitors for Gaselee and Sons, *J. A.* and *H. E. Farnfield.*

Solicitors for Darling Brothers, *Keene, Marsland,* and *Co.*

July 20 *and* 21, 1904.

(Before Sir F. H. JEUNE, President.)

THE HARVEST HOME. (*a*)

Collision—Tug and tow—Damage to pilot boat lashed to tow—Independent duty of tug to avoid collision—Right of owners of pilot boat to recover against negligent tug when tow in fault—Costs — Co-defendants — Plaintiffs' right to recover from unsuccessful defendant costs paid to successful defendant—Right of negligent tug to towage remuneration though debarred from salvage—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 422.

A pilot cutter, made fast alongside a sailing vessel which was being towed by two tugs, was run into and sunk by a schooner. The collision was due to the negligence of the tow and tugs. The schooner was also damaged by it. The owners of the pilot cutter brought an action against the owners of the schooner and the

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

owners of the tugs to recover the damage sustained by them. The owners of the schooner counter-claimed against the owners of the pilot cutter and the tug owners for the damage sustained by the schooner.

Held, that there was an independent duty on the tug to exercise reasonable skill and care to avoid danger, and that, although those on the tow had been negligent, the owners of the pilot cutter were entitled to recover against the tug owners, as the pilot cutter was not identified with the tow. (a)

Held, further, that, as the owners of the schooner had not been guilty of negligence, they could recover against the tug owners, but their claim against the owners of the pilot cutter should be dismissed, as those on the pilot cutter had not been guilty of negligence.

The owners of the pilot cutter, who had first brought their action against the owners of the schooner and then amended their claim by joining the tug owners, claimed that the tug owners should be condemned in the cost incurred by them in their unsuccessful action against the owners of the schooner on the ground that the tug owners in their defence had alleged negligence against the schooner as well as against the pilot cutter.

Held, that the owners of the pilot cutter had not acted reasonably in bringing their action against the owners of the schooner in the first instance, and that the costs of the unsuccessful action against the owners of the schooner were to be borne by the owners of the pilot cutter and not by the tug owners.

After the collision one of the tugs towed the schooner to Cardiff and claimed salvage.

Held, that, the negligence of the tug having brought about the collision, she was not entitled to recover salvage, but that, as the tug was not bound to tow the schooner, the tug owners were entitled to towage remuneration.

ACTIONS of damage and salvage.

The action of damage was brought by the owners of the pilot cutter *Emily* against the owners of the schooner *Harvest Home* and the owners of the steam-tug *Clarissa*.

The case made by the plaintiffs in the first instance was that the *Emily*, a pilot cutter of 18 tons register, manned by a crew of five hands all told, was, shortly before 11.10 p.m. on the 14th March 1904 in the Bristol Channel off the Nash Light.

The *Emily* was made fast to the starboard bow of the sailing ship *Moy*, from which vessel she was waiting to take a pilot.

The *Moy* had two tugs made fast to her the *Nora* on the port and the *Clarissa* on the starboard bow, with scopes of ninety fathoms on their tow ropes.

The *Emily* had no sails set, but was being towed abreast of the starboard side of the *Moy* on a westerly course at a speed of about five knots. The weather was dark and overcast, with drizzling rain, the wind, which about half an hour previously had been calm, was easterly, a moderate to fresh breeze, and the tide was last quarter ebb of little force.

(a) Since reversed by Court of Appeal, which held the pilot cutter in fault as well as the tugs.—ED.

The *Moy* had her regulation side lights, her tugs their regulation towing and side lights, and the *Emily* a white globe light at her mast head, all of which were being duly exhibited and were burning brightly.

A good lookout was being kept on the *Emily*. In these circumstances, those on the *Emily* observed, about one or two points on their starboard bow, and distant about three miles, a low white light, which they took to be the stern light of the sailing ship *Harvest Home*.

The *Emily* continued to be towed on a westerly course, and was overtaking the *Harvest Home*, whose stern light gradually broadened on the starboard bow of the *Emily*.

Shortly afterwards, as the *Emily* was approaching the *Harvest Home* in a position to pass well clear to the southward, the *Harvest Home* suddenly opened her red light, and directly afterwards she was seen to be standing to the southward on the port tack. Those on board the *Emily* hailed the *Harvest Home* to starboard their helm and keep clear, and immediately afterwards, as the *Harvest Home* was seen to be coming rapidly towards the *Emily*, causing danger of collision, fenders were put out between the *Emily* and the *Moy*, and the *Emily's* rope was ordered to be slipped, but before this could be done the *Harvest Home* came on at considerable speed and, with her stem and port bow, struck the starboard side of the *Emily*, cutting her in two and causing her to founder immediately.

The owners of the *Emily* charged those on the *Harvest Home* with failing to keep a good lookout, with neglecting to keep clear of the *Emily*, with neglecting to keep her course, and with improperly and at an improper time putting and keeping the *Harvest Home* on the port tack.

The plaintiffs afterwards amended their claim by adding the owners of the *Nora* and *Clarissa* as defendants, alleging that those on the tugs had the control of the navigation, and charged those on the tugs with not keeping a good lookout, and with failing to keep the *Emily* clear of the *Harvest Home*.

The owners of the *Harvest Home*, in their defence to the amended claim, denied that there had been any negligence on the part of those on the *Harvest Home*, and alleged that the *Emily* and the *Clarissa* and *Nora* had been negligently navigated. The case made by them was that, about 11 p.m. on the 14th March 1904, the *Harvest Home*, a schooner of 102 tons gross register, was in the Bristol Channel between Breaksea Lightship and Nash Point, on a voyage from Londonderry to Cardiff, manned by a crew of four hands. The wind was calm, with occasional light northerly airs, and the night was dark and overcast, with occasional showers, the tide being the last quarter ebb of little force.

The *Harvest Home* was heading about S.E. to E.S.E., having little or no headway. Her regulation lights for a sailing vessel under way, including a stern light, were being duly exhibited and were burning brightly, and a good lookout was being kept on board of her.

In these circumstances, the masthead and green lights of the two tugs and afterwards the green light of the sailing ship *Moy*, which was in tow of the tugs, were observed about a quarter of a mile distant, bearing about two to three points on the port bow of the *Harvest Home*.

The *Emily*, which was exhibiting no light, and was not visible to those on the *Harvest Home* until just before the collision, had a rope from the starboard side of the *Moy*, and was also being towed by the tugs.

The *Harvest Home* remained heading in the same direction, but the tugs, with the *Moy* and *Emily* in tow, came on without taking any steps to keep clear of the *Harvest Home*, and passed close across her bows, with the result that the stem and starboard bow of the *Emily* struck the stem and port bow of the *Harvest Home*, doing her damage, and the starboard side of the *Moy* also struck the bowsprit and forward part of the *Harvest Home*, during her further damage.

The owners of the *Harvest Home* charged those on the *Emily* and the tugs with not keeping a good lookout, with neglecting to keep out of the way of the *Harvest Home*, and with attempting to cross ahead of her. They also charged the *Emily* with neglecting to exhibit the regulation lights for a vessel being towed, and with neglecting to slip her rope, and they counterclaimed against the owners of the *Emily* and the owners of the tugs for the damage they had sustained.

The tug owners by their defence denied that the collision had been caused by any negligence on the part of those on the tugs; in the main they adopted the case made by the *Emily*, but denied that the tugs had control of the navigation of the *Moy*, or that a good lookout was kept on the *Emily*, and they alleged that the wind was a strong breeze from the north-east. The case made by them was that those on the tugs observed, about one to two points forward of the beam on the starboard side, the red light of the *Harvest Home* about a quarter of a mile off. Suddenly the *Harvest Home* shut in her red light and opened her green, apparently acting under a starboard helm, and was seen to be standing to the southward on the port tack, and that they knew nothing further as to the collision. They alleged that the navigation of the *Moy* and her tugs was under the control of the pilot of the *Moy*, that the pilot was a compulsory one, and that the tugs obeyed, and were bound to obey, his orders, and that a good lookout was being kept on the tugs. They further alleged that the *Emily* was attached to the *Moy* for her own purposes—namely, to attend upon the pilot of the *Moy*, who was one of the crew of the *Emily* and in charge of the *Moy*, and that the *Emily* was so attached at her own risk; alternatively they alleged that the *Emily* was identified with the *Moy*, which was being towed on the following conditions: "The owners and masters of vessels are requested to take notice that the steam-tug proprietors will not be responsible under any circumstances for damage or injury, however caused, occurring to vessels or their cargoes, or occasioned by such vessels while in tow of these tugs."

They further alleged that the collision was due to the negligence of the *Harvest Home*, and alleged that those on the *Emily* were negligent in not slipping their tow rope.

Robson, K.C. and *Stephens* for the plaintiffs, the owners of the *Emily*.—The main question in the case is as to the heading of the *Harvest Home*, there had been no wind and she was heading westerly, which was in the direction in which the *Emily* was being towed; the result is that the *Harvest Home* would show her stern light to those on the *Emily*. When the breeze sprang up from the eastward the *Harvest Home* got on the port tack leading to the southward, and so a bad lookout on the *Harvest Home* brought about the collision, and for that the *Harvest Home* is to blame. The change of lights was no indication of danger to those on the *Emily*, as it might be caused by the *Emily* passing from the area lit by the stern light into that lit by the port light. The tugs are also to blame for not observing the improper action of the *Harvest Home*. The tugs had control of the navigation, and ought not to wait for orders from the tow before taking steps to avoid obvious danger:

The Altair, 76 L. T. Rep. 263; (1897) P. 105; 8 Asp. Mar. Law Cas. 224.

The fact that the pilot on the *Moy* gave directions to the tug is immaterial, for the *Emily* is entitled to rely upon the exercise of reasonable skill and care on the part of the tugs.

Laing, K.C. and *Dawson Miller* for the defendants, the owners of the *Harvest Home*.—As far as the application of the rules is concerned the two tugs and both the *Moy* and the *Emily* are to be considered one vessel, and that a steam one. It was therefore the duty of the *Harvest Home* to keep her course and speed, and that she did. The white light seen by those on the *Emily* could not have belonged to the *Harvest Home*, for she was heading S.E. to E.S.E., whilst the *Emily* was heading about west. If the view put forward by the *Emily* is correct, the *Harvest Home* would have been proceeding down channel and away from Cardiff, while her voyage was from Londonderry to Cardiff. The *Emily* had an improper light, for she was being towed by the tugs and was exhibiting a white globe light at her mast-head:

The Mary Hounsell, 40 L. T. Rep. 368; 4 P. D. 204; 4 Asp. Mar. Law Cas. 101.

It may be said that the improper light made no difference, that would be so if the weather was a flat calm and the *Harvest Home* could not manœuvre, but if there was a wind, as the plaintiffs allege, the improper light becomes very material. It is not incumbent on the pilot in charge of a tow to direct all the movements of the tugs:

The Sinquasi, 43 L. T. Rep. 768; 5 P. D. 241; 4 Asp. Mar. Law Cas. 383.

There was an independent duty on the part of the tugs to keep clear of the *Harvest Home*. There was also a duty on the tow to be ready to slip their rope in case of danger:

The Jane Bacon, 27 W. R. 35.

The *Emily* and the tugs are therefore to blame. They also referred to

The Milan, Lush, 388; 1 Mar. Law Cas. O. S. 185; *The Devonian*, 84 L. T. Rep. 125, 675; (1901) P. 221; 9 Asp. Mar. Law Cas. 158, 179.

Aspinall, K.C. and *Bailhache* for the owners of the tugs *Clarissa* and *Nora*.—As a compulsory pilot was in charge of the vessel towed, whose orders the tugs were bound to obey, the tugs cannot be said to have had charge of the navigation; so that if anyone was guilty of negligence it was

those on the *Moy*. Even if the tugs ought to have taken some action because of the sudden manœuvre of the *Harvest Home*, it must be remembered that the tugs are in a position of difficulty, for they have the tow behind them and cannot stop or reverse their engines as they could have done if they had nothing in tow, and in such circumstances the tugs are entitled to special considerations:

The Lord Bangor, 73 L. T. Rep. 414; (1896) P. 28; 8 Asp. Mar. Law Cas. 217.

Once the tug had the green light of the *Harvest Home* open on her starboard side the position was one of safety, and if the tow then found herself in a difficulty she should have informed the tug of that fact, as it would be impossible for the tug to know when the tow and the sailing ship were green to green. Further, the tugs owed no duty to the *Emily*; they had not contracted to tow her, and she was alongside the *Moy* at her own risk. By making herself fast in that way she identified herself with the *Moy*; so that any defence opened to the tugs against the *Moy* is available against the *Emily*. The *Emily* was guilty of contributory negligence in not casting off her rope. She had a bad look-out.

Robson, K.C. in reply.—The case of the *Bernina* (58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257) overruled *Thorogood* v. *Bryan*, (8 C. B. 115), which established the doctrine of identification, so the *Emily* cannot be identified with the *Moy* in order that the negligence of the *Moy* may preclude her from recovering against the tugs. The *Moy* may have contracted herself out of her right against the tugs, but that would affect no passenger on board her nor does it affect the *Emily*. The question of the light carried by the *Emily* is immaterial, for those on the *Harvest Home* admit that they did not see any light:

The Argo, 82 L. T. Rep. 602; 9 Asp. Mar. Law Cas. 74.

The PRESIDENT.—The question which controls practically the whole case is the question of the course of the *Harvest Home*. The difference between the two cases as to that is considerable. According to the *Emily*, the *Harvest Home*, although her destination was Cardiff, was going down channel, and then came round heading about E.S.E., so that those on the *Harvest Home* first saw a white light, for the vessel was then lying in a westerly direction. The story told by the *Harvest Home* is that she was lying becalmed, heading to the E.S.E., and that when the wind sprang up she proceeded on that course, and they deny that she was ever going to the westward, so that her stern light could have been seen by vessels coming down channel. Having carefully considered the matter with the Elder Brethren, it seems to me that the story told by the *Harvest Home* is the correct one. I do not believe that the *Harvest Home* was proceeding down channel to the westward, and I think that the white light which those on the *Emily* and the *Moy* say they saw may have been on some other vessel than the *Harvest Home*; though it is difficult to imagine even that, because there is no evidence of any other vessel being about at that time showing such a light. It is also remarkable that the men on the *Clarissa* never saw any white light at any material time, and no evidence has been called from the *Nora*; I think, therefore, that the account given by the *Harvest Home* is one which is substantially true. The next point made against the *Harvest Home* is that, even if her story is accepted and she was lying becalmed heading to the E.S.E. with her helm lashed and the wind sprang up, she ought not under the circumstances to have moved on, but should have waited until the tugs and tow had passed. I agree that there is a strong argument to be used against the *Harvest Home* in connection with this matter, because it is difficult to avoid the conclusion that the *Harvest Home* had a bad look-out. Those on the *Harvest Home* saw only one white light on each of the towing steamers, and so they failed to see that they were carrying the ordinary towing lights, therefore they may have mistaken the true character of these vessels, and may not have thought that they were vessels towing. I do not think that makes any material difference, because even if they had had more perfect knowledge of the character of these vessels I cannot say they would have done anything wrong in doing what they did. The *Harvest Home* was becalmed, the wind springs up, and she moves on. I see no reason why she should not. If the other vessels had seen her at the distance they should have done they might have kept out of her way, and this they failed to do. They were to all intents and purposes steamers, having every facility for keeping out of the way of the schooner, and if they had seen this schooner, as I think they ought to have done some way off, it was their duty to keep out of her way, and the fact that they did not see her and saw a white light shows, I think, that there was a bad look-out on their part. If they had seen, as they ought to have done, the red light of the *Harvest Home* in the position in which they ought to have seen it, they ought to have realised that it was a sailing vessel which, when the wind sprang up, might be expected to proceed on her course; and they should have given her as wide a berth as possible. In these circumstances I think no blame attaches to the *Harvest Home*.

On the other hand, it seems equally clear that the tugs and the *Moy* are to blame for not keeping out of the way of the *Harvest Home*. It is not necessary for me to discriminate between the *Moy* and the tugs, because the *Emily* brings her action against the tugs and not against the *Moy*. If both the tugs and the *Moy* are to blame, the *Emily* is entitled, as far as this point is concerned, to maintain her action against the tugs. It is clear that the tugs had a sufficiently independent position for me to say that it was negligent of them not to have kept out of the way. The case of *The Altair* (*ubi sup.*) shows that the tugs had a duty cast on them. It is true that they had to obey the orders of their tow, but the case of *The Altair* (*ubi sup.*) and other authorities show that they had an independent duty, and that they were bound to keep out of the way and exercise independent action to do so, although their tow was also negligent in giving them orders. It is said that the *Emily* cannot maintain her action against the tugs because she was lashed to the *Moy*, and was therefore identified with her, and if the *Moy* is negligent the *Emily* has to share the consequences of that negligence. At one time that might have been so, but the view of the law has altered in a material respect as to the question of identification of persons on the wrongdoing ship with the ship herself. Having regard to the

case of *The Bernina* (*ubi sup.*) it is clear that there is an independent right in persons, whether in an omnibus or on a ship, against one who negligently injures them, even though those directing the omnibus or ship are guilty of negligence, and it is no answer to the *Emily* to say "You were lashed to the *Moy*, and the *Moy* was in fault." I am of opinion that nothing can be said against the *Emily* on that ground.

There is another matter which I have considered carefully with the Elder Brethren—that is, the failure of those on the *Emily* to slip their rope. The *Emily* had no man stationed at the tow rope for the purpose of slipping it, and the effect was that the *Emily* did not slip her tow rope at the earliest possible moment; though in the end the master did give an order to that effect, and the rope was slipped, but too late to produce any real result. That raises the question whether or no it was negligence on the part of the *Emily* not to have slipped the rope. On the one hand, it may be said that if she had slipped her rope at one time she would have got clear, and could then have hoisted her sail and got away; on the other hand, it may be said that if she had cut herself adrift from the *Moy* she would be losing her chance of being towed clear, and that if she had dropped astern of the *Moy* she might have put herself in the way of the approaching vessel if the approaching vessel tried to go under the stern of the *Moy*. The question is a difficult one, and although my opinion, after consultation with the Elder Brethren, is that it would have been better, on the whole, to have slipped the rope at an earlier time, and that if a man had been stationed, as I think he should have been, at the rope, it would have been more satisfactory; still I feel unable to say that there was any such want of ordinary care and skill on the part of those on the *Emily* as would deprive her of her right to recover in this action, or would entitle the *Harvest Home* to succeed in an action against her. The result is that the *Emily* is entitled to maintain her action against the tugs for their negligence, but is not entitled to maintain her action against the *Harvest Home*; the *Harvest Home* is entitled to maintain her counter-claim against the owners of the tugs, but is not entitled to maintain it against the *Emily*.

On the question of costs,

Dumas, on behalf of the plaintiffs, the owners of the *Emily*, applied that the owners of the tugs should pay not only the costs of the *Emily's* successful action against the tug owners, but also the costs paid by the owners of the *Emily* to the owners of the *Harvest Home* in the action brought by the owners of the *Emily* against the *Harvest Home*, on the ground that the tug owners alleged that the *Harvest Home* was at fault as well as the *Emily*:

The Mystery, 86 L. T. Rep. 359;
The River Lagan, 58 L. T. Rep. 773; 6 Asp. Mar. Law Cas. 281.

THE PRESIDENT.—The circumstances of the cases cited in support of the application, so far as they touch the question of costs, are not the same as in this case. The question really is whether the plaintiffs acted reasonably in bringing their action against the owners of the schooner. The costs of the action brought by the owners of the *Emily* against the *Harvest Home* will be borne by them, and not by the tug owners.

After the collision between the *Harvest Home* and the *Emily* and *Moy* the *Clarissa* towed the *Harvest Home* from off Nash Point to Cardiff. The towage lasted about eight hours. The owners, master and crew of the *Clarissa*, a screw tug of ninety-three tons register manned by a crew of six hands all told, claimed salvage for the services so rendered, or, in the alternative, 25*l.* for the towage service, alleging that the *Harvest Home* was in a helpless condition, with her stem started and her bowsprit and head-gear carried away. The owners of the *Harvest Home* denied that any salvage services were rendered to the *Harvest Home*; alternatively they alleged that if the services were salvage services, they were rendered necessary by the negligence of the plaintiffs, and that therefore the plaintiffs were not entitled to salvage or towage remuneration, and they further relied on sect. 422 of the Merchant Shipping Act 1894, which is as follows:

(1) In every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without danger to his own vessel, crew, and passengers (if any), (*a*) to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable, and may be necessary to save them from any danger caused by the collision, and to stay by the other vessel until he has ascertained that she has no need of further assistance.

The defendants, after stating the facts which led up to the services, and which are set out in the report of the collision action, alleged that a light breeze sprang up from the eastward, the wreckage was cleared away, and the *Harvest Home* was put on a course for Cardiff, and was able to make about three knots an hour.

About half an hour after the collision the tug *Clarissa* came up and offered to tow the *Harvest Home* to Cardiff and dock her. The master of the *Harvest Home*, who required a tug for docking, agreed to take the tug and passed his hawser on board the tug, and the *Harvest Home* was docked about 6 a.m. During the towage the wind was light to moderate.

The defendants further alleged that the services were ordinary towage, for, although the *Harvest Home* had lost her bowsprit, she was in other respects perfectly seaworthy, and was able to sail without assistance and was making no water, and only required a tug for docking; that the ordinary rate for towing and docking a vessel of the size of the *Harvest Home* was not more than 5*l.* 5*s.* and that the tug was in no danger when rendering the services. As an alternative defence the defendants, while denying liability, brought into court the sum of 5*l.* 5*s.*, alleging that that sum was sufficient to satisfy the plaintiffs' claim.

The value of the *Harvest Home* was 500*l.*, of her cargo of burnt ore, 121*l.* 17*s.* 9*d.*; and of her freight, 10*l.*; in all 631*l.* 17*s.* 9*d.*

Aspinall, K.C. and *Bailhache* for the plaintiffs, the owners of the *Clarissa*. — The services rendered by the tug were not ordinary towage services, for mere towage is confined to vessels that have received no injury or damage, and is payable only where the vessel receiving the services is in the same condition she would

ordinarily be in without having encountered any accident or received any damage:

The Reward, 1 Wm. Rob. 174.

Laing, K.C. and *Dawson Miller* for the *Harvest Home*, her cargo, and freight.

The PRESIDENT.—What has been said in the collision action disposes of the question of salvage, for whether the services were in fact salvage or not, it is clear that the tug cannot maintain an action for salvage, for she was to blame for the collision. The question of towage, however, remains. There is no doubt a duty on the tug under the circumstances to stand by, but I do not think there is any duty on the tug to tow the vessel to Cardiff. So, although the tug is not entitled to salvage, I think she is entitled to towage remuneration. As to the amount to be paid for the towage, there is some dispute; there is a tariff for a certain distance, but beyond that the matter is one of mere towage. I have no doubt the vessel could have sailed by herself had it been imperative that she should do so. I think the sum of 5*l.* 5*s.* is sufficient, and so the tender will be upheld.

Solicitors for the owners of the *Emily*, *Holman*, *Birdwood*, and *Co.*, agents for *James Inskip* and *Co.*, Bristol.

Solicitors for the owners of the *Harvest Home*, *Downing*, *Handcock*, *Middleton*, and *Lewis*, agents for *Downing* and *Handcock*, Cardiff.

Solicitors for the owners of the *Clarissa* and *Nora*, *Stokes* and *Stokes*, agents for *Lloyd* and *Pratt*, Cardiff.

Monday, Aug. 8, 1904.

(Before Sir F. JEUNE, President.)

THE ELMVILLE. (*a*)

Wages—Emolument—Maritime lien of master—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 167, 742.

The managing owners of a steamship, while the vessel was abroad, wrote to the master of the vessel undertaking that he should be paid a bonus of 50*l. if he stayed on the vessel and brought her back to England.*

On the arrival of the vessel in England the master brought an action in rem *against the vessel to recover his wages and disbursements and claimed the sum of* 50*l. promised him as part of his wages. On the reference to assess the amount due to him as wages, the registrar allowed the sum of* 50*l.*

On appeal from the decision of the registrar:

Held, that the master was entitled to recover the sum claimed either as wages or as an emolument and that he had a maritime lien for the 50*l. claimed.*

APPEAL from a decision of the Admiralty registrar which came before the court by way of motion on objection to the report of the registrar.

While the *Elmville* was in an Australian port her master received a letter from the managing owners of the vessel telling him that if he stayed with the vessel and brought her safely to England he should receive a bonus of 50*l.* over and above the wages which he was entitled to under his agreement—namely, 26*l.* a month.

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

The master brought the *Elmville* back safely to this country, and on her arrival she was arrested by certain mortgagees; the master then instituted an action *in rem* against the *Elmville* for his wages and disbursements, and on the 20th June 1904 obtained a judgment against the ship subject to a reference to the registrar to assess the amount of his claim.

At the hearing of the reference the master claimed the 50*l.* which had been promised him as part of his wages, and the registrar by his report, dated the 20th July 1904, allowed the claim.

The mortgagees objected to the registrar allowing it, and lodged an objection to his report, which came before the court on appeal from the decision of the registrar.

Stephens for the appellants, the mortgagees, in support of the motion.—The section of the Act which gives the master a lien for his wages is sect. 167 (1) of the Merchant Shipping Act 1894. But the sum is not wages claimed, but a bonus, and the master has no maritime lien for it. In sect. 742 of the Act—the definition section of the Act—the word "wages" is said to include "emoluments," and the question in this case is whether this sum of 50*l.* can be called either wages or emolument. It is submitted that the word emolument means the reward for services other than those which a master would be bound to perform to earn his wages; it is a reward for some work which would not fall within the scope of his contract of employment. [The PRESIDENT.—Might not an owner increase the wages of a master after he has entered on the service of the ship?] Surely not; for that might allow owners and masters fraudulently to defeat the rights of mortgagees. The master in this case did no more than he was bound to do under his contract of employment, and this bonus, it is submitted, cannot properly be termed an emolument, and it is not, in fact, a part of his wages.

Dumas (*Balloch* with him) for the respondent, the master of the *Elmville*.—The registrar was right in allowing this sum; it is either wages or it is an emolument. It is submitted that it is wages properly so called; it may be they are conditional wages—but the condition which had to be performed before they became due—namely, that the master should bring the *Elmville* to this country—has been performed, and the wages are therefore due. If this sum cannot be termed wages it is certainly an emolument; any reward which comes to a man for a service rendered is an emolument. In *The Tergeste* (87 L. T. Rep. 567; 9 Asp. Mar. Law Cas. 356) a victualling allowance was recovered as wages, the court being satisfied that it was given in lieu of or as part of the wages of the master and crew; the fact that this sum is called a bonus does not make it any the less a part of the wages or an emolument.

The PRESIDENT.—I think the learned registrar came to a right decision in this case. I am not sure whether this sum ought to be considered as conditional wages or as an emolument. I am inclined to regard it as conditional wages—conditional upon the master bringing the vessel home in safety. I am inclined to think it is wages, because that word is used in a very wide sense in the Merchant Shipping Act 1894, but if it is not wages I am satisfied that it is an emolument.

The result is that the master is entitled to recover this 50*l.* as part of his wages within the meaning of the Act, and as such he has a maritime lien for that sum. The appeal will be dismissed with costs.

Solicitors for the appellants, *Williamson, Hill,* and *Co.*, agents for *Ingledew* and *Co.*, Cardiff.

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

Thursday, Nov. 16, 1904.

(Before GORELL BARNES, J.)

THE ROSSLYN. (*a*)

Limitation of liability—Loss of life or personal injury—Proof of ownership at date of collision.

Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of the Merchant Shipping Act 1894 (57 *and* 58 *Vict. c.* 60), *ss.* 503, 504, *and the evidence in support of their claim is given by affidavit, the affidavit as to whether loss of life or personal injury was occasioned by the collision should be made by some person having knowledge of the facts, and the certified copy of the register proving the ownership of the vessel should be a certified copy of the register at the date of the collision.*

THE collision in respect of which this action was brought by the Rosslyn Steamship Company Limited to limit their liability occurred between their steamship the *Rosslyn* and the steamship *Devonshire* on the 21st Feb. 1904.

On the 26th Feb. 1904 the owners of the *Devonshire* instituted proceedings against the owners of the *Rosslyn* to recover the damage caused them by the collision.

The action came on for hearing on the 17th March 1904, and the *Rosslyn* was pronounced alone to blame, and the claim of the owners of the *Devonshire* was referred to the registrar and merchants for the amount of the damage to be assessed.

On the 30th Sept. 1904 the owners of the *Rosslyn* issued a writ against the owners of the *Devonshire* and all other persons claiming to have sustained damage by reason of the collision, claiming that their liability in respect of the said collision should be limited in accordance with the provisions of the Merchant Shipping Act 1894.

The owners of the *Rosslyn* delivered their statement of claim in the limitation suit on the 17th Oct., and sought to prove their case by an affidavit made by the manager of the Rosslyn Steamship Company Limited. A paragraph of his affidavit was as follows:

I have made careful inquiry, and have been informed and believe that no loss of life or personal injury was occasioned by the said collision.

The certified copy of the register of the plaintiffs' vessel exhibited to his affidavit to prove the ownership and tonnage of the vessel was dated the 5th Feb. 1904, and showed that on that date the Rosslyn Steamship Company Limited were the owners of sixty-four shares.

Dawson Miller for the owners of the *Rosslyn.*

L. Noad for the owners of the *Devonshire.*

GORELL BARNES, J.—The decree may go on payment into court of the sum of 4480*l.* 14*s.* 5*d.*, with interest on that sum from the date of collision, that sum being the aggregate amount of 8*l.* per ton on 560·09 tons, the gross tonnage of the *Rosslyn*, calculated according to the provisions of the Merchant Shipping Act; but, as the evidence as to the loss of life or personal injury rests at present only on the information and belief of the person making the affidavit, a further affidavit to the satisfaction of the registrar must be filed, sworn by the master or some other person actually acquainted with the facts that no loss of life or personal injury was occasioned by the collision, and the copy of the register exhibited to the affidavit in these cases should be a copy of the register as it appears at the date of the collision, for such a copy would contain the names of the owners of the vessel at the time of the collision.

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

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

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

HOUSE OF LORDS.

Thursday, Feb. 16, 1904.

(Before the LORD CHANCELLOR (Halsbury), Lords MACNAGHTEN and LINDLEY).

ELDERSLIE STEAMSHIP COMPANY *v.* BORTHWICK. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading — Construction — Exceptions — Damage to goods — Unseaworthinesss — Liability of shipowner.

In order to relieve a shipowner from liability for loss by reason of the unseaworthiness of the ship, the bill of lading must be expressed in plain and unequivocal terms.

A bill of lading contained two clauses relating to exceptions. The first provided: "Neither the ship nor her owners shall be accountable for . . . any loss or damage . . . from any cause whatsoever, whether existing at the commencement of the voyage, or at the time of the shipment of the goods or not." The second clause, which was printed in smaller type, excepted loss or damage resulting "from any accidents to, or defects, latent or otherwise, in hull . . . or otherwise, whether or not existing at the time of the goods being loaded or at the commencement of the voyage . . . if reasonable means have been taken to provide against such defects and unseaworthiness."

A cargo of frozen meat was shipped under the bill of lading, and in the course of the voyage it was damaged by carbolic acid which had been used to disinfect the vessel after carrying a cargo of horses. If reasonable care had been taken to cleanse the ship from the taint of carbolic acid before the meat was shipped the injury would not have occurred.

Held (affirming the judgment of the court below), that the second clause could only be read as

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

qualifying the general exception contained in the first clause, and that the owner was not exempted from liability for damage caused by the condition of the vessel.

APPEAL from a judgment of the Court of Appeal (Lord Alverstone, C.J., Collins, M.R., and Romer, L.J.), who had reversed a decision of Walton, J. at the trial of the action before him without a jury.

The case is reported 9 Asp. Mar. Law Cas. 513; 90 L. T. Rep. 187; (1904) 1 K. B. 319.

The respondent (plaintiff) brought his action as indorsee of bills of lading, dated in Dec. 1901, for certain carcases of sheep and lambs shipped at Melbourne on board the steamship *Nairnshire*, to be delivered at London, against the appellants, the owners of the *Nairnshire*, to recover damages for breach of the contract contained in the bills of lading.

By his points of claim the plaintiff alleged that all the carcases were delivered damaged, and that the damage was not due to any exceptions contained in the bills of lading, but was due to the *Nairnshire* not being seaworthy or fit for the carriage of the meat, and to the defendants not having taken means to make the *Nairnshire* seaworthy and fit.

In particular the plaintiff alleged that the holds were not sweet or clean, and that the insulation and holds were impregnated and tainted with disinfectants which affected and damaged the meat.

By their points of defence the defendants, while alleging that they took all reasonable steps to make the *Nairnshire* seaworthy and fit for the carriage of the meat, and that she was seaworthy and fit, relied on the exceptions contained in the bills of lading in answer to the claim made upon them.

The bills of lading, which were all in the same form, were headed "Refrigerator Bill of Lading," and contained the following clauses, the first of which was printed in Roman type, and was as follows:

Neither the steamer nor her owners nor her charterers shall be accountable for the condition of goods shipped under this bill of lading, nor for any loss or damage thereto, whether arising from failure or breakdown of machinery, insulation, or other appliances, refrigerating or otherwise, or from any other cause whatsoever, whether arising from a defect existing at the commencement of the voyage or at the time of shipment of the goods or not, nor for detention, nor for the consequence of any act, neglect, default, or error of judgment of the master, officers, engineers, refrigerating engineers, crew, or other persons in the service of the owners or charterers, nor from any other cause whatsoever.

The second clause was printed in small italics, and, so far as material, was as follows:

. . . Loss or damage resulting therefrom or from any of the following causes or perils are excepted —viz., . . . or by or from any accidents to or defects, latent or otherwise, in hull, tackle, boilers, or machinery, refrigeration or otherwise, or their appurtenances (whether or not existing at the time of the goods being loaded or the commencement of the voyage), . . . if reasonable means have been taken to provide against such defects and unseaworthiness.

The *Nairnshire* was a large steamship fitted with refrigerating machinery and with insulated holds for the carriage of frozen meat.

Before the voyage in question she had been engaged in carrying horses to South Africa on the main deck and in the 'tween decks, which formed part of the insulated space. For purposes of disinfection carbolic acid had been used.

Before loading any frozen meat on the voyage in question the ship was fumigated, and the holds and bilges cleansed and disinfected under the supervision of the local sanitary authority both at Sydney and Townsville.

On arrival in London, when the respondent's frozen meat was discharged, it was found to be tainted by disinfectants.

At the trial the only question was that of liability.

The learned judge found as a fact that the meat on arrival was found to be tainted with the smell of carbolic acid, and was damaged; that the meat was damaged by having become tainted during the voyage; and that this was caused by the condition of the ship at the commencement of the voyage. He further found that, if proper care, skill, and attention had been paid to the cleansing and preparation of the ship before she started on her voyage from Melbourne, the damage would not have occurred. But he further held that the damage was caused by a defect existing at the commencement of the voyage, and that the defendants were exempted from liability for the damage to the meat by the exceptions contained in the bills of lading.

This decision was reversed on appeal, and the shipowners appealed to the House of Lords.

T. G. Carver, K.C. and *Leck* for the appellants.—The first exception covers this case. The first clause was intended to override the second clause, so far as it is inconsistent with it, or else they must be construed as independent contracts. The judgment of Lord Alverstone, C.J. construes this bill of lading as if it was in the form of that in *Owners of Cargo on Ship Maori King* v. *Hughes* (8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550), which it is not. It is also distinguishable from

Rathbone v. *MacIver*, 9 Asp. Mar. Law Cas. 467; 89 L. T. Rep. 378; (1903) 2 K. B. 378.

J. A. Hamilton, K.C. and *M. Hill* for the respondent.—A shipowner can only contract himself out of liability for unseaworthiness by plain, unequivocal words. It is impossible to say that this bill of lading is clear and unambiguous. The only way to reconcile the two clauses is to read the latter as qualifying and restricting the former. They referred to

Rathbone v. *MacIver* (*ubi sup.*);

Czech v. *General Steam Navigation Company*, 3 Mar. Law Cas. O. S. 5; 17 L. T. Rep. 246; L. Rep. 3 C. P. 14;

Steinman v. *Angier Line*, 7 Asp. Mar. Law Cas. 46; 64 L. T. Rep. 613; (1891) 1 Q. B. 619;

Price v. *Union Lighterage Company*, 9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1903) 1 K. B. 750; affirmed on appeal, 89 L. T. Rep. 731; (1904) 1 K. B. 412;

Owners of Cargo on board Steamship Waikato v. *New Zealand Shipping Company*, 8 Asp. Mar. Law Cas. 442; 79 L. T. Rep. 326; (1899) 1 Q. B. 56.

Carver, K.C., in reply, referred to

Baerselman v. *Bailey*, 8 Asp. Mar. Law Cas. 4; 72 L. T. Rep. 677; (1895) 2 Q. B. 301.

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

The LORD CHANCELLOR (Halsbury). — My Lords: I do not think it necessary to quote any authority in this case, because, I think, construing this instrument and applying to it the ordinary canons of construction, that I must move your Lordships that the appeal be dismissed. It seems to me that if what has been called the large print had stood alone, I should not have had the smallest doubt in the world that it would have carried the shipowner the whole way. I can give no other construction to it than that which the words express, but the difficulty which is in his way of course is this: That he has thought proper to execute an instrument which has two different sets of phrases in it; and one rule of construction which I think prevails, and must prevail, is that you must give effect to every part of a document if you can—you must read it as a whole. He says at the commencement of it that he is not to be liable for this particular thing; but in another part of the same instrument you find another set of words which also you have to construe. Mr. Carver has ingeniously spoken of independent contracts and independent paragraphs, and so on, but we must remember that this is one contract; and each of the parts of this contract must be read so as to be intelligible and to be reconciled with the others if it can be. The true construction of the clause is, according to my view, that he is to be exempted from any liability for the particular injury that has happened, and if that had stood alone I should have thought it perfectly clear that he was not liable; but instead of that, he goes on to say in another part of the same contract, to which I must, if I can, give some effect because of that rule of construction from which I cannot escape: "I shall not be liable for this same injury (as I must call it) if all reasonable means have been taken to avoid it." The only mode of reading as an entire contract that instrument which has those two stipulations in it, is to suppose that you must read the first part of it thus: "I am not to liable for this," and then what comes after it by way of exception, "I shall not be liable unless I have failed to take all reasonable means against the injury that has happened." In that way you can read the two together, and you can make a reasonable contract out of it. But reading it in the way in which it has been suggested that we should read it, as meaning, first of all, "I shall not be liable at all under any circumstances"; and, secondly, "I shall not be liable if I have taken all reasonable means to prevent the injury that has happened," it is impossible that you can reconcile those two together. You have in the one an absolute freedom from liability in the same case, which, according to the other, is to be treated as a qualified freedom from liability—that is, "if I have taken all reasonable means to prevent what has happened." Then, what have we got to do? We have here one contract dealing with the same thing, between the same persons expressing themselves in that way. I confess that I felt for a very long time, in the course of this argument, that the whole thing turned upon whether you could reconcile those two parts of the contract together. I should have felt no difficulty whatever in the construction contended for by the appellants if I had found the particular part of the contract on which they relied standing alone; but then I find the other added to it; and if you are to deal with what perhaps it is not very desirable to deal with—namely, what you might think that the persons who were making the contract would understand by it at the time—I suppose that the shipper might say to himself, "I see by this part of the contract that the shipowner is bound to take all reasonable means to prevent injury, and, if he does not, he is to be liable." Therefore, perhaps it is more in accordance with what you would consider to be the reasonable mode of looking at the contract that you should so construe it as the person entering into it might reasonably have understood it at the time. The view which I take of the matter is that the maxim upon which the judgment of the Court of Appeal ought to be supported is this: That you must give, if you can, to a contract a meaning that will satisfy all the words of it if you can make it intelligible, and you must not reject any part of it as surplusage, or as not reconcilable with another part, if you can help it. I have pointed out what appears to me to be the only way in which these two portions of this contract are capable of being reconciled with each other; and whatever may have been the meaning of the parties at the time, I must suppose—what sometimes, perhaps, is a very violent hypothesis—that they knew exactly what they were talking about and that they intended it; but whether they did or not, I must give effect to the words to which they agreed, and must reconcile them if I can. Under these circumstances it seems to me that the appeal ought to be dismissed, and I move your Lordships accordingly.

Lord MACNAGHTEN.—My Lords: I am entirely of the same opinion. The clause which has been called the large print clause seems to me to be perfectly clear, and the small print clause equally clear. For my part I am unable to reconcile the two, and I do think it a very wholesome rule that a shipowner who wishes to escape from the liability which would attach to him for sending an unseaworthy vessel to sea must say so in very plain words. The only way to reconcile the two clauses is to apply the qualification in the small print to the large print clause. It seems to me that by neither of the ways which have been suggested can the appeal be maintained.

Lord LINDLEY.—My Lords: I am of the same opinion. This is a contract between two persons, one of whom—the shipowner—prepared it. I have not the slightest doubt that the shipowner understood it as Mr. Carver says he did. But when I look at it from the other side and consider whether the shipper, the man shipping the goods, would so understand it, I say, if it were myself, certainly I should not. I should find that the defects which were to render the ship unseaworthy were only to be excepted in certain conditions—that is, if reasonable means had been taken to provide against them. That is how I should read it as a shipper, although the shipowner would not. It appears to me that the vice of Walton, J.'s admirable judgment is that he has rather lost sight of what would be reasonably plain to the shipper. I quite agree with the principle on which the Lord Chancellor and my noble and learned friend Lord Macnaghten

have proceeded in deciding this case. I agree that this bill of lading did not employ plain terms and relieve the shipowner from liability in the case of unseaworthiness—I mean by "plain terms" terms sufficiently plain to the shipper for him to understand it—he would not understand it in the sense contended for by Mr. Carver.

Judgment appealed from affirmed, and appeal dismissed with costs.

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Dec. 1 *and* 19, 1904.

(Present: The Right Hons. Lords MACNAGHTEN and LINDLEY, Sir FORD NORTH, and Sir ARTHUR WILSON.)

COMMONWEALTH PORTLAND CEMENT COMPANY *v.* WEBER, LOHMANN, AND CO. (*a*)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Carriage of goods—Principal and agent—Negligence of agent—Delay in passing goods through Customs—Increase of duties.

The appellants carried on business in Australia, and employed the respondents, who were a firm of shipping agents in Sydney, to receive and transmit goods arriving at the port consigned to them.

The respondents made no charge for passing goods so arriving through the Customs.

A cargo of goods consigned to the appellants arrived at Sydney, and the arrival of the ship was reported to the respondents early on the 8th Oct. 1901, *and the goods might have been passed through the Customs on that day, in which case no duty would have been payable.*

The goods were not in fact passed through the Customs till the 9th Oct., on which day an altered tariff came into force, under which the goods became liable to heavy duties, which the appellants were compelled to pay.

Held (*affirming the judgment of the court below*), *that they could not recover the amount so paid from the respondents.*

APPEAL from the refusal of the Supreme Court of New South Wales (Stephen, Simpson, and Walker, JJ.) to set aside the judgment of nonsuit entered by Owen, J. at the trial of the action before himself and a jury, and to direct a new trial, or to enter judgment for the plaintiffs.

The case is reported 3 N. S. W. State Rep. 516.

The plaintiffs (appellants) were a company carrying on cement works in New South Wales, and from time to time imported machinery and building materials by steamers belonging to different owners.

The defendants (respondents) were a company carrying on business in Sydney as shipping agents, stevedores, and lightermen.

The action was brought by the plaintiffs on the 10th Oct. 1902 against the defendants to recover damages for the alleged breach of a contract alleged by the plaintiffs to have been made by the defendants to lighter, handle and load, and to pass certain machinery and building materials through the Customs House in Sydney within a reasonable time after the arrival of such shipments or alternatively with care and diligence after their arrival there, and for the negligent and unskilful conduct of the defendants, and their delay in making such entries, by reason whereof the plaintiffs had to pay certain Customs duties—viz., 997*l.* 5*s.* 10*d.*—on the importation of such goods.

By their pleas the defendants denied all material allegations, and issue was joined thereon.

The facts of the case were as follows:—

In 1901 the plaintiffs were expecting certain shipments of machinery and materials form England and Germany, and applied for tenders for the receiving and transmitting of such goods.

The defendants tendered for such work by a letter dated the 24th April 1901, and thereupon the following letters—viz., the 1st May 1901, from the plaintiffs to the defendants; the 3rd May 1901 from the defendants to the plaintiffs; and the 4th May 1901, from the plaintiffs to the defendants—were written. By such tender and letters the defendants agreed to discharge and lighter such goods, and to load them into trucks, and to store them, for certain charges therein mentioned; and also, in answer to the plaintiffs' inquiry in their letter of the 1st May 1901, "if they would undertake to pass the goods through the Customs, and what your charge would be, if any," said that "the passing of the goods through the Customs would be attended to by us free of charge."

Before and at the time at which this contract was made and up to 4 p.m. on the 8th Oct. 1901 there were no Customs duties payable on the importation of such goods. Up to that time the passing of such goods through the Customs House was a purely formal matter, and it had not been necessary when doing so to produce the invoice for them.

After the contract was made the plaintiffs from time to time forwarded to the defendants bills of lading for machinery, building material, and goods which were expected to arrive for the defendants to handle under the contract, which the defendants did.

According to the practice in New South Wales, no entries of imported goods could be made before the vessel in which they were had been reported inwards. Further, by sect. 47 of the Customs Regulations Act (42 Vict. No. 19), importers of goods imported from ports from which the steamship *Karlsruhe* hereinafter mentioned came had to make entry within twenty-four hours after the date of the report of the ship, or might under sect. 49 do so afterwards at any time before the goods were landed on behalf of the shipowner.

By sect. 72 of the Customs Act (No. 6 of 1901) entries were to be made within such times after the report of the ship as might be prescribed, or within such further time as the collector might see fit to allow, and by the regulations made under that Act, which took effect from the 1st Nov. 1901, the entries in case of a steamer were to be made within two clear days from the date of the ship's report inwards.

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

On the 30th Sept. the plaintiffs by a letter of that date sent to the defendants two bills of lading for certain machinery and building materials to arrive by the steamship *Karlsruhe* for the defendants to clear and deliver "in terms of our contract," which letter the defendants acknowledged on the 3rd Oct. 1901.

The *Karlsruhe* arrived in Sydney on Sunday, the 6th Oct., and Monday, the 7th Oct. being a holiday, the vessel could not and did not report itself till 9.10 a.m. on Tuesday, the 8th Oct.

Previously the Prime Minister had, on the 25th Sept. 1901, announced to the House of Representatives that he would deliver his budget statement on the 8th Oct. 1901, and that the tariff would then be known. On the 8th Oct., at 4 p.m., the proposed Federal Tariff was laid on the table of the House of Representatives. By it for the first time it was proposed to put duties on imported goods of the nature abovementioned. In consequence of this the Customs House officials on and after 4 p.m. of that day demanded payment of such duties on and the production of the invoices of such goods. These duties were, in fact, imposed by the Act relating to Duties of Customs, No. 14 of 1902.

The defendants did not pass the entries for such goods before 4 p.m. on the 8th Oct. 1901, and, on their going to the Customs at 9.15 on the 9th Oct., the Customs officials refused to pass the entries of the goods and to deliver them unless the duties were paid. For this purpose it was necessary for the defendants to have the invoices of such goods, and they thereupon wrote to the plaintiffs on the 10th Oct. 1901 for the invoices and for a cheque to cover the duty.

The plaintiffs sent the invoices to the defendants, and afterwards paid them the amount of the duty, 997*l.* 5*s.* 10*d.*, which they sought in the action to recover as damages.

The case was tried before Owen, J. and a jury. At the trial evidence was called proving the above facts. At the end of the plaintiffs' case the defendants' counsel submitted that the plaintiffs should be nonsuited, and the judge being of that opinion ordered a judgment of nonsuit to be entered.

At the trial the learned judge rejected copies of three newspapers tendered by the plaintiffs which were alleged to contain the statement that the Prime Minister had stated that it was the intention of the Federal Government to introduce the proposed Federal Tariff on the 8th Oct. 1901, and had discussed the character of such tariff. He also rejected evidence that it was a matter of notoriety in commercial circles in Sydney that a tariff imposing higher duties would come into force early in Oct. 1901.

The plaintiffs afterwards on the 28th March 1903 filed a memorandum for a rule to have the judgment of nonsuit set aside, and on the 5th May the plaintiffs obtained a rule *nisi* to set aside the judgment and for a new trial, or to enter the verdict for the plaintiffs.

The rule came on for argument on the 27th Aug. 1903, when it was discharged.

The plaintiffs subsequently obtained leave from the court to appeal to His Majesty in Council.

Cohen, K.C. and *T. T. Paine* appeared for the appellants.

Lawson Walton, K.C. and *C. C. Scott* for the respondents.

The following authorities were referred to in the course of the arguments:

Dudgeon v. *Pembroke*, 3 Asp. Mar. Law Cas. 393; 31 L. T. Rep. 31; L. Rep. 9 Q. B. 581; 34 L. T. Rep. 36; 1 Q. B. Div. 96; 36 L. T. Rep. 382; 2 App. Cas. 284.
Giblin v. *McMullen*, 21 L. T. Rep. 214; L. Rep. 2 P. C. 317;
Hick v. *Rodocanachi*, 7 Asp. Mar. Law Cas. 97, 23; 65 L. T. Rep. 300; (1891) 2 Q. B. 626;
Horne v. *Midland Railway Company*, 28 L. T. Rep. 312; L. Rep. 8 C. P. 131;
Elbinger Actien Gesellschaft v. *Armstrong*, 30 L. T. Rep. 871; L. Rep. 9 Q. B. 473;
Grébert-Borgnis v. *Nugent*, 15 Q. B. Div. 85;
Mayne on Damages, edit. 1903, p. 42.

Cohen, K.C. was heard in reply.

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

Dec. 19.—Their Lordships' judgment was delivered by

Lord LINDLEY.—This is an appeal from a judgment of the Supreme Court of New South Wales affirming a judgment of nonsuit in an action brought by the appellants against the respondents. The appellants are manufacturers of cement. Their head office and works are at Portland, New South Wales. They had ordered machinery from abroad, and it was to arrive at Sydney in a steamer named the *Karlsruhe* consigned to the care of the respondents, who were shipping agents there. The ship arrived on Sunday, the 6th Oct. 1901. Monday was a holiday. The ship was reported early on Tuesday, the 8th Oct. When the ship arrived no Customs duty was payable in New South Wales on machinery imported from abroad; but, like other duty-free goods, it had to be entered and cleared at the Customs House at Sydney, and (as will be more fully explained presently) the respondents had undertaken to pass it through the Customs House for the appellants. By the New South Wales Customs Regulations Act 1879 (42 Vict. No. 19), twenty-four hours from the date of the report of the ship were allowed for entering and clearing duty-free goods, Sundays and holidays not being counted. Before twenty-four hours for entering and clearing the machinery had expired, and before it had been cleared—viz., in the afternoon of the 8th Oct.—the machinery became liable to a heavy duty of 900*l.* odd, and it could not be afterwards cleared or landed until this duty was paid. It was proved at the trial that there was ample time to enter and clear the machinery on the 8th Oct. before the duty became chargeable. It was also proved that on the morning of the 8th Oct. the defendants did enter and clear some goods of their own brought by the *Karlsruhe*. It was further proved that it had been for some time common knowledge in Sydney that the Government of New South Wales was contemplating the publication of an ordinance bringing into operation in New South Wales the Customs Act 1901, passed on the 3rd Oct. by the Commonwealth Parliament of Australia. Such an ordinance was, in fact, published in the afternoon of the 8th Oct.

These being the admitted facts, the question arises whether the appellants, who had to pay the duty to get their goods landed, are entitled to re-

cover the amount from the respondents as damages for their negligence. This question really turns on the duty of the respondents; and this depends on their contract with the appellants. The contract is to be found in a series of letters passing between the two companies, commencing on the 24th April and ending on the 3rd Oct. 1901. The short effect of these letters was that the respondents undertook to lighter and load on railway trucks the machinery of the appellants brought by the *Karlsruhe* for certain fixed charges, and they also agreed to pass the machinery through the Customs without extra charge. It is clear from the correspondence that the payment of Customs duties was not contemplated by either party. To enter and clear duty-free goods involved no difficulty or trouble worth mentioning to the respondents, who were to receive and lighter them; and it was very natural that the respondents should further undertake to pass them through the Customs House without extra charge. The appellants contend that the obligation contracted by the respondents included the duty of exercising reasonable diligence in entering and clearing the goods; and that this involved the duty of protecting the appellants' goods from loss which was known to the respondents to be imminent or at least probable. The appellants further contend that it should have been left to the jury to say whether such diligence was exercised or not. The respondents, on the other hand, contend that all that they agreed to do was to enter and clear the goods in the usual way in the time fixed by the Customs regulations. They contend that the appellants are seeking to throw upon them a duty which they never undertook, and one which was never contemplated by either party. There is no doubt that all agents are bound to take reasonable care in doing what they have undertaken to do; but it appears to their Lordships that the appellants cannot succeed unless they can show that it was the duty of the respondents to attend to taxation by the Government, and to take reasonable care to protect the appellants' goods from taxation. Their Lordships are of opinion that the contract between the parties did not impose upon the respondents any legal obligation to pay attention to what the Government might or might not do as regards altering Customs duties; and that there was no evidence to go to the jury of any breach by the respondents of any duty which they owed to their employers. This was the view taken by the judge who tried the case and by the Supreme Court. In coming to the same conclusion, their Lordships have assumed that all the questions put, and successfully objected to, had been answered favourably to the appellants. No wilful misconduct was imputed to the respondents. The appellants knew quite as well as the respondents that the imposition of Customs duties was to be feared, and they knew that the goods were arriving; but the appellants did not request the respondents to expedite the clearing under the peculiar circumstances of the case which had never been contemplated by either party. Under these circumstances their Lordships are of opinion that the nonsuit was correct, and that there was no misdirection or improper rejection of evidence. The case was one in which a jury would be very likely to go wrong by reason of the fact that the respondents cleared their own goods early on the 8th Oct., and might have cleared the appellants' goods at the same time. But what they might have done and what they legally were bound to do are two very different questions. Their Lordships will humbly advise His Majesty to dismiss this appeal, and the appellants must pay the costs.

Solicitors for the appellants, *Paines, Blyth,* and *Huxtable.*

Solicitors for the respondents, *Snow, Fox,* and *Higginson.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, Nov. 21, 1904.

(Before COLLINS, M.R. and STIRLING, L.J.)

THE JAMES WESTOLL. (*a*)

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

Collision — Practice — Action in personam — *Foreign plaintiffs—Counter-claim—Security for damages—Admiralty Court Act* 1861 (24 *&* 25 *Vict. c.* 10), *s.* 34—*Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 24, *sub-ss.* 5, 7.

A collision occurred in the English Channel between the Dutch tug H. *and the English steamship* J. W., *causing the loss of the* H.

The foreign owners of the H. *brought an action* in personam *against the owners of the* J. W. *to recover the damage caused by the loss of the tug.*

The owners of the J. W. *defended the action, and counter-claimed for the damage sustained by their vessel.*

The owners of the J. W. *then applied that the action by the owners of the tug* H. *should be stayed unless they gave security to satisfy any damages found due on the counter-claim.*

That application was dismissed by the registrar, and on appeal to the judge Gorell Barnes, J. confirmed the order of the registrar.

The owners of the J. W. *appealed to the Court of Appeal.*

Held (*affirming Gorell Barnes, J*), *that the court had no jurisdiction, either under sect.* 34 *of the Admiralty Court Act* 1861, *or under sect.* 24, *sub-sects.* 5 *and* 7, *of the Judicature Act* 1873, *to make an order requiring plaintiffs suing* in personam *to give security for damages which might be found due to defendants under a counter-claim.*

THE Dutch tug *Hollander* and the English steamship *James Westoll* came into collision in the English Channel on the 17th Aug. 1904. The Dutch tug was sunk. Her owners, who were foreigners, then issued a writ *in personam* against the owners of the steamship *James Westoll* to recover the damage sustained by them by reason of the loss of the tug.

The owners of the *James Westoll* entered an appearance in that action and put in a defence, and counter-claimed against the owners of the tug *Hollander* for the damage sustained by them by

(*a*) Reported by LIONEL F. C. DARBY, Esq., Barrister-at-Law.

reason of the injury done to the *James Westoll* by the collision.

On the 6th Sept. 1904 the owners of the *James Westoll* took out a summons, which came before the registrar, calling on the owners of the tug *Hollander* to show cause why all further proceedings should not be stayed until the plaintiffs gave security for the defendants' costs of the action and also in respect of the defendants' counter-claim.

The registrar dismissed that part of the summons which asked for security in respect of the defendants' counter-claim.

The defendants appealed to Gorell Barnes, J., who confirmed the order of the registrar.

Sect. 34 of the Admiralty Court Act 1861 is as follows:

Sect. 34. The High Court of Admiralty may, on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal cause and the cross cause be heard at the same time and upon the same evidence; and if in the principal cause the ship of the defendant has been arrested, or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested, and security has not been given to answer judgment therein, the court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause.

Sub-sects. 5 and 7 of sect. 24 of the Judicature Act. 1873 provides:

(5) No cause or proceeding at any time pending in the High Court, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto: Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, if this Act had not passed, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule, or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just

(7) The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in such cause or matter; so that, as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided.

On appeal to the Court of Appeal.

Dawson Miller for the appellants, the owners of the *James Westoll*.—The result of the plaintiffs electing to sue the owners of the *James Westoll in personam* and not *in rem*, as they might do, is that the defendants can get no security for any damages which may be found due to them on the counter-claim; if the plaintiffs had instituted proceedings *in rem*, and had arrested the *James Westoll*, as they might have done, the owners of the *James Westoll* would have got the security they now seek under sect. 34 of the Admiralty Court Act 1861. That section does not specifically apply to this case, for the defendants' ship has not been arrested nor has security been given by the defendants to answer the claim. It is submitted that sub-sects. 5 and 7 of sect. 24 of the Judicature Act 1873, which give the court power to stay proceedings in certain cases, empower the court to stay this action until these foreign plaintiffs give security for any damages found due to the owners of the *James Westoll* under the counter-claim. If this is not so foreigners can submit to the jurisdiction of the court knowing that if the case is decided against them they cannot be compelled to comply with the terms of the judgment.

A. Adair Roche for the respondents, the owners of the tug *Hollander*.—An English judgment can be made executory in Holland.

Dawson Miller.—The defendants cannot usefully proceed in Holland, for there the liability of the shipowner is limited to the value of the *res*. In this case the *res* having been lost nothing could be recovered.

A. Adair Roche. — The plaintiffs have other tugs which come to ports in this country, so there would be no difficulty in executing any judgment which might be obtained against them.

COLLINS, M.R.—It has been conceded that the court has no jurisdiction apart from the general jurisdiction under the Judicature Act to do what it is asked here. The particular section of the Admiralty Court Act does not deal with this particular case, so one has to fall back upon the power under the Judicature Act. The learned udge thought he had no power under the Judicature Act to make the order asked for, and counsel for the appellants has not been able to satisfy me that such power existed. The onus was on him to do so, and he has failed. The appeal will be dismissed.

STIRLING, L.J. — I agree. The Admiralty Court Act 1861 certainly does not apply in terms, and the only other source of jurisdiction is the Judicature Act. It appears to me that the section referred to does not touch the present question. Sect. 24, sub-sect. 5, begins by stating that "no cause or proceeding at any time pending in the High Court, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained, if this Act had not passed, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto." It then continues: "Nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it if it shall think fit." Now, that portion of the section is not an enabling clause. It does not confer jurisdiction

upon any court which had it not before the passing of the Act. It simply keeps alive the jurisdiction which existed prior to the passing of the Act. Therefore it does not apply to the present case. The other clause is as follows: "The High Court and the Court of Appeal respectively, in the exercise of the jurisdiction vested in them by this Act in every cause or matter pending before them respectively, shall have power to grant, and shall grant, either absolutely, or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim." It is said that under that sub-section the court is entitled to call upon a party to an action before action tried to give security for damages. That does not seem to me to be in accordance with the Act. The court before the passing of the Act had no jurisdiction so to do, and this clause only enables the High Court, and every branch of it, to give effect to all the remedies which the parties were, in the language of the Act, entitled to—that is to say, were entitled to in any court which was made a member of the High Court by the Judicature Act. It seems to me it does not confer jurisdiction upon any court to make such an order as is sought here.

Solicitor for appellants, *C. E. Harvey.*
Solicitors for respondents, *Cooper* and *Co.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Oct. 27 *and* 28, 1904.

(Before CHANNELL, J.)

HASSAN *v.* RUNCIMAN AND CO. AND LOHNE. (*a*)

Charter-party — Previous verbal representation as to carrying capacity of vessel—Breach of warranty.

During negotiations for the chartering of a vessel the owners' agents represented that the vessel had carried a certain quantity of cargo. The charterers acted on the representation, which, in fact, was untrue, and entered into a charter-party, containing no reference to the previous cargo.

Held, that the representation was a warranty, and being untrue, the charterers could recover as for breach of a collateral verbal warranty.

ACTION tried in the Commercial Court.

Claim for damages for breach of a collateral verbal warranty as to the carrying capacity of the steamship *Mandal*, whereby the plaintiff was induced to enter into a charter-party dated the 22nd Oct. 1903.

The plaintiff was the charterer and the defendant Lohne was the owner of the *Mandal*. The defendants Runciman and Co. were the shipbrokers.

The shipbrokers negotiated the charter-party for the defendant Lohne, and signed the same for and by the authority of the owner as agents.

On the 21st Oct. 1903 the shipbrokers in the course of the negotiations verbally represented to the plaintiff's chartering clerk that the *Mandal* had carried 1367 tons of Arzew esparto.

On the strength of the representation the plaintiff agreed to take the vessel for 1000*l.*, and drew up and signed a charter-party, which contained no reference to the previous cargo of esparto.

The *Mandal* loaded under the charter-party a full and complete cargo of Tripli esparto, including a full deck load. The cargo amounted to 1385 tons. 1370 tons Arzew esparto is equal to about 1800 tons Tripoli esparto.

The plaintiff alleged that the cargo loaded was about 415 tons short of the guaranteed cargo, and that he had thereby suffered damage and lost the proportionate part of the lump sum freight, which equalled 240*l.* The plaintiff alleged that the defendants were both, or one of them, liable for the damages (1) on the representation and (or) warranty, or (2) as for breach of warranty of authority.

The charter-party was dated the 22nd Oct. 1903, and was signed "for and by authority of owners, W. Runciman, of London agents," and by one Samuels on behalf of the plaintiff.

By the charter-party it was agreed that

the steamship *Mandal*, of the measurement of 1241 net registered tons, and 139,000 c.f. guaranteed or thereabouts . . . shall proceed to Tripoli for orders, and load at two or three places Tripoli and for Tunis Coast in charterer's option . . . and load . . . a full and complete cargo (with full deck load) of esparto fibre . . . proceed to (1) west coast port or Sunderland (south dock), Manchester and Garston excluded. . . Freight to be at rate of 1000*l.* if loaded at three places. 987*l.* 10*s.* if loaded at two places. . .

J. A. Hamilton, K.C. and *Chaytor* for the plaintiff.—The statement was intended to be a warranty; for a lump sum charter this information as to the previous cargo was most important. The case of *Bannerman* v. *White* (4 L. T. Rep. 740; 10 C. B. N. S. 844) is in point.

Erskine v. *Adeane*, 29 L. T. Rep. 234; L. Rep. 8 Ch. 756.

As to which of the defendants is liable; it was within Runciman's authority—at any rate within his ostensible authority—to give such information as he had in his office. If that were so then the defendant Lohne is liable. If that were not so then there was a warranty of authority, and the defendants Runciman and Co. are liable. Judgment should be given against the defendant Lohne.

Scrutton, K.C., and *Bailhache* for the defendants.—Did what happened before the charter-party was signed amount to a promise that the ship had carried a certain number of tons, or to an innocent representation upon which no action could lie? The language used did not amount to a promise, and was not included as a term of the contract. The plaintiff's chartering clerk drew up the contract, and did not include it, clearly showing that he did not think it was a promise. A statement made in the course of, and leading up to a contract, does not amount to a promise:

Green v. *Symons*, 13 Times L. Rep. 301.

If the statement was a promise, can that verbal promise be read into the charter-party? The rule is that if the contract is reduced into writing you must look at the document itself, and

(*a*) Reported by TREVOR TURTON, Esq., Barrister-at-Law.

parol evidence cannot be admitted to vary its terms:

Angell v. *Duke*, 32 L. T. Rep. 320; L. Rep. 10 Q. B. 174;

De Lassalle v. *Guildford*, 84 L. T. Rep. 549; (1901) 2 K. B. 215.

Further, the description in the charter-party would have shown anyone, by reference to Lloyd's Register, that the ship could not have carried the amount misstated.

CHANNELL, J.—What is the effect of the statement on the contract? Is an assertion, made during negotiations, for a lump sum charter that the vessel had carried a certain amount of cargo, made in belief that it was true, a warranty, or merely an innocent representation which would give no cause of action? When you have a definite description of the subject matter of the contract, such an assertion would be a warranty. I have no hesitation in saying that an assertion of this character during negotiations amounts to a warranty. Then arises the question, is there anything in the contract to exclude that assertion? There is nothing, unless the 139,000 cubic feet mentioned in the charter-party is inconsistent; but I can see no inconsistency. There must be judgment for the plaintiff against the defendant Lohne, with costs; and judgment for the defendants Runciman without costs.

Solicitors for the plaintiff, *Hollams, Sons, Coward,* and *Hawksley.*

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

Jan. 24, 25, 26, *and Feb.* 3, 1905.

(Before CHANNELL, J., Commercial Court.)

ROPNER AND CO. *v.* STOATE, HOSEGOOD, AND CO. (*a*)

Bill of lading—Charter-party—Custom of port for steamers—Discharge according to custom of port—Rate of discharge—Unreasonableness of custom—Altered circumstances since origin of custom.

A bill of lading (incorporating conditions of a charter-party) provided "Time for discharging at destination shall be according to the custom of the port for steamers at port of discharge, demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day." An alleged custom was set up to the effect that the consignee could not be required to take delivery at a faster rate than about 500 tons per day at the port of Bristol for River Plate grain cargoes. A vessel discharged a grain cargo, under the above bill of lading, at Avonmouth Dock, Bristol. The alleged custom had been a matter of dispute for years. The facilities of discharge as regard ships and the three docks in the port of Bristol had increased since the origin of the alleged custom. The rate of discharge, in fact, was often in excess of 500 tons per day.

Held, that no such custom now existed at Bristol for grain steamers generally or for River Plate grain steamers. The charter-party must be read as "custom, if any, at the port of discharge." Where a custom relates directly to the obligations of parties under certain circumstances, it must, in order to be valid and to be binding on parties who do not know of the existence of the custom as a fact, be reasonable. The custom was inapplicable to the state of things at present existing, and there was no such settled and established practice in the port as to satisfy the words of the charter-party. If the custom applied to the altered circumstances, it was unreasonable. Contracting out of a custom may become so general as to destroy the custom. When a custom becomes the exception and not the rule, there is no longer a custom.

ACTION tried in the Commercial Court before Channell, J. sitting without a jury.

Claim by the plaintiffs, the owners of the steamship *Mountby*, against the defendants, the endorsees of the bill of lading, for two days' demurrage of the steamship *Mountby* while discharging a grain cargo at Avonmouth Dock Bristol.

The bill of lading incorporated the terms of a charter-party. The Uniform River Plate Charter-Party 1904, dated the 9th July 1904, provided that the vessel having loaded a "cargo of wheat, and (or) maize, and (or) linseed, and (or) rapeseed, in bags and (or) bulk" at "one or two safe loading ports or places in the River Parana . . . shall, with reasonable speed therewith, proceed to . . . to discharge at a safe port in the United Kingdom or on the Continent between Bordeaux and Hamburg . . . and deliver the cargo, in accordance with the custom of the port for steamers, . . . the time for discharging at destination shall be according to the custom of the port for steamers at port of discharge; demurrage, if incurred, to be paid by consignees at the rate of fourpence sterling per gross register ton per day."

The discharge of the steamship *Mountby* at Avonmouth, to which place she had been ordered, in fact, took eight days.

The principal question to be decided was whether or no there was a binding custom of the port by which the plaintiffs were precluded from requiring the defendants to take delivery of the cargo at a greater rate than about 500 tons a day, at which rate the defendants were entitled to eight days to take it. The alleged custom had been a matter of dispute for years; the rate of discharge could have been increased; the facilities for discharge had considerably increased since the origin of the alleged custom.

Scrutton, K.C. and *Leck* for the plaintiffs.—This charter-party requires the vessel to be discharged within a reasonable time; she was not discharged within a reasonable time. To determine what is a reasonable time the circumstances which exist when the port is reached must be looked at:

Hick v. *Raymond and Read*, 7 Asp. Mar. Law Cas. 223; 68 L. T. Rep. 175; (1893) A. C. 22.

One cannot look at the customary dispatch year in year out; the circumstances when the particular ship arrived, the condition of the port, and the facilities of the ship and warehouses, &c., must be looked at to find out whether the particular ship was discharged within a reasonable time:

Hulthen v. *Stewart*, 9 Asp. Mar. Law Cas. 285; (1903) 8 Com. Cas. 297.

(*a*) Reported by TREVOR TURTON, Esq., Barrister-at-Law.

Applying that principle, the steamship *Mountby*, on the evidence, could have been discharged at a faster rate than that actually done. The time occupied was not reasonable. The case of *Rodgers* v. *Forresters* (2 Camp. 483) deals with the mode, not time, of discharge. A custom to be a good custom must be notorious, uniform, certain, and reasonable:

Nelson v. *Dahl*, 4 Asp. Mar. Law Cas. 392; 41 L. T. Rep. 365; 12 Ch. Div. 568; 6 App. Cas. 38;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599.

As to unreasonableness, the last sentence in *Sea Steamship Company* v. *Price, Walker, and Co.* (1903, 8 Com. Cas. 292) is in point. *Stewart* v. *West India Pacific Steamship Company* (27 L. T. Rep. 820; 1 Asp. Mar. Law Cas. 528; L. Rep. 8 Q. B. 88, and at p. 362) is not in point; that case refers to particular state of things in that case, and a particular and certain custom was expressly made part of the contract. Here the only reference to a custom must be taken to be "custom if any." The custom in fact is not notorious, it was always a matter of dispute, it is not uniform; it is not reasonable, since it applies to Avonmouth, Portishead, and Bristol Docks, at which places the facilities for discharge are different. A custom once reasonable can cease to be reasonable if circumstances alter. A custom to be reasonable must continue to be reasonable.

Hamilton, K.C. and *Inskip* for the defendants.—There is such a custom, the custom in this Argentine trade has been acted on. In the charter-party reference is made to custom, it implies a custom, and if there is no custom at Bristol it is strange that such a charter-party was repeatedly used:

Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 616.

It is not competent for the plaintiffs to dispute the reasonableness of a custom if the custom exists in fact, for the plaintiffs have agreed to the custom:

Stewart v. *West India Pacific Steamship Company*, 1 Asp. Mar. Law Cas. 528; 27 L. T. Rep. 820; L. Rep. 8 Q. B. 88, and at p. 362.

In *Sea Steamship Company* v. *Price, Walker, and Co.* (8 Com. Cas. 292) the parties failed to establish the custom, and the case of *Stewart* v. *West India Pacific Steamship Company* was not referred to. The reasonableness of a custom is a question of fact; in the present case the custom was reasonable. A custom by reason of progress and improvement may become more harsh to one party than to the other, but it can still exist; but contracting out is always possible. In determining the reasonableness of the custom the merchants' interests and surrounding circumstances have to be considered:

Crawford v. *Wilson*, 1 Com. Cas. 277;
Harrowing v. *Dupré*, 1902 7 Com. Cas. 157;
Rodgers v. *Forrester*, 2 Camp. 483.

If the custom is not proved, or if proved to be unreasonable, then the discharge was completed within a reasonable time:

Hulthen v. *Stewart*, 9 Asp. Mar. Law Cas. 285; 8 Com. Cas. 297.

CHANNELL, J.—In this case the plaintiffs claim from the defendants two days demurrage of the steamship *Mountby* on the occasion of her discharging a grain cargo at Avonmouth Dock, Bristol, in October last. The bill of lading, of which the defendants were endorsees, incorporated the conditions of the charter-party, which provided as follows:—"Time for discharging at destination shall be according to the custom of the port for steamers at port of discharge, demurrage, if incurred, to be paid by consignees at the rate of 4*d.* sterling per gross registered ton per day." The discharge of the *Mountby*, in fact, took eight days, and it is alleged that it could reasonably have been done in six days, and the principal question I have to decide is whether there is a binding custom of the port by which the plaintiffs were precluded from requiring the defendants to take delivery of the cargo at a greater rate than "about" 500 tons a day, at which rate the defendants would have the eight days to take it. It is clear that for a considerable time past the corn merchants at Bristol have alleged that such a custom exists in the port of Bristol. Some shipowners appear to have acquiesced in it, others, including the plaintiffs, have, at any rate recently, disputed it. Recently an action for demurrage of a vessel called the *Specialist* was tried in the Bristol County Court before Judge Austin, who held the custom not to be proved, and the corn merchants then determined to fight the question in the Superior Court. The claim of the merchants to this custom was undoubtedly known to the plaintiffs, and one point raised by the defendants' counsel was that the reference to "the custom of the port of discharge" in the charter-party must be taken to be a reference to the custom so known to be claimed at Bristol, and, therefore it was not necessary to prove that the custom was good, as it must be taken to be incorporated in the charter-party as if written out there in words. I expressed my opinion at the trial that this was not so. If Bristol had been named as the only port of discharge, the argument would have required consideration, but as the vessel might under the charter-party have been ordered to any safe port in the United Kingdom or on the Continent between Hamburg and Bordeaux it seemed to me quite impossible to treat the charter-party as recognising the existence of some custom at Bristol any more than at any other of the numerous ports to which the vessel might have been ordered. I hold that the charter-party must be read as if it said "custom, if any, at the port of discharge."

Before dealing with the more or less conflicting evidence of the witnesses called before me, it is convenient to consider what such a custom means, and what is necessary in order to prove it, and in order to make it valid if proved to exist in fact. There are many cases in the books of customs at ports relating to modes of unloading, but few relating directly to time to be taken in unloading. In *Postlethwaite* v. *Freeland* (5 App. Cas. 599) the charter contained a clause: "The cargo is to be discharged with all despatch according to the custom of the port." I find Lord Blackburn in the House of Lords saying (as reported at p. 616): "The jury were told by Lord Coleridge at the trial, and I" (that is Lord Blackburn) "think quite correctly, that custom in the charter-party did not mean custom in the sense in which the word is sometimes used by

lawyers, but meant a settled and established practice of the port." All the law lords agreed that there was no misdirection, though they do not in terms refer to this particular passage of the summing up. There must therefore certainly be "a settled and established practice," but I feel some doubt as to what is the sense in which the word custom is sometimes used to which Lord Coleridge and Lord Blackburn were referring as not being the sense in which the word was used in that charter-party. Did they mean merely that it was not a custom from time immemorial, or did they mean that it was not necessary to show everything which would be necessary in order to incorporate a mercantile custom as an implied term into a contract? In the case then before the court no question of reasonableness of the custom arose, and whatever may be the case where, as in *Postlethwaite* v. *Freeland*, the custom under consideration is merely a practice to work in a particular way as to navigate lighters across a harbour bar by means of a warp, I think that where the custom, as in the case before me, relates directly to the obligations of parties under certain circumstances, it must, in order to be valid as a custom and to be binding on parties who do not know of the existence of the custom as a fact, be reasonable. To support this view I have, at any rate, the opinion, if not the authority, of my brother Kennedy, for in the recent case of *Sea Steamship Company* v. *Price, Walker, and Co.* (8 Com. Cas. 292), where he held a custom which was more like the one before me than any other I have found in the reports to be not proved in fact, he said that if he had to decide the question he should hold that the objection to the reasonableness of the custom was good. It seems to me therefore that the question I have to deal with is practically the same as whether this alleged custom of trade at Bristol if it had been in no way referred to in the contract could be incorporated as an implied term in it. See also *Postlethwaite* v. *Freeland* at the commencement of Lord Blackburn's judgment at p. 613 as to this, and also *Hulthen* v. *Stewart* (8 Com. Cas. 297). But even if that is not so, at any rate there must be a "settled and established practice" at Bristol corresponding to what is referred to in the charter-party as "a custom of the port for steamers at the port of discharge." When one comes to consider the particular custom set up, it is material to consider in what way it alters the position in which the parties would have stood without it. The consignees would have had to take delivery of the cargo in a reasonable time, and the time which would be reasonable would be arrived at by taking into account the state of things which actually existed at the time when the ship actually had to be discharged. It would not be the average time within which this work could be done with the facilities which usually existed at the port and under circumstances which might be expected to occur, but it would depend upon what actually existed at the particular time. This proposition had, as it seems to me, really been established in earlier cases, but it is now quite clearly settled by *Hicks* v. *Raymond* (7 Asp. Mar. Law Cas. 233; (1893) A. C. 22). The effect of the custom set up in the present case is to alter this state of things by substituting a fixed rate of discharge independently of the facilities for the work which happen to exist at the particular time. The consignee cannot be compelled according to this custom to take the cargo at a greater rate than 500 tons a day, although at the time he could quite easily do so; on the other hand, the custom as put forward before me obliges him to take it at that rate or pay demurrage, even though circumstances happen to exist which prevent his doing it in fact. Further, the custom gives somewhat greater facilities for the merchant to find purchasers for parcels of the cargo to be taken ex ship without incurring warehouse charges, and it is probably on account of this that the merchants are anxious to establish the custom. The charter-party and the bill of lading provide for the cargo being delivered in accordance with the custom of the port, and there is no obligation to take it or any particular proportion of it in any particular one of the three or more ways in which it is usually taken at Bristol — that is, either with trucks or into lighters or direct into the warehouse. But as the discharge direct into the warehouse by means of the elevator which is provided at the Avonmouth Dock is somewhat more rapid than discharging into lighters or trucks, the longer the time the merchant has to take the cargo the better chance he has of avoiding warehouse charges. Grain cargoes are discharged at Bristol by a joint operation of the shipowner and consignee, rather the larger share of the work falling on the consignee, as is shown by the fact that he has to employ gangs of eight men in each to keep pace with the work done by gangs of five men in each employed by the shipowner. Grain cargoes are largely imported into Bristol, but the custom is only set up in respect of cargoes imported from the River Plate. Large quantities of grain are imported from Black Sea ports and from North American ports, and in those cases the charter-parties always contain clauses as to discharge inconsistent with the alleged custom, or said to be so. They clearly are so in the case of the North American trade, but in the Black Sea trade there are merely words added to those in the River Plate charter-party, which the defendants allege prevent their setting up the custom, though this view does not seem correct (see *Postlethwaite* v. *Freeland*, *Hulthen* v. *Stewart* (8 Com. Cas. 297), and *Sea Steamship Company* v. *Price, Walker, and Co.* (8 Com. Cas. 292). At any rate, the merchants do not set up the custom or act on it in fact as regards steamers from the Black Sea.

I pass now to the history of the alleged custom. In 1886 a claim for demurrage was made in respect of a vessel named the *County of Salop*, and an action was tried at the Bristol Assizes before Manisty, J. and a jury. A custom was then set up somewhat similar to that now relied on, but for an average rate of 200 tons only per day. The jury under the direction of Manisty, J. found against the custom, and I am told (though not in a way to enable me to act on it as an authority as to the law) that Manisty, J. expressed an opinion that the alleged custom, even if proved in fact, would not have been binding on strangers by reason of its being in his opinion unreasonable. In that case the shipowner ultimately recovered demurrage based on a rate of discharge of 500 tons a day. I had no proof before me showing how this rate was assessed, but I must presume that it was decided to be a

reasonable rate, having regard to the facilities which the *County of Salop* had for her discharge of cargo, and to the facilities which then existed in the Bristol docks for her discharge. It certainly does not appear that the jury found there was a custom, but that it was for 500 tons a day and not 200 as then set up. In fact the contrary appears to be the case. After this the shipowners began to claim to have grain cargoes discharged at the rate of 500 tons per day, and the merchants accepted this view. The steamers which then brought the grain were apparently similar to the *County of Salop*, and the facilities at the docks, which have now been somewhat improved, remained the same for some time, so that perhaps it was natural that the result of the litigation in the case of the *County of Salop* should be accepted as showing what was reasonable under normal circumstances at Bristol. As I have pointed out, the doctrine that the actual circumstances of each case, and not the normal circumstances of the port, must be looked at was not fully and decisively established until 1893, although I think myself that it was made fairly clear by cases earlier in date than 1886. I am satisfied that it was in this way that the idea of a custom for a discharge at the rate of 500 tons a day grew up, and I am satisfied that for several years the rate was accepted and acted on by both sides, and was then found to be mutually convenient. Before many years had passed, however, the size of steamers increased, and they were fitted with improved appliances for the discharge of their cargoes. The effect of this was not merely to increase the facilities of the ship for delivering the cargo, but also to increase the facilities for consignees to take delivery, as more lighters and more tenders can get alongside and be loaded up at the same time from a long steamer with many hatches. The shipowners then began to claim a more rapid discharge, and the merchants, finding the custom now clearly to their advantage, did their best to insist on it. Being frequently if not usually able to discharge the vessels at a greater rate than the 500 tons a day they frequently did so, but claimed to do it only as a matter of favour to the shipowners, taking in some cases small payments from the shipowners as dispatch money for discharging the vessels quicker than they were bound to, and in other cases getting letters from the shipowners saying that the discharge at a higher rate than 500 tons a day should not prejudice the custom. This has continued to the present time except that in at least one case in the County Court —the *Specialist*, and, apparently, from the judgment read to me of the County Court judge in that case, in more than one case, judgment was given against the custom. Before me most of the principal corn merchants of Bristol were called, and stated that they had understood the custom to exist, and that it was always recognised by shipowners. They produced lists of steamers from the River Plate, and showed that perhaps four-fifths or thereabouts of them had been discharged at rates not much exceeding 500 tons a day, on the average, and as to the remaining fifth or thereabouts which had been discharged more rapidly, either there had been despatch money paid (almost always quite small, not to say nominal, amounts), or a letter had been written by the shipowner to the effect that the speedy discharge should not prejudice the custom, and in some cases it was shown that, owing to the vessel having been neaped, the lay days had, under the express provisions of the charter-party, begun before the actual discharge began, so that the merchant had to discharge as rapidly as possible to avoid demurrage. On the side of the plaintiffs a good many witnesses, with more or less knowledge of the trade and the port, were called to say that, although they knew of the custom claimed, it had always been treated as a matter open to dispute, and had, in fact, been disputed. The Black Sea and North American steamers were habitually discharged at a more rapid rate, the facilities for discharge being the same as for the Plate steamers, except that the North American steamers, which were mostly liners, had a preference in the use of the transit sheds. There were some minor difficulties arising out of the evidence of the defendants' witnesses, as they did not entirely agree as to what days were counted as working days under the custom, but, as it was eventually explained that the days were the same as expressed in one of the ordinary forms of charter used in another trade, this discrepancy did not, I think, really show uncertainty in the custom, but merely a defective memory on the part of some of the witnesses as to the terms of that charter-party. No cases were proved on one side or the other of demurrage having been paid either on the basis of custom or, except the cases in the County Court, on any other basis. This seems odd, because the number of steamers with grain from the River Plate being about sixty in the five years from 1900 to 1904, both inclusive, as shown by the dockmaster's returns, it is scarcely likely, having regard to the fact that some of the vessels were neaped, that the merchants always succeeded in avoiding demurrage. If they did, it certainly shows the custom to be very favourable to them. On the part of the defendants it was contended that on this evidence I ought to find a settled and established practice—that such change of circumstances as had occurred since the custom arose did not put an end to the custom, especially as the changes, if any, were gradual, and that if any shipowner disliked the custom his remedy was to contract himself out of it. For the plaintiffs it was contended that there never was, in fact, any settled custom, but that it was contentious all the time, and that the alleged custom was quite inapplicable to the state of things which now existed at Bristol; also that the custom was bad because uncertain and not universal, and not reasonable inasmuch as it applied the same rate to all vessels without regard to their varying facilities for discharging cargo. It was also pointed out that the custom was alleged to prevail in the Port of Bristol generally, although the facilities for discharge were clearly different in the three different parts of the port, in Bristol Old Dock, Avonmouth Dock, and Portishead Dock.

I have had some hesitation both as to the conclusions of fact which ought to be arrived at on this evidence and also on the propositions of law involved, as I think there is reliable evidence that this custom has been supposed to exist and has been acted on to a considerable extent, but I think it is quite inapplicable to the state of things which now

exists, and I have come to the conclusion, therefore, that I ought not to find such a settled and established practice in the port as will satisfy the words of the charter-party. I have no doubt at all that for some time after 1886 the shipowners and merchants did make agreements, as steamers came into port from time to time under charter-parties not defining the lay days that those steamers should be discharged at the rate of 500 tons a day, but I think that was based upon the then existing state of things. It was an agreement to treat as reasonable for them what had been held to be reasonable in the case of the County of Salop, the circumstances of which were similar. I cannot see any principle upon which any number of such agreements could create a custom which would bind a shipowner who came with a steamer able to discharge cargo at a substantially greater rate than those which had come previously. If a scale had been adopted similar to that to be found in the North American contracts of the Bristol and West of England Corn Trade Association, the case might have been different. It may be that the true answer for the shipowner coming with his improved vessel to make to a merchant who tried to set up this custom against him would be that the custom applied only to a different class of ships and not to his ship; or it may be that the true answer would have been that as the custom purported to provide the same rate of discharge for ships which could be discharged quickly as for those which could only be discharged slowly it was unreasonable, and therefore bad in law. Either answer brings about the same result—either the custom purports to provide for an altered state of things or it does not. If it does not, it does not apply after the alteration; if it does, and applies the same rule as before, it is unreasonable. There is another ground upon which I think the custom cannot be upheld. The charter-party, in referring to "the custom of the port for steamers at port of discharge," seems to me to refer to a custom for all steamers discharging at the port, or at all events for all grain steamers. The custom as acted on cannot be considered, in my opinion, sufficiently general or universal to satisfy these words—of course, when a custom is once established, the fact that persons frequently contract themselves out of the custom would not of itself destroy the custom; but I think the practice of contracting out may become so general as to destroy the custom. When once the custom becomes the exception and not the rule there is no longer a custom. In Bristol the largest grain imports are from North America and the Black Sea. The North American steamers are in fact unloaded at a more rapid rate than the custom provides because there is an agreed scale incorporated in the charter-party which, except for very small vessels, is greater than the 500 tons a day. The Black Sea steamers arrive under a charter the words of which are practically the same as those in *Postlethwaite* v. *Freeland*; and if I understand that case and *Hulthen* v. *Stewart* and *Sea Steamship Company* v. *Price, Walker, and Co.* rightly, the words added to those in the charter-party before me really do not affect its construction at all. The custom therefore if good ought to be applied to these steamers, but is not. Again, even in the case of the Plate steamers it can hardly be said to be really acted on. When the shipowner objects, the merchant quite commonly does unload faster than the customary rate of 500 tons, but protects himself either by taking some small sum for despatch-money or by taking a letter that the custom is not to be prejudiced. I am anxious not to deal in any way that can be considered unfair with the cases in which such letters have been given, but a custom must really be acted on if effect is to be given to it. It is not, in my opinion, now true to say that at Bristol the practice either as regards grain steamers generally or even as regards grain steamers from the River Plate is to unload them at a rate not exceeding 500 tons a day. Steamers not from the Plate get a more rapid discharge, and some of those from the Plate get it also. There is also considerable difficulty in the defendants' way arising from the three docks and their different facilities. For these reasons, and also for those given by Kennedy, J. in the Sharpness case (*Sea Steamship Company* v. *Price, Walker, and Co.*), most of which are applicable here, I must decide against the validity of this alleged custom.

The defendants further contended that eight days were in the present case a reasonable time, so that no demurrage is due even if there is no custom. It was, however, quite clear on the facts that the steamer could have been discharged considerably faster than she was if it had not been for the instructions given to the dockmaster by the defendants not to exceed the average of 500 tons a day. At the end of the seventh day 3977 tons had been discharged, and there still remained 378 tons only to be discharged. It is quite clear that these 378 tons could easily have been discharged during the seven days in addition to what was discharged; so that the plaintiffs are clearly entitled to one day's demurrage. At the end of the sixth day 3378 tons only had been discharged, and there remained 977. On some of the six days undoubtedly very little work was done, and on some of them it was purposely not done with the object of following the supposed custom; but I do not think it is very clearly made out that as much as 977 tons more could have been done in the six days, and therefore I think the plaintiffs have only made out a case for one day's demurrage. The judgment therefore is for the plaintiffs for 54*l.* 17*s.* 8*d.*, and, of course, with costs.

Solicitors for the plaintiffs, *W. A. Crump* and *Son*, agents for *Turnbull* and *Tilly*, West Hartlepool.

Solicitors for the defendants, *Downing, Handcock, Middleton*, and *Lewis*, agents for *James Inskip* and *Co.*, Bristol.

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 13, 14, 16, 17, *and Feb.* 6, 1905.

(Before VAUGHAN WILLIAMS, ROMER, and STIRLING, L.JJ.)

BOSTON FRUIT COMPANY *v.* BRITISH AND FOREIGN MARINE INSURANCE COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Policy effected by agents of owner of ship—Right of charterer to sue on policy—Authority to effect policy on behalf of charterers—Time charter—Demise—Collision—Negligence of master of chartered ship.

The plaintiffs were the charterers of the ship B. *which, in consequence of the negligence of the master and crew, came into collision with another ship. In the courts of the United States the owners of the latter ship, in an action to which the owners and charterers of* B. *were parties, recovered damages against the charterers.*

A policy of insurance on B. *had been effected on the instructions of C. and Co., who were agents of the owners, by insurance brokers "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject matter of this policy does, may, or shall appertain in part or in all," the name of the plaintiffs not being mentioned in the policy.*

The policy was a valued one on the hull and material, engines and machinery of the ship, and contained a collision clause.

The charter-party, which amounted to a demise of the ship, was made between C. and Co. "as agents for the owners" and the plaintiff. It provided that the owners were to maintain the hull and machinery in an efficient state, and the charterers were to appoint and pay the master and crew, and were also to pay for coal, fuel, port charges, and pilotages, and that "in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four working hours, the payment of hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, breakdown, or other causes, the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance. The owners shall pay for the insurance on the vessel."

Held, that the plaintiffs were not entitled to sue the underwriters on the policy to recover the damages paid by them as being a loss covered by the policy, as the persons on whose behalf the policy was effected were alone entitled to the benefit of it; and they had not shown either that it was in fact effected on their behalf or that they had afterwards ratified or adopted the action of the agents; and there was nothing in the charter-party to show that the owners had contracted to effect an insurance on the ship for the benefit of the charterers, or that the policy ought to be treated as having been taken out on behalf of the charterers.

Decision of Bigham, J. affirmed.

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

ACTION brought by the charterers of a vessel called the *Barnstaple* against certain underwriters, the question to be decided being whether the plaintiffs were entitled to recover upon a policy of marine insurance which had been effected by brokers instructed by agents for the owners of the vessel. Bigham, J. dismissed the action, and the plaintiffs appealed.

The facts are fully stated in the judgment of Vaughan Williams, L.J.

Carver, K.C. and *A. Llewelyn Davies* for the appellants.—The appellants are entitled to treat this policy as made on their behalf. Clause 22 of the charter-party provides that the owners shall pay for the insurance on the vessel, and there was an obligation on them to insure for the benefit of the appellants. The policy covers the risks of damage due to accident; damages due to negligence; damage to third persons and also the ship's share of general average losses. Under the charter-party the owners are only liable for the first-mentioned risk and the charterers are liable for the others. The collision clause in the policy does not concern the owners. The insurance should therefore be for the benefit of both. It is immaterial that the agent does not know for whom he is acting:

> *Small* v. *United Kingdom Marine Mutual Insurance Association*, 8 *Asp. Mar. Law Cas.* 293; 76 L. T. Rep. 326, 828; (1897) 2 Q. B. 42, 45, 311.

If there is any obligation or authority on the owner to effect the insurance and the words of the policy are wide enough to include the interests of the time charterers, he must be taken to have effected it on their behalf:

> Arnould on Marine Insurance, 2nd edit., p. 210; 7th edit. pp., 212, 214, ss. 172, 173;
> *Crowley* v. *Cohen*, 3 B. & Ad. 478;
> *Routh* v. *Thompson*, 11 East, 428;
> *Routh* v. *Thompson*, 13 East, 274;
> *Lucena* v. *Craufurd*, 2 Bos. & P. N. R. 269;
> *Grant* v. *Hill*, 4 Taunt. 380;
> *Irving* v. *Richardson*, 2 B. & Ad. 193;
> *Watson* v. *Swann*, 11 C. B. N. S. 756;
> York-Antwerp Rules, App. C. in Carver's Carriage by Sea, 3rd edit. p. 855.

[*Scrutton* referred to *Philpot* v. *Swann* (5 L. T. Rep. 183; 11 C. B. N. S. 270.] In considering whether there has been ratification of a policy of marine insurance undisclosed intention will be taken into account. The only thing to be considered is what passed between the parties. A man may ratify what purported to be made on his behalf even if there was no actual authority. He need not necessarily be named, it is sufficient if he comes within the description of the persons

to be benefited. There is no decision that where there is a person for whom the broker purports to act that person cannot ratify the contract. The question in *Keighley, Maxted, and Co.* v. *Durant* (84 L. T. Rep. 777; (1901) A. C. 240) was as to what gave a right to ratify. The right to ratify does not depend on unexpressed intentions:

Scott v. *Globe Marine Insurance Company*, 1 Com. Cas. 370;
Hill v. *Scott*, 8 Asp. Mar. Law Cas. 109; 73 L. T. Rep. 210; (1895) 2 Q. B. 371, 713.

There is no difference between the law of marine insurance and the general law in respect of ratification.

Scrutton, K.C., *J. A. Hamilton*, K.C., and *Maurice Hill* for the respondents. — Although the words of a policy are very wide, and might include persons who are not parties to it, it will not extend to them unless it is shown that such was the intention: (per Willes, in *Watson* v. *Swann* (*ubi sup.*):

Duer on Marine Insurance (1846), vol. 2, p. 28.

The general words of a policy include only those on whose behalf it was intended it should be effected. The substantial interest in this ship was in the owners, and there was no duty to insure for the benefit of the charterers:

Aira Force Steamship Company v. *Christie and Co.*, 9 Times L. Rep. 104.

The owners said they did not mean to insure on behalf of the charterers, and to make a ratification effectual the insurance must have been made for the party ratifying:

Phillips on Insurance (3rd edit., 1853), ss. 382-385;
Parsons on Insurance (1868), vol. 1, p. 47.

The question is on whose behalf was the insurance effected:

Routh v. *Thompson* (*ubi sup.*);
Byas v. *Miller*, 3 Com. Cas. 39;
Hagedorn v. *Oliverson*, 2 M. & S. 485.

That question is one of fact for the jury:

Irving v. *Richardson* (*ubi sup.*).

In order that a person may recover under a policy his interest must be proved, and an authority from him to insure or an adoption of the contract:

Duer on Marine Insurance, vol. 2, p. 37;
Pollock on Contracts, 7th edit., p. 98.

Carver, K.C. in reply.

Cur. adv. vult.

Feb. 6.—Vaughan Williams, L.J. read the following judgment:—This is an action on a policy of insurance on the steamship *Barnstaple* dated the 5th April 1895. The policy is a valued policy on "hull and material, 12,000*l.*; engines and machinery, 7000*l.*—19,000*l.*" Collision and other clauses are attached. The policy was a time policy, from the 21st March 1895 to the 20th March 1896. The action is by charterers against underwriters, and the question is whether the charterers are entitled to sue on this policy. The policy was effected by Messrs. John Holman and Sons on the instructions of Messrs. Craggs and Sons, described in the charter-party as "agents for the owners." On the 13th Jan. 1896 the *Barnstaple* came into collision with the *Fortuna* and the *Fortuna* was sunk. The collision was caused by the negligence of the master and crew of the *Barnstaple*. The plaintiffs were charterers of the *Barnstaple*. By a charter-party dated the 10th March 1894, and made between R. Craggs and Sons, described therein as agents for the owners, and the plaintiffs, the plaintiffs chartered the *Barnstaple*, which was then being built by Messrs. Craggs and Sons, for thirty-six calendar months from March 1893. The charter-party amounted to a demise of the *Barnstaple*. The *Barnstaple* at the time of the collision was employed by the plaintiffs under the charter-party. On the 15th Jan. 1896 the owners of the *Fortuna* instituted a suit against the *Barnstaple* in the District Court in the United States of America for the district of Massachusetts, claiming damages in respect of the collision. On the petition of the owners of the *Barnstaple* the Boston Fruit Company, as charterers of the *Barnstaple*, were made parties to the suit. At the hearing in the District Court the liability of the *Barnstaple* was admitted, and damages agreed at 14,575 dollars, and the suit thenceforward proceeded as an independent cause between the now plaintiffs, the Boston Fruit Company, and the owners of the *Barnstaple* to determine which, as between them, was the party liable to pay the said damages. This suit, after going through the Circuit Court of Appeals and the Supreme Court of the United States of America, was ultimately decided in favour of the owners. The Boston Fruit Company, having paid the whole damages to the owners of the *Fortuna* in accordance with the result of the suit, now demand from the underwriters sued their proportion of the sum so paid as a loss under the policy of insurance. Now, the policy was effected by John Holman and Sons "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does, may, or shall appertain in part or in all." John Holman and Sons, as appears from the agreed facts, effected the policy on the instructions of R. Craggs and Sons—viz., as insurance brokers. The name of the Boston Fruit Company, the plaintiffs, nowhere appears on the policy, and it follows that to entitle the plaintiffs to sue on this policy, which was not made by the plaintiffs themselves, they must show either that it was made on their behalf by John Holman and Sons, authorised to act for them, or whose act has been subsequently ratified and adopted by them. It is not suggested that the Boston Fruit Company had any direct communication with the brokers John Holman and Sons; the suggestion is that R. Craggs and Sons either instructed Holman on behalf of the Boston Fruit Company, being authorised so to do by necessary implication arising from the terms of the charter-party, or that even if Craggs and Sons did not effect the policy on the authority of the Boston Fruit Company, yet the terms of the policy are sufficient to describe the Boston Fruit Company and cover their interest in the ship, and that the Boston Fruit Company have ratified and adopted the agency thus assumed on their behalf. Bigham, J., who gave judgment in favour of the defendants, says in his judgment, "Now, before an underwriter can be made liable on a policy at the suit of a plaintiff whose name does not appear on the face of the document, it must

be shown by clear evidence that the person taking out the policy intended at the time to effect the insurance on the plaintiff's behalf"; and he then proceeds to show that there is no evidence here of any such intention, and that all that can possibly be contended is that the intention ought to be inferred from the terms of the charter-party. I will deal presently with the terms of the charter-party, and the inferences which ought to be drawn from those terms; but, before doing so, I should like to say that I am not sure that Bigham, J. is right, if he means that the onus of proving the intention is thrown on the plaintiff who is suing on the policy in a case like the present, where the words defining the interests intended to be covered by the policy are manifestly wide enough to cover the plaintiffs' interest. The passage in Duer on Marine Insurance (vol. 2, lecture 9, p. 36, par. 2) does not seem quite consistent with this view. He says: "When it is said that the general words of the policy must in their personal application be limited to those for whom the insurance was intended, it is by no means a necessary consequence that these words must be always understood in a limited sense. The intention of the party effecting the policy may be coextensive with its terms. He may really mean that every person who may be proved to have an interest in the property according to the nature of his interest shall be entitled to the benefit of the contract, and where the persons who are or may be interested are unknown to the agent such is usually his intention." Now, in the present case, the agent with whom we are concerned is not Holman, who effected the policy and who is named in the contract, but Craggs, from whom he received his directions to insure. The charterers certainly were not unknown to Craggs; but I should hesitate to say that because of this knowledge of Craggs the charterers cannot rely on the general words, unless they give extrinsic evidence of the intention of Craggs to insure on their behalf. In the present case there is no evidence whatever outside the general words of the policy available to prove the intention to insure on behalf of the plaintiffs, except the terms of the charter-party itself. The real case of the plaintiffs is based on the terms of the charter-party, which, it is said, either cast a duty upon Craggs to insure on behalf of the charterers, or at least authorise them to insure on their behalf, and it is said that in either case, as the policy contains words wide enough to cover the interest of the charterers, it must be inferred, in the absence of evidence to the contrary, that the intention of Craggs was to insure their interest. If this contention is right, no question of ratification, properly so called, would seem to arise. The case would then resolve itself by the answer to the question, Did the charterers, by the terms of the charter-party, authorise the effecting of the policy on their behalf? For, in my judgment, the policy actually effected does in words cover the interest of the charterers. If, however, the terms of the charter-party do not authorise Craggs to effect a policy covering the interest of the charterers, I cannot come to the conclusion that the charterers ever ratified or adopted the policy. On the contrary, they seem to me, with the consent of the owners, to have rejected the agency of the owners in that behalf, and I doubt whether it was necessary for the rejection of that agency that it should be communicated directly to the underwriters, especially as it is agreed between the plaintiffs and the underwriters that the stipulation regarding facts in the American Record, and the evidence taken shall be included as part of the agreed facts in this case.

It remains to consider the effect of the terms of the charter-party and see whether there is anything in it either constituting or excluding an obligation or authority on or to Craggs and Sons to insure on behalf of the charterers. The charter-party relates to two screw steamships to be built, and by clause 1 the owners agree (the words "to let" seem to be omitted), and the charterers agree to hire the steamship for thirty-six calendar months, commencing on the 1st March 1893 to the 15th March 1894. By par. 2 the charterers are to provide and pay for stores, tackle, &c., and for the provisions and wages of the captain, engineers, and crew, who, excepting the "guarantee engineer," shall be appointed by them, and the owners agree to maintain the vessel in a thoroughly efficient state in hull and machinery for the service, including winches with chain, gear, and donkey boiler. By clause 3 the charterers are also to provide and pay for all the coals and fuel, port charges, pilotages, agencies, commissions whatsoever, excepting for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 4 provides for payment for the use and hire of the vessel. I do not think that any other clause need be referred to except clauses 17 and 22, which are as follows: Clause 17. "In the event of loss of time from collision, stranding, want of repairs, break down of machinery, or any cause appertaining to the duties of the owners preventing the working of the vessel for more than twenty-four working hours, the payment of the hire shall cease from the hour when detention begins until she be again in an efficient state to resume her service. Further, if in consequence of such deficiency, collision, want of repairs, break down, or other causes the vessel should put into any port or ports other than those to which she is bound, port charges, pilotages, and other expenses at those ports shall be borne by the owners; but should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers. It is understood that in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." Clause 22. "The owners shall pay for the insurance on the vessel." Now, it cannot be doubted that clause 2 throws on the owner the responsibility for the maintenance of the vessel in an efficient state in hull and machinery for the service, and it seems clear that under this charter-party, which amounts to a demise, the charterers are not only responsible for the negligence of the master and crew towards third persons, but that, as between the owners and charterers losses arising from such negligence must fall on the charterers; but this, of course, does not prevent the owner having an insurable interest in the ship or in anything else covered by this policy. Such being the general scope of the charter-party,

I will now consider what is the meaning of clauses 17 and 22, and what is their application to the present case, in which it is an agreed fact that the collision was caused by the negligence of the master, mates, or crew in charge of the navigation of the steamship. Now, what is the meaning of clause 17? The first part of clause 17, down to and including the word "service," provides for the cessation of payment of hire in the event of loss of time from collision, stranding, want of repairs, breakdown of machinery, or any cause appertaining to the duties of the owners, preventing the working of the vessel more than twenty-four working hours, and the hire is to cease from the hour when detention begins until the ship be again in an efficient state to resume her service. The clause is clumsily drawn. The loss of time which prevents the working of the vessel may apparently arise from causes over which the owner has no control—for instance, a collision might arise from negligent navigation of another ship, or it might arise from negligence of the charterer's servant; or the causes of the loss of time might arise from the perils of the sea, or the loss of time might arise from imperfections in the machinery provided by the owner—but in each and all these cases the payment of hire is to cease, and the owners have an insurable interest in the loss of time arising from these clauses; and then the clause provides that port charges, pilotages, and other expenses should be borne by the owners if the vessel should put into any port or ports other than those to which she is bound, if that is the consequence of certain causes, and one would expect to find the causes identical with those before mentioned. But they are not identical. "Stranding" is omitted, as also the words "or any cause appertaining to the duties of the owner," and the words "such deficiency" are introduced. I think that the differences arise simply from careless drafting, and that mere repetition is intended. Then follows an antithetical passage—"But should the vessel be driven into port or to anchorage by stress of weather, such detention or loss of time shall fall on the charterers." Now, I think that this means a stress of weather not resulting in any of the above-mentioned causes as the proximate cause of detention. Then clause 17 concludes: "It is understood in the event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses, as the owners are by their insurance." It is suggested that this concluding clause entitles the charterers, at all events when read in conjunction with clause 22, to the benefit of the policy taken out by the owners as a policy taken out on their behalf, or at all events is consistent with the policy having been taken out on their behalf. I cannot agree. I cannot believe that clause 22, taken alone, means anything more than that the owners are to pay the premiums on any insurance of the vessel which they should choose to effect, and that the owners should not be entitled to charge the charterers in account with these premiums. Nor do I think that the consideration of clause 17 alters this conclusion. I think that the effect of the whole charter-party, including clause 17, is to leave the charterers liable, as between themselves and the owners, for the consequences of negligent navigation, and I cannot find in clause 17 itself, or in clause 17 read in conjunction with clause 22, any words sufficient to cast on the owners the obligation to insure on behalf of the charterers against collision or detention risks. I do not think that the word "covered" in clause 17 imports a contract by the owners to effect a policy on behalf of the charterers. I think "covered" means no more than that the owners will give the charterers the protection of the policy to the extent that they happen to insure against risks cast on the charterers by the charter-party. But this does not affect the underwriters, and I cannot find in the charter-party or elsewhere any sufficient evidence to justify the inference that the policy effected by the owners was intended to be effected on behalf of the charterers. On the contrary, I think that the terms of the charter-party would exclude such an inference, even on the assumption that the onus of proving the exclusion is cast upon the underwriters. Moreover, I think it is impossible to leave out of consideration the evidence of Mr. Bennett in the American litigation, given on behalf of the now plaintiffs, that it was optional with the owners whether they insured or not, and that insurance did not concern the charterers. I think that the judgment of Bigham, J. should be affirmed, and this appeal be dismissed with costs.

Romer, L.J. read the following judgment:—This case took a long time to argue, and many questions were discussed in the course of the argument. But in the view I take, the appeal should be dismissed on grounds that after what my Lord has said I can state shortly. The policy of insurance on the face of it states that the insurance company is contracting with John Holman and Sons "as well as in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of the policy does, may, or shall appertain in part or in all." That is a common form which has often received judicial consideration and interpretation. On the face of it a large number of persons might be included. But on the authorities it appears to me that it has long been decided, and is settled law, that it is not every person included in the wide terms of the policy who is of right entitled to the benefit of the insurance as against the insurer. Only those persons are entitled on whose behalf the policy was in fact effected. In some of the cases establishing this the expressions used are that only those are entitled who at the time the policy was effected were the persons "contemplated" as being or "intended" to be, covered by the policy, but I think these expressions mean what I have stated. Now, I need not consider the question, if there be no facts admitted or proved to show on whose behalf the policy was in fact effected, whether any one who comes within the wide terms of the policy could not properly sue on it; for, in my opinion, in the present case there are facts which enable me to come to a conclusion as to the persons entitled to sue on the policy. It is admitted that the policy was in fact taken out by the brokers on the instructions of the agent of the owners of the ship. Now, it is not suggested on behalf of the charterers that they ever gave any instructions to the brokers; and when I look at the terms of the policy I find it is such a policy as the owners might well take out for themselves without regard to anyone else. That

being so, the conclusion I draw from the above facts in the absence of any other sufficient facts established leading to the opposite view, is that the owners on whose behalf the brokers were instructed were the persons, and the only persons, on whose behalf the policy was, as a matter of fact, effected, and therefore the only persons entitled to sue upon it. That leads me to a consideration whether there are any other circumstances in this case sufficient to prevent the above *primâ facie* view being maintained. The only circumstance relied on by the plaintiffs is the charter-party, and, in particular, clauses 17 and 22. As to this I can only say, after a careful consideration of that document, and of the two clauses in particular, that I cannot come to the conclusion that by the charter-party the owners contracted with the charterers that they, the owners, would effect an insurance on the ship on behalf of the charterers as well as on behalf of themselves. Nor do I feel able to infer from this charter-party that the policy in question was or ought to be treated as taken out on behalf of the charterers. And it is satisfactory for me to know from the proceedings in the United States of America that this view appears to have been for some years the view taken alike by the owners and by the present plaintiffs. I think that on these grounds the appeal fails.

STIRLING, L.J.—I am of the same opinion, and cannot usefully add anything.

Solicitors for plaintiffs, *Thorne* and *Welsford*.

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

Friday, March 31, 1905.

(Before Lord ALVERSTONE, C.J., MATHEW and COZENS-HARDY, L.JJ.)

LAW GUARANTEE AND TRUST SOCIETY *v.* RUSSIAN BANK FOR FOREIGN TRADE AND OTHERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Mortgagor in possession—Impairing security of mortgagee—Carriage of contraband of war to belligerent port—Validity of contract as against mortgagee.

Mortgagors in possession of certain ships entered into charter-parties for the carriage of contraband of war to belligerent ports, the ships not being insured against risk of capture. The ships sailed.

Held, that the mortgagees were entitled to a declaration that they were not bound by the charter-parties relating to the ships on the ground that such charter-parties impaired their security.

ACTION brought by the plaintiffs against the defendants claiming a declaration that the plaintiffs, the mortgagees of certain steamships, were not bound by the charter-parties and bills of lading relating to the steamships *Heathbank*, *Heathburn*, and *Heathcraig*, and the cargoes now on board them.

The Heath Line Limited were the owners of the ships.

The plaintiffs were the trustees for the debenture-holders in the Heath Line Limited, and as such were the mortgagees of the ships.

The charter-parties relating to the three ships were entered into between the owners and other persons who were also defendants in the action as agents.

On the 16th Sept. 1904 a charter-party was entered into for the charter of the *Heathbank* for the carriage of a cargo of coals from Barry to Vladivostok at a freight of 40*s.* a ton—a very high rate of freight—30*s.* of which was paid in advance.

The *Heathburn* was chartered on the 28th Oct. 1904 to carry a cargo of coals to Vladivostok at the same rate of freight, 30*s.* of which was paid in advance.

The *Heathcraig* was chartered on the 7th Dec. 1904 to carry a cargo of coals at a similar rate of freight, 30*s.* of which was paid in advance.

The total amount of the freight paid in advance in respect of the three ships was 25,650*l.*

The defendants, the Russian Bank for Foreign Trade, were the holders of the bills of lading, and it was admitted that the cargoes were really shipped for the Russian Government. Inasmuch as the cargoes were contraband, and were destined for a belligerent port, other documents were entered into in respect of each ship, the port of destination in the case of the *Heathbank* being stated to be Manila, in the case of the *Heathburn* being Shanghai, and in the case of the *Heathcraig* also Shanghai; and the ships were cleared at Barry for those ports.

The ships were not insured against war risks.

In Feb. 1905 the plaintiffs ascertained that the ships were destined for Vladivostok, and they obtained an injunction restraining the ships from proceeding to Vladivostok.

The defendants, the Russian Bank for Foreign Trade, were not parties to that proceeding and had no notice of it, but on the 9th March the plaintiffs passed a resolution to take possession of the ships as mortgagees, and on the 15th March the writ in the present action was issued.

By the trust deed which secured the debentures in the Heath Line Limited it was provided by clause 4 that until the security thereby constituted became enforceable and the trustees were in a position to enforce the same, the trustees should permit the company to hold and enjoy the mortgaged steamships and to carry on the business authorised by the memorandum of association of the company.

By clause 6, upon the security becoming enforceable, the trustees might enter upon and take possession of the mortgaged property and sell the same; and it was provided that the security should become enforceable on the breach by the company of any covenant or stipulation in the deed.

By clause 24 the company were to carry on and conduct the business of the company to the greatest possible advantage, and were at all times to give to the trustees such information as they should require relating to the business or affairs of the company; and the company were to insure and keep insured such of the mortgaged property as were of an insurable nature, including the ships, against loss or damage by fire in their full value at such office or offices as the trustees should appoint,

And as to the said vessels under proper marine policies containing the ordinary conditions applicable to steam-

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

ships with the usual collision clauses, and will enter and keep the said vessels properly entered in some protection club or association to be approved in writing by the trustee, and shall forthwith, upon effecting such insurances and entry, give notice thereof in writing to the trustee stating the full particulars of such policies and entries, with the dates and amounts thereof, and will deposit all such policies with the trustee, and whenever required so to do by the trustee insure the said vessels in such office or offices as aforesaid under proper marine policies against seizure, capture, and war risks.

The plaintiffs contended that they were entitled to take possession and to sell, and were not bound by the charters, on the authority of the principle laid down in *Collins* v. *Lamport* (11 L. T. Rep. 497; 4 D. J. & S. 500). The defendants, the Russian Bank, contended that the contracts were binding on the plaintiffs for the following reasons: (1) Under the Merchant Shipping Acts the mortgagors had power to make contracts binding on the plaintiffs; (2) by the special terms of the trust deed for the debenture-holders, authority was given to the Heath Line, the owners, to make the contracts; and (3) if there were no such authority, then by estoppel the contracts were binding upon the plaintiffs.

Pickford, K.C. and *Maurice Hill* for the plaintiffs.

Scrutton, K.C. and *Leck* for the defendants, the Russian Bank for Foreign Trade.

Carver, K.C. and *Cozens-Hardy*; *Hamilton*, K.C. and *Bailhache* for the other defendants.

March 27.—Channell, J.—In this case the Law Guarantee Society, as mortgagees of certain ships belonging to the Heath Line, have brought an action asking for a declaration (they having taken possession recently under their mortgage) that they are not bound by certain charter-parties and bills of lading relating to the three steamships and to the cargoes now on board. I do not think it is necessary that I should go through all the facts of the case, because there is really no dispute about them, and so far as I have to refer to them it perhaps may be more convenient to refer to them in reference to the particular points which I have to deal with. It seems to me that there are three questions which arise in the case —three grounds upon which it may be contended, and, I think, as to each it has been contended, that these contracts are binding. The first is that the shipowners, the mortgagors, who are owners subject to the mortgage, had power under the Merchant Shipping Act to make these contracts and to make them binding upon the plaintiffs. The second point, which is the one that I think was mostly insisted upon by Mr. Scrutton, was the point that, by the special terms of the trust deed of July 1903, which practically was the document containing the terms of the mortgage, the formal mortgages being, of course, in the proper and usual terms under the Merchant Shipping Act, the plaintiffs became bound by these mortgages: That is to say, there was authority given by that contract to the Heath Line, the owners, to make them, and then, the third point was that even if there was not any actual authority, yet that the contracts were binding upon the plaintiffs by estoppel or ostensible authority or whatever it may be called, as between them and the third parties.

Now, it would be convenient to deal, I think, with those three questions in that order. The first is one mainly of law as to the extent of the authority of a mortgagor of a ship, the registered owner, subject to the mortgage. Now, I think that I must take the law as laid down by Lord Westbury in *Collins* v. *Lamport* (2 Mar. Law Cas. O. S. 153; 11 L. T. Rep. 497; 4 D. J. & S. 500) as settled law. He there had to consider a question of the then Merchant Shipping Act, which is identical in terms with the section under the present Act except that the order of the words is transposed; and under that section, which stated that a mortgagee should not by reason of his mortgage be deemed to be the owner of a ship or any share therein, nor shall the mortgagor be deemed to have ceased to be owner except in so far as may be necessary for making the ship or share available as security for the mortgage debt, Lord Westbury held that the true construction of that section was that a contract which had the effect of materially impairing the security of the mortgagee was not a contract binding upon the mortgagee, but that other contracts made in reference to the ship which had not that effect were binding. Now that appears to have been recognised as law in all the cases which have arisen since. It is quite true, as Mr. Scrutton has pointed out, that in most of the cases the court came to the conclusion that the particular contract which they were considering had not the effect of impairing the security, and, so far as I know, there is only one case in which the contrary was held, and that is the case of *The Celtic King* (7 Asp. Mar. Law Cas. 440; 70 L. T. Rep. 652; (1894) P. 175), before Gorell Barnes, J., in 1894. But in all the cases that appears to be recognised. There were some passages in a judgment of Lord Cairns in the House of Lords in *Keith* v. *Burrows* (37 L. T. Rep. 291; 2 App. Cas. 636), which were referred to as somewhat altering the position. After referring to the power of the mortgagor to make any contracts in reference to the employment of the ship, or to make none, and pointing out that there was no obligation in any way as between the mortgagor and the mortgagee by the ordinary contract unless, of course, it was imported into it by an express contract between them, to employ the ship at all, he says that "all those acts," that is in making contracts for the employment of the ship, "would be the ordinary incidents of the ownership of the mortgagor who remains the dominus of the ship with regard to everything connected with its employment until the moment arrives when the mortgagee takes possession. If the mortgagee is dissatisfied with the amount of authority which the mortgagor possesses by law it is for him to put an end to the opportunity of exercising that authority by taking the control of the ship out of the hands of the mortgagor." That possibly might be thought to mean that the mortgagor might do anything he liked as dominus of the ship until his possession was taken away from him by the mortgagee doing that which he had a right to do—namely, enter into possession. But in the case of *The Heather Bell* (84 L. T. Rep. 794; 9 Asp. Mar. Law Cas. 206; (1901) P. 143, 272) I find that the present Lord Chief Justice, sitting in the Court of Appeal, discusses that passage in Lord

Cairns' judgment, and distinctly says that in his view Lord Cairns did not intend to go further than Lord Westbury had done. He says: "When that question" (about the power of the mortgagee) "came before Lord Westbury in *Collings* v. *Lamport*, the only test which he laid down in the several passages which have been read from the judgment is whether the dealings materially impair the security of the mortgagee. If not, then they are to stand. When that test was discussed in the House of Lords in *Keith* v. *Burrows*, Lord Cairns used language in which I do not think he meant to go further, but which puts it in a somewhat different way." Then he quotes the passage which I have already quoted. It seems to me, therefore, that for the last forty years—because Lord Westbury's decision is just about forty years ago—this has been treated to be settled law, and I do not think that I ought to depart from it. Now, that being so, the question, I suppose, is one of fact—namely, whether the particular contracts in question do impair the security of the mortgagee. They are contracts to carry coal for the Russian Government to Vladivostok. That is the effect of the contracts. There were a sort of formal charter-parties entered into with the apparent object of carrying the coal to a neutral port, but it is perfectly clear that those never were meant to be the real contracts, and there are letters accompanying the second contracts which say that that is so. So that I think that those may be disregarded. Now the consequence of those contracts clearly is to subject the vessel to forfeiture as a prize if she is caught by any of the vessels of the other belligerent Power. It is perfectly true that they are not illegal contracts according to the law of this country. It is permissible by our own law; that is to say, it is not illegal to help one belligerent, provided, of course, that the kind of help does not come within the provisions of the Foreign Enlistment Act, which is not suggested that this does. The contracts, therefore, are legal, but the consequence of them is the penalty of forfeiture if the vessel is caught. It does seem to me that a contract which, on the face of it, involves the forfeiture of the vessel, the vessel being the mortgagee's security, is almost necessarily a contract which does impair his security. I say almost necessarily, because I suppose it is a question of fact. I think that the view taken by Gorell Barnes, J. in *The Celtic King* shows that you have got to consider it at the time that the contract is entered into. In the present case facts have been shown by evidence which are, of course, common knowledge—namely, that the state of things now is such that it is practically impossible for these vessels to get to Vladivostok without almost the certainty of being captured. Now, that state of things has arisen since these contracts were made. At the time that these contracts were made things were a little different, and, adopting the view of Gorell Barnes, J., it seems to me that you must judge of things at the time the contracts were made. In dealing with the question before him in that case, and referring to the contract there, he says it is not likely an ordinary contract for the ordinary employment of a ship is made from time to time as things are good and as things are bad. I think that means that you cannot set aside the contract as impairing the security because it is not, now at the time when you are dealing with it, as good as it might be. For instance, if a contract was made some little time back at a very low rate of freight, and then freights had gone up very much, a person might say that impairs the security because it is a bad contract; but that would not be an admissible consideration. That is what I think the judge was referring to by saying "as things are good and as things are bad." Therefore, one must go back to the time when these contracts were made, and if at that time there was a real substantial risk of capture it seems to me that a contract which clearly subjects the vessel to capture must be a contract which impairs the security of the mortgagee. Now, in the present case, at the time these contracts were entered into, it is shown that the rate of premium asked for insuring against capture a vessel such as this to Vladivostok with coal would have been 25 to 30 guineas per cent. I think for a short time it was said some were effected at as low as 20 guineas per cent., but 25 to 30 per cent. was the ruling premium asked for insurances of this description. That seems to me to show that the general opinion was as to the probabilities that say one out of four or one out of five out of the vessels going on such an adventure as this would be captured. If that is the case it seems to me that not only was this a contract which on the face of it rendered the vessel liable to forfeiture, but that there was a practical and substantial risk of that forfeiture. As it is a matter of fact, I do not think I should be prepared to hold that the mere fact of a contract being a contract to carry stores of a description that might be warlike stores, as coal undoubtedly is, for a belligerent Power, because it would subject the vessel to capture and forfeiture, was a contract which on the face of it would materially impair the security; because I think you must take into account to a certain extent the question whether it is a real practical danger. If this contract had been to carry coal for the Russian Government, say to a Baltic port, I think it is very probable that one might have come to the conclusion there was no practical danger of the vessels being captured, and then I am not sure that I should have been prepared to hold that the mere fact of its being on the face of it a contract which rendered the vessel liable to capture would in itself be enough to make the security materially impaired. There are one or two other points under this head which I suppose must be referred to which arise upon Mr. Scrutton's argument. First of all, this risk might no doubt have been covered by insurance; but it was not, and I think that that does not make the contract in itself the less one which impairs the security. It may be, as Mr. Pickford I think admitted, if there had been an insurance—an insurance by solvent underwriters whose position could not be questioned, clearly covering this risk—then you would have had a different question of fact to consider, and to consider whether in that state of things a contract to carry coal for a belligerent to this point, but, in fact, covered by an insurance by a solvent underwriter, taking it on the whole, was a matter which did materially impair the security of the mortgagee, and probably one would come to the

conclusion that it did not. But as things stand, I think that that consideration does not come in. I have got to deal with this contract, and this contract in itself does seem to me clearly to impair the security. That being the case, supposing the security is merely the security of the ship, which *primâ facie* it is on a mortgage to a mortgagee of a ship, the security is the ship, and if that ship is forfeited his security is gone. On that view it clearly impairs the security, but I think Mr. Scrutton wanted me to consider the question of the whole of this contract, because the mortgagees in this case had as their security not merely the security of the three ships, but a general security upon the whole undertaking of the Heath Line; and the suggestion is, as I understand it, that on this contract, this contract as a whole did not impair the security because there was a very high rate of freight payable, and that that freight would come into the Heath Line, and that therefore it would materially improve the undertaking, and that, as they had a security not only upon the ships but upon the undertaking, the security as a whole was not impaired because the other part of the security, if I may say so, was improved by the freight coming in. I am not sure that that is a legitimate consideration on this point of the case, because the ship is the substantial security. Clearly, if this had been the ordinary case of a mortgagee, he would not have got hold of the freight. Here the freight was the larger part of it to be paid in advance, and he never would get hold of that in the ordinary way. In the present case, of course, it does go into the pocket of the Heath Line, and so it is an advantage to their undertaking, and in that indirect way there is some sort of set-off to the damage to the security in the ships. But I do not think that is enough on the whole to make the matter profitable. Test it by the premium on the insurance. The 40s. freight clearly would not be enough to enable the Heath Line to get the ships insured against this risk, and still get a fair rate of freight. I think the figures that Mr. Pickford put showed that very clearly. Therefore I think, even if this is a legitimate consideration, which I have some doubt about, still it does not alter my view of the facts, that this is a contract which does materially impair the security of the mortgagee.

Now there comes the question which I think was the one which Mr. Scrutton mainly relied upon, and which possibly is a more difficult one, and that is the question whether the terms of this trust deed gave to the Heath Line, the mortgagors, a larger authority than that which they would have as mortgagors in possession under the Merchant Shipping Act. The deed relates, of course, to a variety of matters. The Law Guarantee and Trust Society were guaranteeing certain debentures, and they were in the position of trustees for the debenture-holders. They had to look after the interests of those debenture-holders, and they had to do that in the interest of the debenture-holders, and also in their own interests because they guaranteed the debentures. The result was an elaborate deed with a great many provisions, and looking at that as a whole I think it would be difficult for anyone to say that there had been any intention to give the Heath Line any authority to do anything which would impair the security of the mortgagees. There are elaborate provisions in it for maintaining that security, but looking at it as a whole it certainly is impossible, I think, to get from it anything like an intention to give larger powers to diminish the security, or to impair the security than the Merchant Shipping Act would have given. But no doubt there are words which create some difficulty, and which want consideration. The clause mainly relied on is the fourth clause: "Until the security hereby constituted becomes enforceable, and the trustee, having regard to clause 7 hereof, is in a position to enforce the same, the trustee shall permit the company to hold and enjoy the mortgaged premises"—that includes the ships—"and to carry on therein and therewith the business or any of the businesses authorised by the memorandum of association of the company, and as regards the mortgaged premises, other than the said steamships hereinbefore named, these presents shall operate as a floating security," but there is no power to create a prior charge. That clause, of course, was wanted to enable the Heath Line to carry on any business at all, otherwise the security over the whole of their undertaking would necessarily have stopped their business, and that is what is meant by making the security a floating security. The term is fairly well understood, and it means that the person giving the security has the right to continue his business, and in the ordinary course of continuing his business to deal with the subject matter of the security, even, of course, to the extent of parting with it, substituting in the ordinary course of dealing other things of the same character for it. That is the way in which it operates in ordinary trading concerns, the business of which is buying and selling; it would put a stop to the whole business if you had not such a clause as that. So in this case it would put a stop to the whole business. True it is a shipping line, and their business is not buying and selling directly, but it involves the consumption of articles, and the alteration altogether of the security, and they could not at all have carried on business without some such clause. Then as regards the steamships it is not made a floating security, and that indicates, of course, that which would be obvious without it, that it is not intended by that to give the company the power of disposing of the steamships, and making it a floating security does give power of disposing in the ordinary course of business of the articles included in the security. Again, this clause is a clause similar to those I suppose that are always put in contracts in reference to an issue of debentures, and the effect of it is that, notwithstanding any such clause as that, if the security is in jeopardy, the debenture-holders may come to the court and ask for protection. I am not sure that that is very material in the present case, because the way in which they would get their protection would be by getting a receiver appointed, and the receiver, of course, would take subject to any binding contracts that there were, so that perhaps it has not much bearing upon the question whether these contracts were binding or not. What I have to consider is whether the true effect of this clause is that it permits the company to do everything that they possibly might have done without its being *ultra vires* by reason of the words "to carry on the business or any of the businesses authorised by

the memorandum of association of the company." I think the real object of putting in those words is to prevent their carrying on any *ultra vires* business, which would have affected the security. That is probably the real object. Still, there they are, and you have to consider them. The first effect they have is that it is a contract not to take possession of the vessels except in certain events; therefore it is a contract to leave the parties in the position in which they would be under the Merchant Shipping Act as owners subject to a mortgage. Then it is a permission to carry on the business, but it does not say anything at all about the mode in which the business was to be carried on, and if the thing stopped there I think it would be necessary to read into it something in reference to the mode in which the business was to be carried on, so that I cannot treat it as an absolute authority to carry on the business in any possible way they liked. But, of course, there are in other portions of the deed clauses which do deal with the manner of carrying on the business, and those are practically incorporated into this clause, because this clause deals with the circumstances under which the security can be enforced in the event of any breach of the contract by the company, so that it brings in in effect the other clauses, and the principal one is clause 24. Clause 24 contains a great many provisions as to what the company are to do, and they are all for the maintenance of the security. The company are to repair the vessels, keep them in repair, keep them insured against ordinary risks, and so on, and to do a great many other things, the object of all of which clearly is to maintain the security as good as it was at the time it was taken. Then it contains two provisions, which are the only ones that create any difficulty in the case—one is that the company are to give "such information that they shall require as to all matters relating to the business," and another clause as to war risks, that, when required so to do by the trustees, they shall insure the vessels as aforesaid against seizure, capture, and war risks. Now, the contention is, as I understand, that there is no breach of the obligations of the company towards the trustees in the present case, because they made no specific requirement as to what was the employment of these three vessels at the time in question, and consequently they did not know the facts of what contracts had been entered into; and, secondly, that not knowing in fact what contracts had been entered into they never made a specific requirement that those three vessels should be insured against capture and war risks. That undoubtedly is the case, but I am by no means sure that there was no requirement for the insurance; there have been requirements for war risks in other cases where they were not by any means so clearly required as in the present, and it seems to me that the true meaning of this clause, "whenever required so to do by the trustee shall insure against seizure, capture, and war risk," means to make the trustee—that is, the Law Guarantee and Trust Society, which is called the trustee in this deed—the person who is to judge whether or not upon a particular voyage an insurance against capture and war risk is required. It is perfectly obvious, as the history of the previous transactions under this contract shows, that there may have been contracts which did not expressly, as these contracts did, and clearly on the face of them render the vessel liable to capture, but which nevertheless might take her to a part of the world where there was some risk of capture, whether a rightful capture or not does not, I think, signify much for this, and that the trustee was to be the person who was to judge whether that was necessary. They had made requirements before, and I do not know that those related to specific things, so that they had been actually complied with. In the present case it is beyond doubt that the parties perfectly well understood that if they mentioned these contracts, they would be required either to cancel them at once, or at any rate to have the ships insured, and I am by no means prepared to say that there was not an existing requirement that these three vessels should be insured against war risks. There had been a requirement that they should be insured against war risks, and they had been insured against war risks—against some war risks, but not extending to capture, because there was a clause in the insurance that they were free from capture—that was because those contracts were of a different character to this. I am not sure that I should be prepared to hold that myself. I do not think myself that all these considerations are very important. If it were necessary I almost think that I should find that there had been a breach of this particular clause 24, but the substance of the whole matter seems to me to be this—that this contract, although possibly it is not expressly forbidden in the articles of association as being *ultra vires*, nevertheless in my view cannot be said to be an ordinary contract for the employment of the ship such as has been contemplated in the cases relating to this matter. I have been told, and I daresay it is true, that persons are speculative, and that whenever there is a war some persons are tempted to make speculative profits by sending their ships blockade running, or other ventures of that description; but it does not seem to me that it is the ordinary business of a shipowner, and on that ground it seems to me that you cannot infer from this contract that there was any authority merely because it is said you may employ the vessel in the business, or the business authorised by the articles of association, which are ordinary shipowners' businesses. It does not seem to me that contracts by which you contract in substance with a belligerant Power to take material such as coal to a port which is within the area of warlike operations can be within the ordinary business of a shipowner. On that ground it seems to me that I must come to the conclusion that neither under the Merchant Shipping Act, nor under the special terms of this contract, was there authority to bind the mortgagees by a contract which dealt with their security in that manner.

The remaining question is as to the estoppel, and I see no evidence that the plaintiffs ever held out to any of the defendants—that is to say, to any of the parties claiming under these charter-parties or bills of lading — that the Heath Line were in any other position than that in which they actually were, namely, mortgagors in possession, and consequently I do not see any holding out which gives ostensible authority. That the true owner of property puts another person in possession of his property is not of itself by our law a holding

out to any person of the apparent possessor of the property having authority to deal with it; if it were so, of course, many provisions of our law would not be required. The Factors Act would not be required, and the order and disposition clauses in bankruptcy would not be required. As I understand the law, it is quite clear you must do something more than merely put somebody else in possession of your property in order to make a holding out of that person as entitled to dispose of it. You must either be brought into some sort of relation to the person claiming the benefit of the estoppel, so that you may be said to represent to him that the person is the owner. Standing by, as it is called, means, in my opinion, standing by in the presence of the other person, like the case of the man who actually stood by in the presence of somebody else who was seizing goods which belonged to him and never said that they were his. In that sort of case a man makes a representation to the person; but you must, in some way or other, be brought into relation with the person claiming the estoppel in such a way as to be directly or indirectly making a representation to him, and the mere fact of the possession of property will not do. Now, that is the ordinary law, and it is *à fortieri* the law in reference to a species of property of which there is a register. Here, in the case of shipping, there is a register of the owners and a register of mortgages, and, in reference to a matter of that sort, whether it is the habit of people to go and look at the register or not I do not know, and I suppose it probably is not; if a person does not choose to do so they cannot rely upon any state of things other than that, and in the present case all that did happen was that the plaintiffs, being mortgagees, did allow the Heath Line, who were mortgagors and owners subject to the mortgage, to remain in possession. The result is that they gave them the authority which that remaining in possession gives, but there is nothing to indicate that they gave them anything more. The result, therefore, seems to me to be that there is no estoppel or apparent authority either, and consequently it seems to me that I must make the declaration which is asked for as to the terms of which there has been no question. It asks, I think, that the plaintiffs are not bound by the charter-parties and bills of lading relating to the steamships and the cargo. I think that is right. It does not say the charter-parties under which the cargoes are to be taken to Vladivostok. Of course, that is what it means, and, further than that, those are of course the only real contracts, because the other ones were mere shams, and consequently there is no objection, as it seems to me, to that. The only other thing that I must remark is that in holding that these contracts are not binding upon the plaintiffs, I say nothing at all as to what their position may be in reference to the coal, which is in point of fact on board the ships. That has not been argued before me. It may be, and I suppose it is between some of the parties at any rate, the subject of another action; but there has been no argument before me in reference to that, and I simply make the declaration that is asked for—namely, that the plaintiffs are not bound by those contracts. Whether or not the coal being on board they are under some, and, if so, what liability or duty in reference to that coal I say nothing. It has not been argued before me, and I have not at the present time got it before me. I simply point that out so that there may be no mistake about it, that the decision is that the plaintiffs are not bound by those contracts. What effect that has upon their position in other matters is, of course, open for further consideration.

The defendants, the Russian Bank for Foreign Trade, appealed.

Scrutton, K.C. and *Leck* for the appellants.—Whatever may be the rights and liabilities between the mortgagees and their mortgagors, the owners, the charter-parties are good as between the mortgagees and the charterers and the holders of the bills of lading. These contracts made by the charter-parties were not illegal, and they might be made by any shipowners. These ships were left by the mortgagees in the possession of the mortgagors, the owners, who were held out as having authority to enter into these charter-parties. Where the mortgagor is allowed to remain in possession, the mortgagees are bound by his contracts and they cannot treat them as invalid. The only limitation that has been imposed on his right is that laid down in *Collins* v. *Lamport* (2 Mar. Law Cas. O. S. 153; 11 L. T. Rep. 497; 4 D. J. & S. 500); but the only case in which the limitation has been applied is *The Celtic King* (7 Asp. Mar. Law. Cas. 440; 70 L. T. Rep. 652; (1894) P. 175). The ships having sailed the mortgagees cannot interfere, for lawful charter-parties cannot be declared invalid during the performance of the contract—that is to say, during the voyage. The relation between mortgagor and mortgagee in a matter of this kind is analogous to that of principal and agent, and the charter-parties here must be taken as authorised by the mortgagees. They referred to

Johnson v. *Royal Mail Steam Packet Company*, 3 Mar. Law Cas. O. S. 21; 17 L. T. Rep. 445; L. Rep. 3 C. P. 38.

There is no obligation on charterers to inquire whether there is a mortgage on the ship they are about to charter, and they are not bound to search the Shipping Register for that purpose. That being so, they have not even constructive notice of this mortgage, and they are entitled to enter into any legal contract with the owners. The hardship on charterers and holders of bills of lading would be great if this declaration were made, for, without any notice, they have paid to the owners the best part of the freight, the goods have been shipped, and the ships have sailed. As the mortgagees have allowed the mortgagors to deal with the ships as owners, and left them in possession, they are bound by all lawful contracts entered into by them. They referred to

Williams v. *Allsup*, 19 C. B. N. S. 417;
Keith v. *Burrows*, 37 L. T. Rep. 291; 2 App. Cas. 636;
The Maxima, 4 Asp. Mar. Law Cas. 21; 39 L. T. Rep. 112;
The Fanchon, 4 Asp. Mar. Law Cas. 272; 42 L. T. Rep. 483; 5 P. Div. 173;
Cory Brothers v. *Stewart*, 2 Times L. Rep. 508;
The Heather Bell, 84 L. T. Rep. 794; 9 Asp. Mar. Law Cas. 206; (1901) P. 143, 272.

When the trust deed is looked at it is clear that charter-parties of this kind were authorised, for

clause 24 provides for insurance against seizure, capture, and war risks, but the mortgagees were to require such insurance before the mortgagors were bound to insure. The mortgagees have never made such a requirement. These charter-parties do not impair the security within the exception created by *Collins* v. *Lamport* and *The Celtic King*.

Pickford, K.C., *Maurice Hill*, and *W. H. Cozens-Hardy* for the defendants, the plaintiffs. —As a fact these charter-parties do impair the mortgagees' security and so are not binding on them, coming within the exception stated in *Collins* v. *Lamport*. That case makes it clear that although a mortgagor in possession of a ship can enter into ordinary contracts which will bind his mortgagee, a contract which impairs the security will enable the mortgagee to take possession and he will not be bound by such a contract. It makes no difference whether the mortgagee enters into possession and repudiates such a contract before or after the commencement of the performance of the contract. They referred to

The Celtic King, 7 Asp. Mar. Law Cas. 440; 70 L. T. Rep. 652; (1894) P. 175.

That case exactly covers the present case, and in fact it is stronger, for the contract there was made before the mortgage. On the question of hardship, the charterers, if they had chosen, could have examined the Shipping Register and seen there was a mortgage, and even had the mortgagees inquired as to what the charter-parties on these vessels were they would not have discovered what they were in fact owing to the ficticious documents that were drawn up. The mere fact that these risks might have been insured against is no answer in the case of contracts of this kind, but insurance was practically and commercially impossible. The provisions of the trust deed certainly give no authority to the mortgagors to bind the mortgagees by contracts of this description. They referred to

Laming v. *Seater*, 16 Rettie, 828.

Scrutton, K.C. in reply.

Lord ALVERSTONE, C.J.—This is an appeal from my brother Channell, who has decided that three contracts of charter-party are not binding on the respondents—the Law Guarantee and Trust Society—on the ground that they are contracts which impair the security of the mortgagee within the principle laid down some forty years ago by Lord Westbury, and recognised ever since. In my opinion my brother Channell's decision is perfectly right, and I can add very little indeed to that which he has said; but out of respect to the most able argument addressed to us by Mr. Scrutton I think it right to say a few words upon the point that he has argued. Now it is, as I have already said, fully established that the owner of the ship, the mortgagor remaining in possession, can exercise the ordinary rights of an owner until the mortgagee takes possession. On the last occasion I had to consider this matter I referred to the language of Lord Cairns in *Keith* v. *Burrows* (37 L. T. Rep. 291; 2 App. Cas. 636). I do not cite it again, but in the judgment in the case of *The Heather Bell* (84 L. T. Rep. 794; 9 Asp. Mar. Law Cas. 206; (1901) P. 143, 272) I pointed out that I considered that Lord Westbury and Lord Cairns had both enunciated the law in different language to the same effect. Now, in this case, I propose to first deal with the case quite apart from the trust deed for the debenture-holders. In this case the mortgagor, the ship-owner, has made three charter-parties—one in October last, one somewhat later, and one in January—to carry coals from Barry to Vladivostok. Those were the real contracts. There were to the knowledge of the charterers some fictitious documents entered into in order that it might appear that the vessels were going to a neutral port—Manila in the first case, and Shanghai in the two other cases—and the vessels did, in fact, clear from Barry for those ports. It is not disputed by Mr. Scrutton that the Russian Government were really interested in the coal, and that the coal never was intended to go anywhere else but to Vladivostok. At the very earliest time the premium to insure against the war risks to Vladivostok was very high—some twenty-five to thirty guineas. At that rate if the vessel had been insured nearly all the profit on the charter-party would have disappeared, but at a later date I do not think that it is too much to say that it was practically uninsurable; at any rate, my brother Channell has come to the conclusion that these charter-parties for these voyages by which the owners of the ships bound themselves to carry coal to Vladivostok were contracts which, taken by themselves, would imperil the security of the mortgage, and, apart from other considerations than insurance, I think the mere statement of the circumstances under which the contracts were made, and the circumstances which existed at the time those contracts were made, were sufficient to show that he was fully justified in coming to that conclusion. Certainly, I see nothing to justify me in differing from that conclusion as a question of fact. Therefore it seems to me that if all that we know is that at the date of these charter-parties the owners as mortgagors have purported to contract that the ships shall go to those ports, it is, as my brother Channell said, a contract which put the subject-matter of the mortgage in peril, diminished and endangered the value of the security, and is a contract which would not be binding upon the mortgagee upon the principle laid down by Lord Westbury, and recognised by Lord Cairns. Now it is said that of course this matter could be met by insurance. What may be the right remedy if the case should ever arise of there being no insurance, there being no special circumstances in the case, we need not consider. As my brother Mathew, L.J. pointed out, in the ordinary case of a mortgagee being able to insure under ordinary circumstances, and to add the insurance policy to his security, this question would not arise; but certainly I do not intend by anything that falls from me to suggest that if there is nothing in the case but a contract of this kind, which it cannot be disputed seriously puts the property in jeopardy, that is a contract binding upon mortgagees, and the only question will be one of relief, or one of redress, arising in some other case where the owner is in a position to show either that he has insured or can insure. Therefore, upon the general principle of law that the mortgagor cannot bind the mortgagee by a contract which impairs the security, I think the judgment of my brother Channell was absolutely right.

Then it is said that the terms of the deed in this particular case give the mortgagor such authority that the contract would be binding upon the mortgagee. I do not go through the terms of the deed at length, because I think I can summarise them, and I do not in any way differ from the view taken by my brother Channell. I agree that the language of the deed giving the mortgagor the power to carry on the business to the full extent of the memorandum of association does not in any way by its general terms limit the rights and powers which the mortgagor has. I think it is, however, right to point out with regard to clause 4 that whereas it is quite true that as regards the general undertaking the security was intended to be a floating security with regard to the mortgage premises, in regard to the steamships it was never intended to be a floating security, and there was no right either to sell these ships, or to get rid of them, or to imperil them, or to do anything but reserve them for the benefit of the debenture-holders. Therefore, so far the matter was left entirely to be governed by the general law. I do not think the deed gave the mortgagor any greater power to bind the mortgagee than exists in the general law. Then comes clause 24, which provides, first, speaking in general terms, that the company would carry on its business to its greatest advantage. It then provided for inspection of the company's books by the trustees who represented the debenture-holders. It then provided that the company would at all times give such information as the trustees should require as to all matters relating to the business, and it then provided for the insuring and keeping insured of the vessels in clubs and under marine policies containing the ordinary condition applicable to steamships, and for the insurance of the ships under proper marine policies against seizure, capture, and war risks. It was strenuously urged upon us that the effect of those words in that clause, taking it with clause 4, is to enable the mortgagor to enter into any contracts he likes, and that there was no duty or obligation upon him to protect the vessel against war risks unless the trustee called upon him to do that. The first answer to that, it seems to me, if I may venture to say so, is the cogent observation made by my brother Mathew, L.J. in the course of the argument; that at any rate the effect of that clause must depend upon full and proper information being given by the mortgagor of the ships to the mortgagee—truthful information and proper information, so that they may know against what war risks they ought to call upon the mortgagor to insure. It seems to me that that clause inserted for the protection of the trustee cannot be used to justify the mortgagor and permit the mortgagor to enter into contracts which would have the effect of impairing the security, and thereby making those contracts binding upon the mortgagee. Now, in my opinion, unless the mortgagor, when he made these contracts in October, protected the interests of the mortgagees by proper policies of insurance, those contracts were, and continued to be, contracts that were not binding upon the mortgagees, as they fall distinctly within the principle which Lord Westbury laid down; and in my judgment those clauses for the protection of the trustee, for the protection of the debenture-holders, did not in any way—certainly not directly or by implication—give the mortgagor the additional or extra authority to bind the mortgagee in the matter of such a contract as this. I do not notice, because it is not material that I should notice, the correspondence beyond saying that the only importance of it seems to me is that it carries out the view that from the beginning to the end of this matter the mortgagees were not being given proper information. All they could tell in October from the published information, from the documents given to them, the information communicated to them, was that the ships were clearing for a neutral port; and when they make their inquiries they are told that there is absolutely no risk of either of the belligerents interfering with those ships. Therefore, it seems to me that the mortgagees did nothing which deprived them of their rights, and they did not authorise the mortgagors to enter into any other contracts other than the ordinary law would authorise the mortgagors to enter into. Therefore, whether you regard the trust deed or not, the decision of my brother Channell must be upheld. I only desire to make one other observation upon one or two minor points. For the general principle, the judgment of Gorell Barnes, J. in the case of *The Celtic King* (7 Asp. Mar. Law Cas. 440; 70 L. T. Rep. 652; (1894) P. 175) is an authority. I wish it to be understood I cannot altogether take the view that, if the contract really did exist before the mortgage, the same principle would apply. I only mention that because it is not necessary for us to deal with that point, because we are only dealing with *The Celtic King* so far as it affords an illustration of the class of contract which would impair the security of the mortgagee or affect his rights. The other point which I wish to notice is that in the observations which I made, in concurrence with Smith, L.J. and Romer, L.J., in *The Heather Bell* we certainly did not mean to say that if vessels were not insured it was not a matter to be considered in connection with the question of these contracts. All we said was that if the contract was otherwise binding, and the mortgagee had the right to prevent the vessel from sailing uninsured, that fact by itself might not be sufficient to prevent the contract being still binding on the mortgagees. And so far as *Laming* v. *Seater* (16 Rettie, 828) is concerned, it seems to me to be a decision exactly on the same lines, in accordance with the view here expressed, and points out that if there is an obligation on the mortgagor to insure, then a contract which would force the vessel to go away uninsured cannot be binding upon the mortgagees. For these reasons I am of opinion that the judgment is right, and that this appeal should be dismissed.

Mathew, L.J.—I am of the same opinion, and I have little to add to what my Lord has said. Now, it cannot be contended here that the contracts entered into with reference to the employment of the ships by the charterers did not impair the security, for the destination of the ships placed them in the greatest jeopardy of being seized and confiscated. But I understood the argument of Mr. Scrutton to be this, that the mortgagees cannot complain because, in the first place, they had the authority

apart from the deed—the authority of the mortgagors—to do what they did, to employ the ship in this way, and, if they did not have that authority as between mortgagor and mortgagee, they had authority under the special terms of the mortgage deed in question. Now, with reference to the first point, Mr. Scrutton relied upon the phraseology of Willes, J. in *Johnson* v. *Royal Mail Steam Packet Company* (3 Mar. Law Cas. O. S. 21; 17 L. T. Rep. 445; L. Rep. 3 C. P. 38), and he suggested the learned judge was of opinion that there was a certain analogy between the case of a mortgagor and mortgagee and principal and agent. It is suggested that these charters entered into after a contract are of the kind that the mortgagees must be taken to have authorised. Now, if there is anything that is perfectly clear to me, it is that the mortgagees are not involved in any contracts for the employment of the ship; they have nothing to do with them, they hold the security of the ship, and are in no way responsible in respect of any contracts for the supplies of the ship, for the wages, or any contract for the employment of the ship. They stand entirely clear of any contract that the mortgagors may enter into, not only on this account, but on their own account for the ship. Therefore the supposed analogy does not assist Mr. Scrutton in the least. I am only dealing here with the case where the charter is after the mortgage, but I desire, as my Lord has said it is considered desirable, to reserve judgment upon the other question that is raised, and which is not material to this case, whether the position of a mortgagee after a contract had been entered into was different and the same result would follow. Certainly the decision in *The Celtic King* was to the effect that a contract before the mortgage did not affect the application of the principle. That is all I have to say upon that.

Now, what do we find took place in this case? The mortgagees made every effort to get information about the destination of the ship. They failed. Now, the mortgagors having conceived this idea to send these ships on this most hazardous adventure, they set to work to conceal that intention, and when inquiries were made in due course it was denied that any such adventure was in contemplation. They continued to deceive down to the month of February, when the last ship had cleared for Manila. The charterers were in a position to know that there was a mortgage, but that is a very common condition of affairs; and they entered into the contract well knowing that as between the mortgagor and mortgagee the mortgagor must not impair his security. Upon inquiries being made they continued to present a totally false view of the destinations of the ships, and said they were quite empowered to do what was done here by the terms of the deed. When we get to the terms of the deed they give the mortgagors no such power. In the first place it was said that the powers were given by clause 4, under which the shipowners were empowered to carry on the business authorised by the memorandum of association of the company, and it is said that the business authorised by the memorandum of association of the company involved the employment of ships in this way; but with that I cannot agree. I think the shareholders of the company could have interposed if they had been informed, and have prevented the ships from being employed on any such contract as this. That point entirely fails. The other point that is made is upon the construction of clause 24. The object of that clause is perfectly clear. It was to enable the mortgagees to know how the ship was being employed, and for what purpose; and if there was a deviation from the proper course of business as between the mortgagor and mortgagee the ships might be stopped. That was certainly the result of their getting this information. Then the clause requires that they should have that information at all times, and having that information they are entitled to require that the ship shall be fully insured. That information was withheld, and the consequence was that they did not make any requirement that the ship should be insured against war risks and the risk of capture. The mortgagors cannot complain of that. It is their fault. If they had informed the mortgagees what the real position of things was, as they were bound to do in accordance with the terms of this clause of the mortgage, then the result would have followed that the transaction would never have gone forward. The mortgagees appear to me to have interposed, not too late, but to have interposed in strict accordance with their rights under this mortgage deed. The judgment of the court below seems to me to have been quite right, and I therefore agree with the judgment given by my Lord.

Cozens-Hardy, L.J. — I am of the same opinion, and I have very little to add. The main principle of law applicable to the case has not been disputed, and could not be disputed, since the leading authority of *Collins* v. *Lamport*, Lord Westbury's decision of forty years ago. On the question of fact I cannot bring myself to doubt that the security of the mortgagees here is materially depreciated and imperilled by the three charter-parties in question. They can, therefore, only be justified as against the mortgagee who has entered into possession by finding out something not under the general law, but under the terms of the special mortgage, the terms of the mortgage itself. I have carefully looked at that debenture deed, but I can find nothing whatever to derogate from what I may call the common law rights of the mortgagees. In substance, clause 4 merely means this: that the company being shipowners may carry on the business of shipowners, and use the vessels for the purposes of their business. Clause 4 seems to me to have no other effect whatever beyond this: If, instead of being a limited company it had been an ordinary shipowner, the mortgagee could have said, "Until I enter into possession you can use these vessels for the purposes of your business." But then it is said, although that may be so, clause 24 confers some special and peculiar rights; but when you look at clause 24 it seems to me very plainly not to be in derogation of the rights of the mortgagees, but is an additional protection. It provides that there should be full information; that proper books should be kept; that ordinary insurance should be effected; and that special war risks insurance should be effected at request. All that seems to me to imply is that it was the duty of the mortgagors — so as to enable the mortgagees to exercise the discretion which it was intended they should have—to give the mortgagees all proper information so that they might

decide whether they should or should not require policies to be effected against war risks. Nothing of that kind was supplied. There was here a studious concealment of what was being done. I am unable to find anything in this deed which would place the plaintiffs in any other position from that which would be their position if this deed had not been entered into containing clause 24. One word only, following what my Lord and Mathew, L.J. said with reference to *The Celtic King*. I do not think that Gorell Barnes, J. intended to say that this doctrine always applied where the charter-party is prior to the mortgage. There may have been, and no doubt were, special circumstances in that case. The agreement in question was entered into before the ship was built; there was no registered owner of the ship, still less was there any registered mortgage on the ship at the time when the contract was entered into. That may have been, and probably was, the reason which justified the court in saying that the agreement was not binding on the mortgagees.

Appeal dismissed.

Solicitors: *Gribble, Oddie, Sinclair*, and *Co.*; *Thomas Cooper* and *Co.*; *Ward, Perks*, and *Mackay*; *Stibbard, Gibson*, and *Co.*

Monday, April 3, 1905.

(Before Mathew and Cozens-Hardy, L.JJ.)

Harding *v.* Bussell. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Discovery—Marine insurance — Action against underwriters — Insurance on goods—Transit partly by land — Discovery of ship's papers.

By a Lloyd's policy of insurance goods were insured during their transit from the United Kingdom to South Africa "from warehouse to warehouse," and the policy covered all loss or damage arising from any cause whatever.

Held (allowing the appeal), that, in an action against an underwriter upon the policy, although a part of the transit was by land, the defendant was entitled to the usual order for discovery of ship's papers.

Henderson *v.* Underwriting and Agency Association (64 *L. T. Rep.* 774; (1891) 1 *Q. B.* 557) *and* Village Main Reef Gold Mining Company *v.* Stearns (5 *Com. Cas.* 246) *not followed.*

Appeal of the defendant from an order of Channell, J. at chambers.

The plaintiff brought this action to recover from the defendant a sum of money alleged to be due upon certain policies of insurance subscribed by the defendant.

The plaintiff's claim was made upon eight policies of insurance, all of which were in the ordinary form of a Lloyd's policy, upon eight cargoes of dried fish, from the United Kingdom to Durban, in Natal.

The policies contained the usual "warehouse to warehouse" clause, and covered all loss or damage from any cause whatsoever.

Each policy covered some transit by land, in one case the land transit was from Hull to London and from London to Southampton.

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

The defendant applied for the usual order for discovery of ship's papers.

Channell, J. at chambers refused the application upon the ground that the policies covered transit by land as well as transit by sea, upon the authority of *Henderson* v. *Underwriting and Agency Association* (64 L. T. Rep. 774; (1891) 1 Q. B. 557) and *Village Main Reef Gold Mining Company* v. *Stearns* (5 Com. Cas. 246); and also upon the ground that, as the policies covered loss or damage arising from any cause whatever, the discovery was not necessary.

The defendant appealed.

J. A. Hamilton, K.C. and *D. C. Leck* for the appellant.—The decision of the learned judge was wrong, and the usual order for discovery of ship's papers ought to have been made. In the case of *Henderson* v. *Underwriting and Agency Association* (64 L. T. Rep. 774; (1891) 1 Q. B. 557) the facts were very different from the facts in the present case. There the goods insured were sent by post, and a very large part of the transit was by land; and, the carriage being by post, many of the documents would be in the possession of the Government. The decision of the Divisional Court in that case was based upon the peculiar circumstances of the case. In *Village Main Reef Gold Mining Company* v. *Stearns* (5 Com. Cas. 246) Kennedy, J., assuming to follow *Henderson* v. *Underwriting and Agency Association* (*ubi sup.*), refused to make the usual order in a case where the loss occurred during the land transit. The present case is very different. Here only a very small part indeed of the transit is by land, being only that which is covered by the usual "warehouse to warehouse" clause; the land transit is at most about eight hours, while the transit by sea is eighteen or twenty days. This is substantially a marine policy, and all the considerations for the rule as to discovery of ship's papers apply as strongly as in any case of marine insurance. The rule which has been laid down in an unbroken series of authorities as to the right of an underwriter to discovery of ship's papers is in principle applicable to the present case, and, if the cases relied on by the learned judge are in conflict with that rule, they ought to be overruled. The reasons for the rule were stated by Brett, L.J. in *China Steamship Company* v. *Commercial Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142), where he said: "Long before the Judicature Acts, the peculiarity of insurance business had given rise to a practice, both in Chancery and at common law, of granting discovery to a larger extent than in ordinary business. 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." Those reasons, especially the last, apply as strongly to this case as to any other. There are other reasons for the rule, as stated by Williams, L.J. in *China Traders' Insurance Company* v. *Royal Exchange Assurance Corporation* (8 Asp. Mar. Law Cas. 409; 78 L. T. Rep. 783; (1898) 2 Q. B. 187), for it is the duty of the assured

"to act with the greatest good faith. Having that duty upon him, he may be properly called on to produce all papers that are in his possession, and to account for those that he cannot produce." The applicability of the rule is shown also by the case of *Boulton* v. *Houlder Brothers and Co.* (9 Asp. Mar. Law Cas. 592; 90 L. T. Rep. 621; (1904) 1 K. B. 784). The fact that the policy covers loss or damage arising from any cause makes no difference, for the underwriter is entitled to know who is really the person interested.

Scrutton, K.C. and *L. Batten* for the respondent.—The order of the learned judge was right. It is clear from the decision in *Henderson* v. *Underwriting and Agency Association* (*ubi sup.*) that an underwriter is not entitled to the usual order for the discovery of ship's papers in an action upon such a policy as this, which covers transit by land as well as by sea. That case was cited in *China Traders' Insurance Company* v. *Royal Exchange Assurance Corporation* (*ubi sup.*) in the Court of Appeal, and was there treated as being good law, but distinguishable upon the ground that it arose upon a policy covering land transit also. That decision must, therefore, be now treated as being good law. The usual practice as to discovery of ship's papers has never been applied in any case where the policy covered land transit; the only authorities upon the point are to the contrary. The grounds and reasons upon which this old practice has been established are not applicable to a policy covering transit by land; they apply only to marine policies:

Goldschmidt v. *Marryat*, 1 Camp. 559;
Daniel v. *Bond*, 3 L. T. Rep. 700; 9 C. B. N. S. 716;
West of England Bank v. *Canton Insurance Company*, 2 Ex. Div. 472.

These policies of insurance cover all risks and all loss and damage, however caused, and therefore it cannot be material for the underwriter to have discovery of ship's papers to see what risk caused the loss; the names of the persons interested can be obtained by the ordinary form of discovery.

J. A. Hamilton, K.C. was not called upon to reply.

MATHEW, L.J.—This is an important case, though I think that the conclusion to which we ought to come is perfectly clear. It is well established by the authorities that the underwriter is entitled, as it seems to me, to what he asks for in this case. The policies of insurance in this case are in substance policies of marine insurance, though they do cover a short transit by land. They cover the transit from warehouse to warehouse, and we are asked to say that, because of those particular provisions, the old practice as to discovery of ship's papers is not to be applied. The origin and object of the practice, under which the underwriter is entitled at the earliest stage of the case to this discovery of ship's papers, is indicated in a long series of authorities. The underwriter is entitled to this information because he cannot get information as to what is his position in any other way. He is entitled to insist that he shall be treated in the fullest good faith, and he is entitled to have full information as to everything which has been done with respect to the subject-matter which he has insured. The question as to who are the parties interested in the property insured is often very important in these cases, and it seems to arise in the present case. The underwriter is entitled to all the information in order to enable him to see whether the plaintiff is the person who is insured by the policy of insurance. He is also entitled to all the information which the assured has with reference to the shipping, to the voyage, and to the arrival of the goods. It has been said on behalf of the plaintiff that in this case, if the affidavit of ship's papers is made, the defendant is not likely to get any information which will be of any benefit to him. The underwriter is entitled to judge as to that for himself. It is said that it may be very inconvenient in a particular case to compel the shipper of goods to obtain the information which the underwriter is entitled to have, but, although we must be careful not to enable the underwriter to improperly insist upon obtaining information, yet there is no indication in the present case of any intention on the part of the underwriter to delay the progress of the action by insisting upon this information being given. Here there is nothing, in my opinion, to prevent the ordinary application of the well-known rule. An underwriter is entitled at the earliest possible moment to know whether he ought to pay or not, and therefore the information which is obtainable from the plaintiff, and from no other source, ought to be placed at the disposal of the underwriter by discovery of the ship's papers. Now, it is said that the matter is concluded by authority, and that, whenever any part of the transit covered by the policy is by land, there is no right to obtain an order for discovery of ship's papers. I think, however, that the reason for the rule which requires the information to be given in the case of a purely marine policy is applicable just as much to the case where a short part of the transit is by land. The case cited, which was decided by Jessel, M.R. and Brett and Cotton, L.JJ.—*China Steamship Company* v. *Commercial Assurance Company* (45 L. T. Rep. 647; 8 Q. B. Div. 142)—indicates clearly some of the grounds upon which the affidavit of ship's papers ought to be made, and those grounds are entirely applicable to this case.

It is contended that the present case is governed by the decision in *Henderson* v. *Underwriting and Agency Association* (64 L. T. Rep. 774; (1891) 1 Q. B. 557). The judgment in that case was very short, and the effect of it was that it was held that, in the circumstances of that case, the peculiar practice prevailing in marine insurance actions could not be applied; but that it would be sufficient if the ordinary affidavit of documents was made at once. That case was in that respect a departure from the ordinary practice, and it seems to have been there thought that the ordinary affidavit of documents would, in the circumstances of that case, be equivalent to all that could be obtained by the affidavit of ship's papers. To some extent it departs from the previous decisions and the ordinary practice, and, if I were compelled to express an opinion upon it, I should very much doubt whether the decision was correct. That decision seems to have had the effect of inducing Kennedy, J.. in *Village Main Reef Gold Mining Company* v. *Stearns* (5 Com. Cas. 246), to treat it as an authority that, wherever any part of the transit is by land, and the transit is not entirely

by sea, there is no right to obtain an order for the affidavit of ship's papers. I regret to say that I am unable to concur in that view expressed by Kennedy, J. As I have said, the reason of the rule applies equally to the case where the transit is partly by land and not wholly by sea, when the risk is covered by a policy in this form. As to the other cases which have been cited to us during the argument, I entirely concur with them, and think that they were properly decided. I see no reason why in this case the ordinary practice should be departed from, and why the ordinary affidavit of ship's papers should not be made. I think, therefore, that this appeal must be allowed.

Cozens-Hardy, L.J.—I entirely agree, and have nothing to add.

Appeal allowed.

Solicitor for the appellant, *James Ballantyne.*

Solicitors for the respondent, *Stanley, Woodhouse,* and *Hedderwick.*

April 6, 7, *and* 8, 1905.

(Before Collins, M.R., Mathew and Cozens-Hardy, L.JJ.)

Braithwaite *v.* Foreign Hardwood Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Contract — Wrongful repudiation — Subsequent discovery of proper ground for repudiation— Right to reject—Waiver of conditions by buyer.

The defendants bought of the plaintiff about 100 *tons of Honduras rosewood for shipment in the course of* 1903 *at* 6*l.* 10*s. per ton weight delivered, cash against bill of lading, less* 2½ *per cent. discount, c.i.f. L., H., or L. at plaintiff's option.*

The deliveries of the wood were to be by instalments, and the wood was shipped by two ships. While the first ship, which contained about sixty-three tons, was on the voyage, the defendants heard that the plaintiff had shipped rosewood to another buyer, and on the 5*th Oct.* 1903 *they wrote to the plaintiff's agent in H. stating that, in consequence of this alleged breach of an alleged collateral oral stipulation not to supply any other person in the trade, they would not accept any of the wood under the contract. Upon the* 30*th Oct. the bill of lading for the wood arrived in England, and was tendered by the plaintiff's agent to the defendants and was refused. The ship arrived on the* 9*th Nov. The second ship arrived in Jan.* 1904, *and the bill of lading for that shipment was tendered by the plaintiff's agent to the defendants on the* 18*th Jan. and was refused. Seventeen tons of the wood by the first ship was not according to the contract. The plaintiff sold the wood and claimed as damages the difference between the contract price and the price realised.*

Kennedy, J. found as a fact that there was no collateral oral stipulation made out. He further found that the defendants wrongfully repudiated the contract upon the ground that the alleged collateral oral stipulation had not been performed by the plaintiff, and the plaintiff accepted that repudiation as final, and that, that being so, they were not entitled to repudiate the contract when they subsequently discovered a ground upon which they might have refused to accept the goods in the first consignment—viz., that a portion of that consignment was not in accordance with the contract—and under those circumstances they could only give in evidence the inferiority in the quality of these goods as diminishing the damages.

The defendants appealed, alleging that they were not liable to pay damages in respect of the non-acceptance of the first consignment.

Held (*dismissing the appeal*), *that the defendants by repudiating the contract waived the conditions precedent to be performed by the plaintiff, and that they were liable to pay damages in respect of the non-acceptance of the first consignment, as they could not say the plaintiff was not ready to perform his part of the contract because a considerable portion of the wood was not according to the contract in quality.*

The plaintiff's claim was for damages for breach of contract to accept about 100 tons of Honduras rosewood for shipment in the course of 1903 at 6*l.* 10*s.* per ton weight delivered, cash against bill of lading, less 2½ per cent. discount, c.i.f. London, Hull, or Liverpool at plaintiff's option.

The plaintiff alleged that the contract was all in writing, but the defendants contended that there was a collateral oral stipulation of the contract, subject to which the defendants agreed to purchase the Honduras rosewood, that the plaintiff would not supply any Honduras rosewood to any other persons in the trade, and that the plaintiff, in breach of the contract, delivered to other persons about 468 pieces of Honduras rosewood, and by reason of the 468 pieces of Honduras rosewood being placed upon the market there was a heavy fall in the price of Honduras rosewood, and in consequence thereof the wood which the defendants agreed to purchase from the plaintiff became of much less value owing to there being no market for it, and on these grounds the defendants said that they were entitled to, and did, repudiate the contract.

They further said that it was an express condition of the contract that the wood should be of good, sound, merchantable quality, and that it should be equal to the previous shipments of Honduras rosewood which the defendants had received from the Southern Estates Company Limited.

The defendants alleged that the wood was not of sound merchantable quality, and that they were entitled to repudiate the contract on the ground of material difference.

Alternatively the defendants claimed damages for the breaches of contract.

The deliveries of the wood were to be by instalments, and the wood was shipped by two ships. While the first ship, which contained about sixty-three tons, was on the voyage, the defendants heard that the plaintiff had shipped rosewood to another buyer, and on the 5th Oct. 1903 they wrote to the plaintiff's agent in Hull stating that in consequence they would not accept any of the wood under the contract.

Upon the 30th Oct. the bill of lading for the wood arrived in England, and was tendered by the plaintiff's agent to the defendants and was

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

refused. The ship arrived on the 9th Nov. The second ship arrived in Jan. 1904, and the bill of lading for that shipment was tendered by the plaintiff's agent to the defendant on the 18th Jan. and was refused.

Seventeen tons of the wood by the first ship was not according to the contract. The plaintiff sold the wood and claimed as damages the difference between the contract price and the price realised.

All the other material facts and findings appear from the judgment of Kennedy, J., which was as follows:—

Nov. 23, 1904.—Kennedy, J.—In this case I think the matter is sufficiently clear, and, with the view I take of the various points, I need not delay to see the judgment (the effect of which I quite accept, I am sure, Mr. Scrutton's statement of) in the Court of Appeal in the equivalent case which has been referred to. The plaintiff's claim is for the non-acceptance of two cargoes which arrived, as appears by the documents before me, in Nov. 1903 and Feb. 1904 in part performance of a contract for the shipment and delivery to the defendants. The defendants say: "We are justified in refusing to accept either of those deliveries, because by collateral contract which constitutes a condition precedent, you bound yourself not to sell or deliver to other people at that time other goods and cargoes of the same nature. You broke that, and it justified us, from the nature of the contract, in not taking delivery of these goods. The value of the contract under which we had otherwise bound ourselves to take these goods was essentially altered to our loss. You have delivered goods to another person during the currency of our contract; that delivery in this peculiar class of business was such as to deprive us really of our profit with regard to that contract on which you are suing. There is only a limited quantity of rosewood in the world, and by delivering to somebody else you have deprived us of the opportunity of making money on this contract which we should otherwise have had." They further say in their defence: "In any case one of the cargoes which you tendered to us was not according to contract; it was to a large extent a cargo which consisted of goods which were of inferior quality and character to those which you bound yourself to deliver to us and which by the terms of the contract we were bound to accept." Upon the first point the rejoinder of the plaintiff is that in point of law evidence is not admissible of this alleged collateral contract. The contract for the supply of rosewood to the defendants was a contract reduced to writing. The alleged collateral contract is really an attempt to engraft that contract on the written contract, and, according to general principles, where the terms of a contract are reduced into writing, you cannot vary that writing by the addition of an oral stipulation at the time. I am of opinion that upon that point, had that been decisive of the case, that the defendant was entitled, if he could prove it, to prove an oral contract of the kind that he describes and alleges. It is not always easy to discriminate on the facts those cases which fall within the general principles to which I have referred in which evidence of an oral contract is inadmissible and those cases in which under the title or description of a collateral contract it has been held permissible and not to violate that principle to allow to be proved and to be enforced a collateral agreement. I say it is not easy upon the facts, although a general principle of law has been stated more than once. On the facts of this case it appears to me that, if it could be substantiated, the defendant is entitled to show, without any violation of the legal principle, that, while he bought goods under a written contract from the plaintiff to be delivered here in England after shipment from Honduras, there was a collateral agreement, in consideration of which alone he entered into the contract, that until the fulfilment of his contract or during the year wherein the contract was to be fulfilled there should not be a shipment or delivery by way of sale by the plaintiff to any other firm of the same quality of goods. It is not really, as it seems to me on the facts, a variation of the written contract. It is not a contract which deals with anything which the written contract professed to deal with, and therefore it is, at any rate, distinguishable from the case of *Angell* v. *Duke* (32 L. T. Rep. 320), in which it is clearly pointed out that the attempt to bring in what was there alleged as a collateral contract was an attempt to vary the contract, which said in effect, "I lease to you a house with furniture in it," and you say, "I lease to you a house with furniture in it and other furniture which should be brought into it." It seems to me it is quite different to say: "I sell you certain goods on certain terms. These we will put into a written contract, but I will only enter into that written contract with you if you contract with me that other goods—nothing to do with this contract and not included in this contract at all—of the same nature shall not be sold to another person during a certain given period." One can well understand, as a matter of business, a man might say: "I am quite willing to buy goods from you on the terms you suggest, but I am not willing to enter into any engagement unless you say you will not sell other goods to another person during a certain time." It seems to me that there is there a contract within this class of contracts which have been held admissible as collateral agreements, but when you get a case in which the alleged collateral agreement is really dealing with one of the points actually dealt with in the written contract and covered by it, and altering terms of that written contract in substance, totally different considerations arise. Therefore I think that I properly admitted evidence of this so-called collateral agreement. Then comes the question was there a collateral agreement in fact, and I am unable to say that there was. It seems to me that, there being nothing admittedly in writing, the burden of proving this agreement lies distinctly upon the defendants. There are two valuable comments, both of which have been made by Mr. Scrutton, which, I think, are very strong to justify my inability to accept as proved the defendants' allegations. One is, that not only is the alleged collateral contract a matter which might very well have been the subject of an express stipulation in the written contract, but in fact in this particular case you would have expected it to be in the written contract, because it was a term which, though not identical with, was very like a condition which had existed in writing in a similar class of contract made with persons whom

I will call the plaintiff's producers in their business at Honduras as regards the shipments of earlier years. It is almost identical, and it seems to me to be rather important as showing it would not be taken as a matter of course, and therefore, not being taken as a matter of course, it would be a matter which you would expect the parties to stipulate for in writing, and, if it was in writing the year before, it seems to me that he would stipulate for this if he meant to stipulate for it at all as part of the written bargain. Therefore I hold that the case of the collateral contract fails, in point of fact, to be made out.

Now comes another question. There is no doubt that one of the two cargoes, in respect of which damages are claimed by reason of non-acceptance by the defendants, was a cargo which, assuming it to be tendered, in my view the defendants would have been entitled to reject. It was to a considerable extent not according to contract—of that I am satisfied; and I am content to accept the view put forward by the plaintiff's own witness, the broker, that to the extent of seventeen tons (I think that is substantially the figure) out of the total contents of the cargo, which is over sixty tons, it was a cargo which consisted of goods which the defendants were not bound to accept, because they were not in accordance with the contract. If there had been tender of the cargo, and refusal on the ground of its not being in accordance with the contract to accept by the defendants, I think it would be impossible for me not to hold that the cargo was in its nature as it stood, at any rate, one that the defendants were not bound to accept. They might have selected out of these numerous logs which the sixty odd tons consisted of those which were in accordance with the contract, taking those and rejecting the others. The burden would clearly lie, if such a tender could be made at all, on the seller who tenders the cargo with these defects to have them selected himself at his own expense and have put together—if I may so call it—out of the good logs a tender in part performance of the contract into which he had entered. But that position is not, unfortunately, the position here. Before this cargo was tendered, the defendants had heard of the sending by the plaintiff of a shipment which was a shipment, not to him, but to brokers for another purchaser; and, on learning that, alleging the contract which I find not to be proved in fact, he said: "I am not going to take that cargo; I am not going to take any cargo. I say it is a condition precedent to my liability to take any that this collateral contract should have been faithfully observed." What is the effect of that? Nobody doubts, I think could doubt, as a general statement of law, that if, before the time of its performance, one of the two parties to a contract says unmistakably, "In consequence of your conduct, or for any other reason bad or good, I am not going to perform the contract," that that relieves the other party to the contract from the necessity otherwise laid upon him in order to maintain successfully an action showing he was willing on his part to perform the contract. You have absolved him by doing that by telling him, "I will not perform it on my part." There is exoneration and discharge on the part of the defendant of the plaintiff's obligation. I confess for some time I was not very clear, upon the correspondence, whether that had been the position which must be treated as the real position to the defendants' disadvantages in this case; but, having followed Mr. Scrutton in his careful analysis of the correspondence, I have come to the conclusion that his view upon this is right, and that the plaintiff on his part, by putting that cargo as well as the next into the hands of his brokers with the directions to sell unless the other man gave way, was in fact treating, as he was entitled to treat, the repudiation of the defendant as intended to be the final one on his part. Of course, anybody may subsequently withdraw their repudiation in this sense—they may withdraw it upon the chance of the other party, who has accepted it, withdrawing his acceptance. Then a settlement could have been come to, and it is to be wished that it had been come to in this particular case; but I think the true view, as it seems to me, is this, that, as regards these cargoes, even if both had been fully in accordance with the contract, the defendants asserted before the arrival of the first and maintained from that time onwards their position of repudiation. It is quite true that subsequently on getting inspection of the first cargo they found, and found rightly in my opinion, that if they had chosen to rely upon the defects in that cargo they might have refused it if the other party persisted in tendering it as it stood, and that they would have been well founded in so doing. But the question is, Was the other party entitled to say, "It is no use my attempting to offer them part of this cargo, because they have absolutely refused and persist in that refusal, however good the cargo is, and however much in accordance with the contract to take acceptance of it as a delivery under the contract"? That being so, I think Mr. Scrutton is well founded in his argument in saying that the imperfections of the "Spheroid" cargo do not come to the relief of the defendants as a discharge in respect of the whole of that cargo, but that the true result is this, that it does affect the measure of damages to which the plaintiff is entitled. Those damages are based upon the difference between contract price and the price realised on sale. It is not a question whether the sale was conducted properly and the best was done that could be done to get a good price. That price was considerably below the contract price, and it is damages for that difference for which the plaintiff is now suing. In considering that difference as it is obtained by taking the contract price, the contract price is not applicable in respect of seventeen tons, because they were inferior to contract. My judgment, which must be for the plaintiff, is a judgment for the claim that he makes, subject to the deduction, which is a matter of arithmetic, of the difference of value in respect of the goods which form part of the "Spheroid" cargo, which were in fact inferior goods, as described by the contract under which that cargo should have been imported.

The defendants appealed and contended that, even if there was no such oral agreement as alleged, the plaintiff had not accepted the repudiation of the contract, but had elected to keep the contract alive and to tender the bills of lading and the consignments as they arrived, and that he was therefore bound to tender consignments which the defendants were under an obligation to accept, and that, inasmuch as part of the first

consignment was inferior in quality and not in accordance with the contract, the defendants were not bound to accept that consignment, and that therefore the defendants were not liable at all in respect of that consignment, and they alleged that they were not liable to pay damages in respect of the non-acceptance of the first consignment.

Hamilton, K.C. and *J. D. Crawford* for the appellants.

Scrutton, K.C. and *Atkin* for the respondent.

COLLINS, M.R.—This case raises an important question of law. The plaintiff was the owner of rosewood in British Honduras, and he made a contract with the defendants for the sale to them of 100 tons of rosewood as set out in the contract. The plaintiff arranged to send it in instalments, which were not definitely specified, during the year 1903. Just about the time when the first instalment was sent the plaintiff sold some rosewood to a competitor of the defendants in the trade, and the defendants, on hearing of that, considered that it was a breach of a collateral oral stipulation alleged to have been agreed, and they wrote repudiating all obligation to take any of the rosewood under the contract. The terms of the letter of repudiation were absolute and extended to the entire quantity of wood covered by the contract. The first consignment was at that time actually at sea, and the bill of lading for it was sent to the plaintiff's agent in England, who informed the defendants of the fact and tendered it and asked for payment against it as provided by the contract. The defendants again refused to accept not only that consignment, but also any of the wood under contract, and refused to pay. When the first consignment arrived it was offered for sale at the best price obtainable. About seventeen tons of that wood was not according to the contract in quality. The plaintiff shipped the rest of the wood, and that second consignment was in conformity with the contract, and the defendants now admit that they have no defence to the claim in respect of that consignment. Kennedy, J. found as a fact that the alleged collateral oral stipulation was not made out, and therefore the ground upon which the defendants repudiated the contract failed. The defendants contend that they are not liable to pay damages in respect of the first consignment, on the ground that the plaintiff might when the defendants repudiated the contract have accepted the repudiation as relieving him from the further performance of the contract, and giving him a right to claim damages at once for a breach of the whole contract, or he might not have accepted the repudiation and have measured his damages from time to time as the defendants refused to accept each instalment. The defendants said that he adopted this last course, and elected to keep the contract alive and so he had to show that he was in a position to perform his part of the contract at the time when each instalment was tendered. They contended that the first consignment not being such as the defendants could have been compelled to accept, because a considerable part of it was not according to the contract in quality, the plaintiff could not recover damages in respect of it as he was not ready to perform his part of the contract, and they said that Kennedy, J. had held that if it had been tendered the defendants would have been entitled to reject it. On consideration I do not think that is tenable. I think we must deal with the contract upon the footing that it was kept alive, but at the time when each instalment is tendered the buyer must be ready and willing to perform his part of the contract as well as the seller, and if the buyer is not so ready and willing, the seller is absolved from the performance of his part of the contract. In the present case, after the repudiation of the contract by the defendants, the plaintiff informed the defendants that the bill of lading for the first consignment had arrived and tendered it, and asked them for cash against it, but they refused to accept the bill of lading upon the ground that they had already repudiated the whole contract, and refused to be bound by it. I think that amounted to a waiver of the performance by the plaintiff of the conditions precedent to the enforcement by him of the contract. That being so, the defendants have debarred themselves from setting up the non-performance by the plaintiff of the conditions precedent, as they have waived their performance. In a contract for delivery by instalments the court must see whether each party is ready and willing to perform his part of the contract at the time for delivery of each instalment. As the defendants were not ready and willing, that is sufficient to decide this case. For those reasons the appeal fails.

MATHEW, L.J.—In this case there were two shipments, and while the first was at sea the defendants repudiated the whole contract upon a ground which failed. When the bill of lading for that consignment arrived it was tendered to the defendants, but they refused to take the bill of lading, and repudiated, at any rate, so much of the contract as was represented by that consignment, and so exonerated the plaintiff from the performance of all conditions precedent in respect thereof. It is now suggested that the plaintiff did not perform the conditions precedent, the performance of which the defendants had in fact waived. That contention cannot be maintained. The appeal therefore fails.

COZENS-HARDY, L.J. concurred.

Appeal dismissed.

Solicitors: *F. W. Hill*, for *Andrew M. Jackson* and *Co.*, Kingston-upon-Hull; *Harcourt, Son*, and *Rolt*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

March 15 *and* 16, 1905.

(Before CHANNELL, J.)

COMMERCIAL COURT.

McFADDEN BROTHERS AND CO. *v.* BLUE STAR LINE LIMITED. *(a)*

Bill of lading—Warranty of seaworthiness—Fit to receive cargo—Loading stage—Principle applicable to voyage in stages—Harter Act.

The warranty of seaworthiness is not a continuing warranty. The principle applicable to a voyage in stages is applicable to the stage of loading. The warranty of seaworthiness as to fitness to

(a) Reported by TREVOR TURTON, Esq., Barrister-at-Law.

receive a cargo does not extend from the time of putting the cargo on board to the time of the vessel's sailing, but it is an absolute warranty that at the time of loading the vessel is fit to receive her cargo.

The incorporation in the bill of lading of the Harter Act does not cut down the absolute warranty of fitness to receive cargo to an undertaking to exercise due diligence to make the vessel fit to receive the cargo.

Trial of action in the commercial list by Channell, J. sitting without a jury.

The plaintiffs claimed for damages resulting from the defendants' alleged breach of contract and (or) duty in relation to the carriage of the plaintiffs' cotton in the defendants' steamship *Tolosa* from Wilmington, U.S.A., to Bremen.

The plaintiffs were holders of five bills of lading, two dated the 18th Nov. and three dated the 24th Nov. The bills of lading contained the following clauses:

(3) Also that the carrier shall not be liable for loss or damage occasioned by causes beyond his control; by the perils of the seas, rivers, canals, and navigation, by fire, from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates, or robbers; by arrest and restraint of princes, rulers, or people, riots, strikes, or stoppage of labour; by explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery, or appurtenances; by collisions, stranding, or other accidents of navigation of whatever kind (even when occasioned by the negligence, default, or error of judgment of the pilot, master, mariners, or other servants of the shipowner, not resulting, however, in any case, from want of due diligence by the owners of the ship or any of them, or by the ship's husband or manager); nor for heating, decay, putrefaction, rust, sweat . . . insufficiency, or absence of marks, numbers, address, or description; nor for accidental obliteration thereof; nor for risk of craft, hulk, or transhipment; nor for any loss or damage caused by the prolongation of the voyage from any of the aforesaid perils, matters, or things.

(14) . . . It is also mutually agreed that this shipment is 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 on the 13th day of February 1893, and entitled "An Act Relating to Navigation of Vessels," &c. [the Harter Act].

The Harter Act provides:

Sect. 2. That it shall not be lawful for any vessel transporting merchandise or property from or between the 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 (to) properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage . . . 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.

The cotton was taken on board about the 12th Nov. 1903 at Wilmington, and stowed in No. 2 hold.

During the night of the 23rd Nov. or the morning of the 24th Nov. part of the cotton at the bottom of No. 2 hold was damaged by the incursion of sea water through the sea-cock.

In Dec. 1903 the plaintiffs delivered the cotton at Bremen, when 120 bales were found to be damaged by sea water.

Shortly before the vessel's arrival at Wilmington the joint of the valve-chest had been remade, and remade improperly. After the goods had been put on board the sea-cock was opened for the purpose of filling up one of the ballast tanks, and was not completely shut off owing to some obstruction. This was not immediately discovered, and consequently water continued to come in, and forced out the defective packing of the valve-chest joint. The water thence flowed through a sluice-door (which had not been tightly screwed down) in a watertight bulkhead, and so into the hold where the cotton was stowed. The sluice-door had been incompletely closed after the goods were put on board.

Bailhache for the plaintiffs.—The defendants have committed a breach of warranty of seaworthiness in that the vessel was not in a fit condition to receive the cotton. That warranty extends from the commencement of the loading until the vessel sails:

Carver on Carriage by Sea, 3rd edit., sects. 21, 79.

The warranty of seaworthiness having been broken, the Harter Act does not protect the defendants:

The Carib Prince, 1898, 170 U. S. 655.

Nor are they entitled to rely on the exceptions in the bills of lading. The following cases were referred to:

Dobell v. *Rossmore Steamship Company*, 8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 408;
Cohn v. *Davidson*, 1877, 36 L. T. Rep. 244; 2 Q. B. Div. 455;
The Glenfruin, 5 Asp. Mar. Law Cas. 413; 1885, 52 L. T. Rep. 769; 10 P. Div. 103.

See also

Carver on Carriage by Sea, 3rd edit., s. 103*e*.

Lewis Noad for the defendants.—There has been no breach of the warranty of seaworthiness:

Hedley v. *Pinkney and Sons Steamship Company Limited*, 7 Asp. Mar. Law Cas. 483; 66 L. T. Rep. 71; (1894) A. C. 222;
The Southgate, (1893) P. 329;
Tattersall v. *National Steamship Company Limited*, 5 Asp. Mar. Law Cas. 206; 50 L. T. Rep. 299; 1884, 12 Q. B. Div. 297;
Steel v. *State Line Steamship Company*, 3 Asp. Mar. Law Cas. 516; 1877, 37 L. T. Rep. 333; 3 App. Cas. 72.

The only warranty at a port of lading is that a vessel shall be fit to receive the cargo at the commencement of the loading:

Owners of Cargo on Maori King v. *Hughes*, 8 Asp. Mar. Law Cas. 65; 73 L. T. Rep. 141; (1895) 2 Q. B. 550.

The vessel was fit for such a purpose, and therefore the exceptions in the bills of lading apply:

The Vortigern, 8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140.

The damage was caused by an accident in the navigation:

Carmichael v. *Liverpool Sailing Ship Owners' Mutual Indemnity Association*, 6 Asp. Mar. Law Cas. 184; 1887, 56 L. T. Rep. 863; 19 Q. B. Div. 242;
The Accomac, 6 Asp. Mar. Law Cas. 579; 1890, 63 L. T. Rep. 737; 15 P. Div. 208;
The Carron Park, 6 Asp. Mar. Law Cas. 543; 1890, 63 L. T. Rep. 356; 15 P. Div. 203;
The Cressington, 7 Asp. Mar. Law Cas. 27; 64 L. T. Rep. 329; (1891) P. 152;
The Southgate, (1893) P. 329;
The Glenochil, 8 Asp. Mar. Law Cas. 218; 73 L. T. Rep. 416; (1896) P. 10.

Or management caused by negligence, and the Harter Act protects the defendants inasmuch as due diligence had been used to make the vessel seaworthy:

Dobell v. *Rossmore Steamship Company*, 8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 408.

Further, the damage was caused by a peril of the sea:

The Xantho, 6 Asp. Mar. Law Cas. 207; 57 L. T. Rep. 701; 12 App. Cas. 503;
Hamilton, Fraser, and Co. v. *Pandorf*, 6 Asp. Mar. Law Cas. 212; 57 L. T. Rep. 726; 12 App. Cas. 518;
The Cressington, 7 Asp. Mar. Law Cas. 27; 64 L. T. Rep. 329; (1891) P. 152;
Blackburn and Sohsten v. *Liverpool, Brazil, and New River Plate Navigation Company Limited*, 9 Asp. Mar. Law Cas. 263; 85 L. T. Rep 782; (1902) 1 K. B. 290.

And was occasioned by latent defect and causes beyond the control of the shipowner. [Carver on Carriage by Sea, 3rd edit, sect. 91, was also referred to].

Channell, J.—In this case there is a claim for damage to certain bales of cotton, carried for the plaintiffs by the defendants under a bill of lading, and a good many questions arise as to whether there was a warranty of fitness of the vessel in which they came, and also as to the exceptions and immunities given by the bill of lading incorporating the Harter Act of America. I do not think there is any real difficulty in deciding what are the principles applicable to the case, except on one small point. There is no real dispute about any of the facts. The water which did the damage came into the vessel at the port of loading soon after the bales of cotton were put on board, and it came in through three apertures at various points in the vessel from the outside. The sea water, or river water, came into the vessel through a sea-cock, or an inlet from the outside, which was used to let in the water for the purpose of filling the ballast tanks. The damage happened at night, and on the previous day to its happening that sea-cock had been used for the purpose of filling right up—hardening up—No. 4 ballast tank, which had been full before, but which it was desirable to make quite full before going to sea. That was a proper operation. On the same day the bilges and some of the other ballast tanks, I think, had been drained, and, that having been done, the sea-cock was opened and left open for a period of about three hours, which would be the correct way of hardening up this ballast tank, and filling it completely full, and would be a proper operation to undertake. What was done was, about four or five o'clock—I forget the exact hour—the valve was opened for about three hours, and ought to have been, and, as I think, had been closed down before the chief engineer came on board and looked round the place at about eleven o'clock at night. Early the next morning, at about half-past five, the stoke-hold was found with a great deal of water in it, as much as 4ft. of water, which had obviously come in during the night, and, so far as regards the particular aperture which I am dealing with—the sea-cock—it became evident after a time that what had happened was that some small obstruction had got into the valve, and had prevented the valve being closed right down. When the second engineer went and closed it the night before he had screwed it down as hard as he could, but it was obvious that something had got into the valve that prevented its being closed quite down, so that the water continued to come in as soon as there was any outlet in the pipe, and let it come out at the other end. It continued to have pressure to come in through this small aperture. By opening up the valve and pumping water through it, the obstruction was got rid of. What had happened, therefore, was that there was an obstruction in the valve, and that it was screwed down as far as it could be. That was what had let water in from the outside into the vessel, and I think from that description it is clear that it was in the ordinary term—it is not a very appropriate term if one did not understand it—a peril of the sea. It was an ordinary accident by which the sea water got in by accident. I do not see how one could find that there was any negligence there, because it was agreed that the man who screwed down the valve, and screwed it down as far as he could, could not know for certain that it had been screwed down absolutely tight if there was an obstruction, and so preventing it going any further.

Now one comes to the next aperture through which the water has to come. The water coming in in that way comes into a pipe which takes the water when it is being let in purposely into one or other of the ballast tanks. That is to say, where the valves are which were closed in reference to the tanks which were not desired to be filled, but open of course with reference to the one that has to be filled. That valve chest has a lid on it and fastened down to a flange by bolts and screw nuts, and screwed down in that way. I suppose it is screwed as close as it can mechanically be in that way, but made watertight as a joint with lamp cotton and tallow. The joint had been remade about a fortnight or three weeks before this accident; and if it had been properly remade at that time it ought to have lasted more than three weeks. I had not any definite evidence as to the exact life of it—the time that it would be expected to go without being renewed again. The practice is to renew it or to remake it at a convenient opportunity on every voyage; but if it had been thoroughly well done it ought to have resisted not only the pressure which it would have during the three hours or so when the sea-cock would be opened for the purpose of hardening up the tank, but it ought to have been good enough to resist the pressure somewhat longer than that

Therefore the joint could not have been made quite as good as it ought to have been, but it was good enough to stand the pressure for a considerable time, and probably good enough to stand all the pressure which it would have had during the ordinary operation of hardening up the tank. That I shall come back again to presently, as it is a point which appears to me to be of some difficulty. The next thing that happened was this: If there had been nothing but those two apertures the water would not have got to where the bales of cotton were, because they were in the No. 2 hold, and No. 2 hold had between it and the stokehold a bulkhead which ought to have been watertight. It was described in the plan of the ship as a watertight bulkhead, and had got in it, and properly got in, certain apertures, amongst others a thing described as a sluice valve to let the water get off from one to the other and let it get to the pumps. It was a proper thing to be there, and which ought to have opened at times, and a thing which ought to have been shut down so as to be shut watertight. It could not have been so on this occasion, because there is no other way in which the water could have got through the stokehold into No. 2 hold, where it did in fact get, and did damage to the cotton. The consequence is what must have happened was that that sluice valve could not have been properly screwed down. It is important to recollect that that sluice valve had for a proper purpose been opened on the previous day. It had been opened for the purpose of draining out the bilges and No. 2 hold, I suppose, if there were any water in and it had been opened for a proper purpose. Therefore the time at which it had been improperly shut was on the previous day, and when the goods were already on board. That is important for a reason I am coming to presently.

Now, these being the facts, and there being three apertures through which the water could get, it did get through and did damage to the bales of cotton. Under those circumstances I have to consider whether the shipowners are liable for it. Mr. Bailhache puts his case first upon the warranty of seaworthiness, as it is called in general terms; but it means a little more than what is described, unless one was familiar with the term "seaworthiness." It means that the vessel must be fit for carrying the goods on the voyage in question, including, of course, such matters as the state of the refrigerating machinery when the goods to be carried consist of meat on a long voyage, and things of that sort. So it means a little more than what one would call in ordinary language seaworthiness, it means it must be fit for the carriage of the goods upon the voyage in question. Now it is, I think, perfectly clear that apart from the Harter Act and other matters, that warranty is an absolute warranty; that is to say, if the ship is, in fact, imperfect at the time when the warranty begins, when it ought to be perfect, it does not matter that it is from some latent defect which the shipowner does not know of, even if he has used his best endeavours to make the ship as good as it can be made. That question about his endeavour to make it good only arises under a special clause under the Harter Act. But the one thing which appears to me also clear is that the warranty of seaworthiness is a warranty of the condition of the vessel at a particular time; it is not a continuing warranty. Take the ordinary warranty of seaworthiness for the voyage, and leaving out the special matter of putting the goods on board before for the moment, the ordinary warranty is that the ship at the time she sails is fit for the voyage on which she is sailing; that she is then fit, and that she is in such a condition as to stand the ordinary perils of the voyage which might then be expected to happen during the voyage. There is no warranty that she shall continue fit during the voyage. If anything happens during the voyage whilst the goods are there in the custody of the carrier, the carrier is liable because he is an insurer, unless it happens from some cause as to which he is protected either by the common law or by the exceptions in his bill of lading. His liability then for anything that happened after the vessel sailed does not depend upon there being a breach of a warranty that the ship shall continue fit; it depends upon his position of carrier. That is the case in reference to the ordinary warranty of seaworthiness on the voyage beyond all question. So, too, it is equally clear that there is no warranty when the goods are put on board at a port of lading that the vessel is then fit to start on a voyage. It would be absurd that there should be, because, of course, during the time, after the goods are put on board, and whilst the vessel is still loading, there are a great many things that require to be done, and before the vessel does start is the most natural time to do them. Therefore it would be ridiculous to say that there was then a warranty that the vessel was then fit to start on her voyage. She must be made fit to start on her voyage before she does start, and when she does start there is a warranty that she is then fit for the voyage. The effect of it is, as has been held, that when the goods are put on board there is a warranty that the vessel is there and then fit to receive them. Then Mr. Bailhache says that warranty differs somewhat from the warranty of seaworthiness at the time of the vessel's sailing. He says that warranty is a continuing warranty, and that the vessel must be fit to receive the goods at the moment when they are put on board, and must remain fit during the period of loading, and until she gets ready to sail, and until the larger warranty takes effect. Now there is very little authority about the warranty as to the vessel being fit to receive the goods at the time when they are loaded, and no direct authority upon it. One has to consider it as a matter of principle and, as a matter of principle, I do not think there is any real difficulty about it. I think one must apply the rule which one would have to apply when the voyage is in stages. When a voyage is in stages the warranty is that on starting on the particular stage of a voyage she is fit for that stage. If she is going to an intermediate port she has to have coals to take her to that port, but she is not bound to have coals to take her the whole voyage. It is a separate warranty for each stage of the voyage. I think one must apply precisely that rule to the loading stage of a vessel when she is loading in a port and when there is a warranty at the time when the goods are put on board that the vessel is fit then to receive them. I think that is a warranty that she is then fit to receive them, and is then fit to stand the ordinary perils and chances

which must be expected to be likely to take place during the period of loading, treating that as a separate stage in the voyage and a separate warranty for the purpose; that there is no warranty during that stage, that all through that stage the vessel shall continue notwithstanding anything that happens to her, to be fit for the goods to be put on board, but that, at the commencement of that stage when the goods are put on board, there is the warranty that the vessel is then fit to receive them and is then in a condition fit to stand the ordinary perils that can ordinarily be expected to take place during that particular stage of the proceedings and until the vessel is ready to go to sea, when she must be fit to go to sea. The reason of that is just the same reason as there is for so holding in reference to the warranty of seaworthiness which takes effect from the time when the vessel goes to sea. The goods then on board are in the custody of the carrier, and he is an insurer of them, and he is then liable as a carrier for the goods if any damage happens to them, unless he is protected by some clause in his bill of lading or by some other thing that gives him protection. I think there is nothing whatever to the contrary. The cases where exceptions have been dealt with, and it has been considered whether they applied to that stage of loading, all seem to me to be really consistent with that view of the matter. Mr. Bailhache says that the case of *The Southgate* is contrary to all the rest of the cases. I think that is the case he referred to. No doubt that case arrives at a somewhat different result to what other cases arrive at; but it seems to me it was approached from the same point of view. When you are considering whether or not there is an immunity applicable to that particular stage, or to something that happens during the stage of loading, the courts have always looked at the words to see whether the words are such that they can apply to a thing happening during that stage of the loading. In some cases they have come to the conclusion that the words used do apply to the stage of loading, and in some cases they have come to the conclusion that the words do not; but they have not said it is unnecessary to consider this, because during that stage there is a continuing warranty. Therefore, it seems to me, all the cases really are consistent with that view, that that warranty is a similar warranty to the other warranty, that it is a warranty that at a particular time—that is to say, when the goods are put on board, and when this stage of the matter of the transit of those goods—namely, when they are not actually in transit, but while the vessel is loading—at that stage of the matter there is a warranty at the commencement of it for the condition of the vessel as being fit for that stage of the proceedings. But it is not a continuing warranty any more than the other, and if anything happens during that stage, then you have to consider whether or not there is a breach of warranty, because if there had been a breach of warranty at the commencement of the voyage there would have been an end of it.

Proceeding upon that view of the matter, I have to consider whether there was any breach of that warranty of seaworthiness at the time in question. I think it is quite clear that if there was a breach of the warranty at the commencement of that stage when the goods were put on board the exceptions would not apply unless you can find express words specifically dealing with the warranty. There is one case, the case of the *Goods ex Laertes* (57 L. T. Rep. 502; 12 P. Div. 187), I think it is, where the words were such that the courts held that these words did show that the parties intended to alter the warranty that would otherwise be implied. But you want express words for that purpose, and ordinary words, giving immunity to the carrier, mean immunity from his liability as carrier, and do not alter the warranty as to the fitness of the vessel. Now, that being so, I now come to the question, Was there a breach of this warranty? The apertures, as I have called them, through which came the water, have to be considered in reference to this. First of all, I will begin from the hold. There is the sluice valve there which was left open. I think, upon the facts as I have stated them, that it must have been left open on the night before, and after the goods were put on board. It does not seem to me that that is a breach of the warranty of seaworthiness, as I have interpreted it. If that had happened before the goods had been put on board I think it would, because what had happened was that there was an aperture which in the ordinary state of things ought to have been closed except when it was being used, and it was imperfectly closed. It was not, obviously, left open. It was imperfectly closed and consequently it was in a dangerous state. If that had existed at the time when the goods had been put on board in all probability it would have been a thing which would have amounted to a breach of the warranty, because where you have a thing to be used such as portholes, or sea-cock, or anything that may be the source of danger, if it is negligently used the mere existence of that is not a defect, nor is it a defect, it has been said, to go to sea with a portholes open in fine weather, because you may expect to get warning of any storm that is coming on which would enable them to be shut in time. But it is a defect to go to sea with a porthole improperly closed which you believe to be closed and which ought to have been closed, such as a cargo port, which is a thing you cannot conveniently close after you get to sea. That has been held to be a defect in the case of *Dobell and Co.* v. *Steamship Rossmore Company Limited* (8 Asp. Mar. Law Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 408). So that in this case this sluice valve, left as it was negligently, if that had happened before the goods had been put on board, then being, in a case like that, as it may very likely have been, found out afterwards, I think that might be said to be a defect; but as we know it was in use the night before after the goods had been put on board it is a mere negligence during the time when the goods are on board at the risk of the carrier, and, therefore, the question will be whether that was protected as a thing done in the management of the ship, or is under one of the other clauses which protect him; but it is not in my judgment a breach of the warranty of seaworthiness or of fitness of the vessel for the purpose of the carriage of the goods. As to the sea-cock, it was intended to be closed and was apparently insufficiently closed, and therefore in a dangerous condition, but that took place after the goods were on board, and was therefore not a breach

of the warranty. The next question is one that has given me some trouble: Is the valve chest leaky? Now, as to that, the result proves that there was a defect. It was a defect that was not known of. There was, I suppose, some amount of negligence on the part of the man who made it, but for the purposes I am now upon it is unnecessary to consider negligence. I shall consider the Harter Act presently. There was a defect in this in fact in the sense that it was not as good as it ought to have been. It appears to have been good enough to stand a certain amount of pressure, and was good enough apparently. We do not know, but the water may have been oozing through during the three hours. It was not rushing through during the three hours. It stood fairly the period of pressure during which the ordinary operations of opening the sea-cocks for the purpose of hardening up the tank were going on; but it did not stand the further pressure. I should have had, and have some doubt now, as to whether or not that is a defect in the condition of the vessel rendering it unfit for the services of the carriage of these goods, or unfit for the service of keeping the goods there in No. 2 hold, whilst the rest of the vessel was being loaded up, and before she went to sea. I think this is the matter I have the greatest doubt about. It is a question of fact to be determined by certain rules. The vessel has to be fit for everything that may reasonably be expected. A vessel has to go to sea not merely in a state in which she can make her voyage safely if she happens to have the good luck to have perfectly fine weather during the whole of the time, but she must go to sea in such a state as to resist ordinarily bad weather such as may be expected, and reasonably expected, during the voyage; she is not bound to be in a state to resist all the accidents that may happen to her. Now, this case seems to be quite on the line. I have been trying to get a guide upon it. In one of the text books I find certain propositions. The propositions are of great authority, but are not legal authority, because the author is alive. He has put it in this way: "A vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage, having regard to all the probable circumstances of it. To that extent the shipowner, as we have seen, undertakes absolutely that she is fit, and ignorance is no excuse. If the defect existed the question to be put is, Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking": (Carver on Carriage by Sea, 3rd edit., sect. 18). Now, applying that to this case, I cannot help thinking that any prudent owner, if he had known that that joint was not good enough to resist a five or six hours' pressure in the pipe would have immediately said to his engineer, "Go and make good that joint at once," although it was just perhaps good enough to stand the three hours' pressure during which the tank was being hardened up. Therefore it seems to me that I must hold that that was a defect, and if it was a defect on the day the damage happened it was a defect when the warranty took effect, and the goods had been put on board, because the joint had been made in the way in which it was made some three weeks before. It seems to me, therefore, that the breach of warranty is made out, and that, therefore, unless the true effect of this bill of lading, as combined with the Harter Act, is to limit or affect or alter the warranty that would otherwise be implied, unless that is the true construction of this bill of lading, then it seems to me that the shipowner is liable. That being so, I may take the rest of the matter shortly, because it is quite clear that that is not the effect of this bill of lading. The conclusion I have come to is that if that defect had not existed, or if that had not been a matter that I must hold to be a breach of the warranty of seaworthiness, then I think that the shipowner would have had, under this bill of lading embodying the Harter Act, a sufficient immunity to protect him. I think that in substance the only things that could have been alleged as causing the damage would have been either perils of the sea or something happening in the management of the ship within the meaning of those words. I think also that there are words in the bill of lading itself, apart from the Harter Act, which would have protected him. Now, the operation of embodying the Harter Act is peculiar, no doubt. I see it was said by Lord Esher in the case of *Dobell and Co.* v. *The Steamship Rossmore Company* (reported in 1895, 2 Q. B. Div., at p. 408)—a case where exactly the same thing had been done as in this case—that the effect appeared to be to insert provisions twice over, and that, although it would do no harm, it would be clumsy to the last degree. Without criticising that, in my view there are excellent reasons for putting in such a clause as this. The Harter Act applies to goods shipped to or from America, and the contract to ship them may be made at one end of the voyage, or it may be made at the other. There may be questions of the greatest possible difficulty arising, especially as the bills of lading may be indorsed to somebody else, and so on—questions of the greatest possible difficulty about which law, the law of one country or another country is to govern; and I should think it would be only a business-like arrangement by anyone shipping goods to or from America to prevent difficulty arising, as to whether the Harter Act applied, or whether it did not, to say in the bill of lading, "We will be bound by the Harter Act." If they are bound by it because they are American subjects, and American law prevails with reference to it, they are doing something that is not necessary; but if it turns out that they would not have been bound by it because they were not American subjects, or because the contract was made elsewhere, or any other reason, then they have provided for those difficulties by saying, "We will be bound by it." It seems to me that is the sort of case the provisions embodying the Harter Act is to affect. There is a clause in this bill of lading in general terms, professing to relieve the shipowner from the consequences of any negligence in certain particular cases specified in the clause.

Now, the Harter Act in its first clause says that as to certain things specified in that Act you must not limit your liability for negligence, and if you do the stipulation is to be null and void. The next clause says that you must

not limit your responsibility. It seems to me that so far as regards those two clauses the effect of incorporating the Harter Act is very much as if the parties had said: "If we have in the general terms of our exemptions inadvertently, or otherwise, included anything which the Harter Act forbids, then we deem that part of our clause to be null and void; we do not mean to do that. We mean that clause to be null and void. If we have, in the more extended exemption which we have put in, included something that would be dealt with by the 1st or 2nd section of the Harter Act, we do not mean that to apply." Therefore they cut down their own contract by that stipulation. Then, again, I think that the 3rd clause of the Harter Act gives immunity for certain matters happening during the voyage. Speaking in general terms, it gives such immunity as had been commonly provided for in bills of lading, but it gives it upon special terms only, the special terms that it shall only be given if the shipowner has used due diligence to make his vessel seaworthy. That is a qualification upon that immunity, and it seems to me that, if an immunity had been given in the same words as these by the express words of the bill of lading, then when that bill of lading went on to incorporate the Harter Act it would make the immunity of the shipowner subject to that qualification. Those seem to me to be the two effects of incorporating the Harter Act, but I do not think either of them affect the present question, because they have nothing to do with the qualification of the warranty of seaworthiness. If in this case I had come to the conclusion that the defect in the lid of the valve chest was not a defect making a breach of the warranty of seaworthiness, then, of course, it would have been no defect, and no question would arise about the owners having done their best to make it seaworthy, because they would have made it so already, and therefore the qualification upon the immunity given by the 3rd section would not arise. Now, I think "in the management of the vessel," upon the cases, would apply to these things that are complained of during the period of loading. They are things that take place during the time that the shipowner has possession of the goods as carrier, and when he wants that immunity, as it seems to me, both by words in the bill of lading in this case and by the words of the Harter Act, he would have it. I do not think anybody could reasonably say that the words of the Harter Act affect the warranty of seaworthiness; and if they could say it at all, I do not think they could say it after the case of *Dobell and Co.* v. *Steamship Rossmore Company Limited*, because I think that is an authority. If they could not, the result seems to me in the present case, owing to the unfortunate fact—unfortunate for the shipowner—that that joint was not so effectively made as to resist the pressure under which it was subjected, I think I must hold that that defect existed at the time the goods were put on board; that it was a breach of the warranty which the shipowner then entered into, and the legal consequence is that he becomes liable for this damage.

Judgment for the plaintiffs.

Solicitors: for the plaintiffs, *Thomas Cooper* and *Co.*; for the defendants, *W. A. Crump* and *Son.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 22, 23, *and* 24, 1904.

(Before Gorell Barnes, J.)

THE GUSTAFSBERG. (*a*)

Collision—Narrow channel—Starboard-hand buoys in open waters—Regulations for Preventing Collisions at Sea 1897, *art.* 25.

The steamship R. *proceeding up Sea Reach, river Thames, on the starboard hand side of that portion of the river which lies to the southward of the four red conical lighted buoys placed in Sea Reach to mark the northen side of the deepest water in the channel, came into collision with the* G., *which was proceeding down Sea Reach. The four red conical lighted buoys were nearly in the central line of the reach, and there were other buoys nearer the northern and southern banks of the reach marking the limits of the navigable water. The owners of the* G. *contended that as the* R. *was to the south of the central line of the stretch of water between the buoys marking the northern and southern limits of the navigable water she had infringed art.* 25 *of the Regulations for Preventing Collisions at Sea, and was to blame for the collision.*

Held, that although physical conditions remained the same an alteration in lights or marks which affected the usual way of navigating a particular stretch of water may make a portion of that stretch a narrow channel because of the convenience which the lights or marks give for the purpose of navigation, and that the four red conical buoys being by their form and colour starboard hand buoys the R. *was right in treating that portion of the reach which lay between them and the buoys marking the southern limits of the navigable water as a narrow channel within the meaning of art.* 25 *of the regulations.*

Action of damage by collision.

The plaintiffs were the Société Anonyme John Cockerill, the owners of the steamship *Rubis*, of Antwerp. The defendants were the owners of the Swedish steamship *Gustafsberg*.

The case is reported on the question of the effect produced by the placing of lights or marks in open waters by the properly constituted authority for the convenience of navigation with reference to art. 25 of the collision regulations.

The collision occurred about 10 p.m. on the 3rd Aug. 1904, in Sea Reach of the river Thames, above No. 2 and below No. 3 red conical lighted buoy and to the south of the line made by them, and on the starboard hand of the channel, which lies between the Nore sand buoys and the red conical lighted buoys; the wind was a light breeze from the east-south-east, the weather was fine and clear, and the tide ebb of the force of about two knots.

The case made by the plaintiffs was that the *Rubis*, a twin screw steamship of the port of Antwerp of 633 tons gross register, manned by a crew of sixteen hands all told, was in Sea Reach on a voyage from Ostend to Tilbury with a general cargo and one passenger.

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

The *Rubis* was making about twelve knots an hour over the ground with her engines working full speed, and was proceeding upon the starboard side of the channel which lies between the red conical gas-lighted buoys and the Nore sand buoys on a course of N.W. by W. ½ W. magnetic. Her regulation lights, including a second masthead light and stern light, were being duly exhibited and were burning brightly, and a good look out was being kept on board of her.

In these circumstances the two masthead lights and green lights of the *Gustafsberg* were seen one and a half to two miles off bearing a little on the port bow.

The *Rubis* proceeded on the same course and at the same speed, and the masthead and green lights of the *Gustafsberg* gradually drew ahead of the *Rubis* and then on to her starboard bow, and just after this the *Rubis*, having arrived off the No. 2 buoy, the vessels being then starboard to starboard, the helm of the *Rubis* was starboarded to get on a W.N.W. course parallel with the line of No. 2 and No. 3 buoys, and two short blasts were at the same time sounded on her whistle. The *Rubis* was directly afterwards steadied on a W.N.W. course.

The *Gustafsberg* continued to approach green to green for a short time broadening on the starboard bow, but as she got nearer she suddenly opened her red light on the starboard bow of the *Rubis*, and sounded one short blast on her whistle. The engines of the *Rubis* were immediately stopped and put full speed astern, and three short blasts were sounded on her whistle, but the *Gustafsberg* came on at great speed, shutting in her green light, and three short blasts were again sounded on the whistle of the *Rubis*, but shortly afterwards the *Gustafsberg* with her port side about amidships struck the stem of the *Rubis*.

The plaintiffs charged the defendants with improperly porting, with failing to slacken speed, or stop or reverse their engines, and with neglecting to keep on the starboard hand side of the channel.

The defendants' case was that the *Gustafsberg*, a Swedish screw steamship of 1155 tons gross register, manned by a crew of twenty hands all told, with a coasting pilot on board, was on a voyage from the Surrey Commercial Dock to Blyth in ballast.

The *Gustafsberg* was proceeding down on the south side of mid-channel, having shortly before passed well to the southward of No. 4 occulting gas buoy, and was heading about east-south-east by compass, and making about eight or nine knots through the water. Her regulation lights were being duly exhibited and were burning brightly and a good lookout was being kept on board her.

In these circumstances those on board the *Gustafsberg* observed about five miles off and about ahead slightly on the starboard bow the two masthead lights of the *Rubis*. The lights were carefully watched, and as the *Rubis* approached her red and green side lights also came in sight on about the same bearing.

Shortly afterwards the *Rubis* shut in her green light.

The helm of the *Gustafsberg* was thereupon ported half a point and steadied, the vessels being then red to red and in a position to pass all clear port side to port side.

The red light of the *Rubis* gradually broadened on the port bow of the *Gustafsberg*, but when the *Rubis* was about a mile off and about one to one and a half points on the port bow of the *Gustafsberg* she suddenly opened her green light and shut in her red light.

The whistle of the *Gustafsberg* was at once sounded one short blast, and her helm was ported. The *Rubis*, not sounding any whistle, the whistle of the *Gustafsberg* was again sounded one short blast and her helm put hard-a-port, and shortly afterwards the *Rubis*, still keeping her green light open, but broadening on the port bow of the *Gustafsberg*, the whistle of the *Gustafsberg* was sounded a long blast and her engines were slowed. When about a ship's length off the *Rubis* sounded three short blasts. The engines of the *Gustafsberg* were at once stopped, but the *Rubis* coming on at a great speed came into collision with the *Gustafsberg*, striking with the stem the port side amidships of the *Gustafsberg*, doing her great damage.

After the collision the *Rubis* was hailed to stand by, but the *Rubis*, without waiting to ascertain whether the *Gustafsberg* required assistance, steamed away.

The defendants charged the plaintiffs with improperly starboarding their helm, with failing to slacken their speed or stop or reverse their engines, and with failure to keep to the starboard side of the fairway or mid-channel which lay on her starboard side.

The red conical buoys mentioned in the case had been placed in Sea Reach in pursuance of the following notice:

Notice to Mariners (*a*).—River Thames.—Sea Reach.—Trinity House, London, E.C., 6th May 1904.—It is intended, on or about the 7th July next, to place four red conical lighted buoys to mark the northern side of the deepest water through Sea Reach. The width of the deepest water is at present about 650ft. The buoys will be named Sea Reach, numbered from seaward 1 to 4, and will lie in about 26ft. at low water spring tides. No. 1 will be situated approximately south 2 miles 5½ cables from St. Andrew's Church, Shoeburyness, and will show a light giving two white flashes about every ten seconds. No. 2 will be situated approximately S. ¾ E. 1 mile 3 cables distant from Southend Pier light, and will show a white light giving one occultation about every ten seconds. No. 3 will be situated approximately N.E., 1 mile 6 cables from Yantlet Beacon, and will show a light giving two white flashes about every ten seconds. No. 4 will be situated approximately N. ½ W. Wly. 1 mile 5 cables from Yantlet Beacon, and will show a white light giving one occultation about every ten seconds. The light on the East River Middle Buoy will at the same date be discontinued, and the spherical buoy thereat (painted in black and white horizontal bands) will be surmounted by a diamond top-mark. Further notice will be given when the above changes have been made. A uniform system of buoyage is observed all round the coast, and the Channel Pilot, part 1, South Coast of England, 9th edit., published by order of the Lords Commissioners of the Admiralty in 1900, at page 29, contains the following statements about it:

Uniform System of Buoyage.—The system of buoyage adopted on the coast of England is as follows:—1. The mariner when approaching the coast must determine his position on the chart, and must note the

(*a*) Note.—The character of the buoys referred to in this notice has since been altered in pursuance of a notice issued by the Trinity House on the 19th Jan. 1905, which is set out at the end of this report.

direction of the main stream of flood tide. 2. The term starboard hand shall denote that side which would be on the right hand side of the mariner either going with the main stream of flood or entering a harbour, river, or estuary from seaward; the term port hand shall denote the left hand of the mariner under the same circumstances. 3. Buoys showing the pointed top of a cone above water shall be called conical, and shall always be starboard hand buoys as above defined. 4. Buoys showing a flat top above water shall be called can, and shall always be port hand buoys as above defined. 5. Buoys showing a domed top above water shall be called spherical, and shall mark the ends of middle grounds. 6. Buoys having a tall central structure on a broad base shall be called pillar buoys, and like other special buoys, such as bell buoys, gas buoys, &c., shall be placed to mark special positions either on the coast or in the approaches to harbours. 7. Buoys showing only a mast above water shall be called spar buoys. 8. Starboard hand buoys shall always be painted in one colour only. 9. Port hand buoys shall be painted of another characteristic colour either single or particolour.

Colouring of Buoys.—In carrying out the above uniform system, the colours adopted by the Trinity House, London, Admiralty, and principal harbour authorities are whole colours on the starboard hand and particolours on the port hand.

Art. 25 of the Collision Regulations is as follows:

In narrow channels every steam-vessel 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 vessel.

Evidence was called which showed that two-thirds of the vessels entering and leaving the river Thames used the waterway between the red conical buoys and the buoys on the south shore, and treated it as being a narrow channel.

Laing, K.C. and *Dawson Miller* for the plaintiffs, the owners of the *Rubis*.—The *Gustafsberg* is to blame for improperly porting, for being on the wrong side of the channel, and for not stopping her engines sooner. The narrow channel, which was being navigated by the *Rubis*, is bounded by the red conical buoys on the north side, and the Nore Sand to the south, and those on board her were right in thinking that art. 25 applied to that stretch of water. The placing of the red conical buoys in this reach may have had the effect of making two channels, the one to the north of them for light draught vessels, another to the south of them for those of deeper draught, if so those on the *Rubis* were right in navigating the channel as they did.

Aspinall, K.C. and *Stubbs* for the defendants the owners of the *Gustafsberg*.—The *Rubis* improperly starboarded, she did not slacken her speed soon enough, and she was in her wrong water. The four red conical buoys only mark the northern edge of the deepest water in Sea Reach; there is only one fairway or mid-channel within the meaning of art. 25 in the reach, and the red buoys are in about the centre of the channel. These buoys occupied the same position in this reach as the Swin Middle Lightship did in the channel between Foulness and Middle Sands:

The Oporto, 75 L. T. Rep. 599; 8 Asp. Mar. Law Cas. 213; (1897) P. 249.

The *Rubis* therefore was wrong in not keeping them on her port hand, and she was in her wrong water. [GORELL BARNES, J.—The red buoys are starboard hand buoys; would not incoming vessels be right in treating them as such?] The purpose of these buoys is to mark the northern limit of the deepest water in Sea Reach, other buoys near the north and south banks mark the edge of the navigable channel. If these buoys indicate a narrow channel to the south of them they are improper, for vessels coming into the Thames will come in with these buoys on their starboard hand, and so may use a greater part of the river than vessels going out, which would be restricted to the southern half of the channel between these buoys and the south bank. They also referred to:

The Blue Bell, 72 L. T. Rep. 540; 7 Asp. Mar. Law Cas. 601; (1895) P. 242;
The Minnie, 71 L. T. Rep. 715; 7 Asp. Mar. Law Cas. 521; (1894) P. 336;
The Corennie, (1894) P. 338.

Laing, K.C. in reply.—Anyone seeing these red conical buoys would treat them as starboard hand buoys, and those on the *Rubis* are not to blame for doing so.

GORELL BARNES, J.—This is a case of collision which took place a little after 10 p.m. on the 3rd Aug. 1904 in Sea Reach, river Thames, between the steamships *Rubis* and *Gustafsberg*. The weather was fine and clear; there was an ebb tide of about two knots. The *Rubis* is a vessel belonging to Antwerp, of 633 tons gross. She is manned by a crew of sixteen hands, and was inward bound from Ostend to Tilbury with general cargo and one passenger. The *Gustafsberg* is a Swedish steamer of 1155 tons gross, and she was on a voyage from the Surrey Commercial Docks to Blyth, manned by a crew of twenty hands and a coasting pilot. These two vessels met in collision above No. 2 and below No. 3 red conical lighted buoy, and to the south of the line of the same, and on the starboard side of the channel which lies between the Nore Sand buoys and the red conical lighted buoys, the stem of the *Rubis* striking the port side of the *Gustafsberg* about amidships. The broad feature of the plaintiffs' case is that they had the masthead and green lights of the *Gustafsberg* a little on the port bow at first, and that those lights drew ahead and on to the starboard bow, and that after they had done so the *Rubis*, having arrived off No. 2 buoy, and when the vessels were starboard to starboard, altered her course from N.W. by W. ½ W. to W.N.W., for the purpose of bringing herself on to the slightly altered course necessitated by the different line of the buoys, and gave two short blasts at the time with her whistle, and steadied on the changed course. Then the case is shortly this, that, when the vessels had continued to approach and were green to green, the *Gustafsberg* ported across the bows of the *Rubis*, and the moment that was seen the engines of the *Rubis* were reversed full speed, and three short blasts were blown twice with the whistle. The point therefore of that case is that the vessels were at the material time green to green, and that the fault lay with the defendants in porting into the plaintiffs' vessel. On the other hand, the defendants' case is that when the lights of the *Rubis* were first made out on the *Gustafsberg* she was a little on their starboard bow and showing all her lights—in other words, that the

Gustafsberg was ahead of the *Rubis*. The defendants say that the *Rubis* then shut in her green light, and that thereupon the *Gustafsberg's* helm was ported slightly, and the vessels became port to port for a short time; and that afterwards the *Rubis* starboarded, and by starboarding brought about the collision, opening her green light on the port bow of the *Gustafsberg*. The evidence of those on the *Gustafsberg* is that various steps were taken by porting and slightly altering her speed, but that this collision took place. In short, the plaintiffs' case is that these vessels were green to green, and the *Gustafsberg* ported into the *Rubis*. The defendants' case is that they became red to red, and that the *Rubis* improperly starboarded. There is no doubt that the *Gustafsberg* ported and hard-a-ported, and that that was going on for some time; and, as far as the helm action of these vessels is concerned, the only question in the case is whether the helm of the *Rubis* was starboarded. I have come to the conclusion it was not. I accept the version of the story told by the master of the *Rubis*. In addition, the courses of these two vessels were slightly crossing, and, taking the account given by those on the *Gustafsberg* as to the seeing of all the lights of the *Rubis* on their starboard bow, and also the evidence given by them as to there being an intention on their part to pass out of the channel which lies between the lights and the south shore at a lower point than where this collision happened, it seems to me that the version of the story told by the master of the *Rubis* is supported. Then there comes the question of the damage. The plaintiffs' surveyor says that the blow was a blow leading aft on the *Gustafsberg* at an angle of five or six points; the defendants say that the blow led forward at an angle of something like seven points forward. There is a conflict of evidence as to it, but my impression is that the evidence given by the plaintiffs' surveyor is entitled to the greater weight, and the result seems to me that the porting of the defendants' vessel admits of a conclusion that that was sufficient alone to produce the collision, and that the defendants' vessel must be held to blame for porting. In addition, it is quite clear to my mind, and the Elder Brethren agree, that the defendants' vessel was not justified in keeping on as she did, and ought to have stopped and reversed her engines as soon as any danger became manifest. On both these grounds the *Gustafsberg* must be held to blame. The plaintiffs' vessel, the *Rubis*, did not starboard, and I think it is clear that her engines were stopped and reversed as soon as any danger was seen, that is, when the red light of the *Gustafsberg* was opened on her starboard bow, so the points attempted to be made against the plaintiffs as to their navigation fail.

This leaves for consideration one point under art. 25 of the collision regulations. Now, the merits of the case do not depend upon the application of this rule at all, because it is clear that on this fine, clear night, when these vessels saw each other for a long distance, they each were navigating for the other just as if they were in the open sea. At the same time, though it has no practical application, it exists, and if it is broken it would be difficult to say that the vessel which broke it was not by any possibility in fault, because if she had not been in the position where she was there would have been no collision. The only point necessary for me to decide is how far this article affects the *Rubis*. I say that for this reason: whether the defendants are right or wrong with regard to their vessel having broken art. 25 does not matter, because they are to blame for other reasons. It is necessary to see, however, how this article affects the plaintiffs. Now, art. 25 provides that: "In narrow channels every steam vessel shall when it is safe and practicable, keep to that side of the fair way or mid-channel which lies on the starboard side of such vessel," and it is necessary to see what the navigation at the place of this collision is. It is in a wide part of Sea Reach, speaking generally, opposite Southend and before these lighted gas buoys were placed there by the Trinity House there were buoys on the south side, one of these being the Jenkin Buoy, which is now a gas buoy. There were on the north side of the channel the black buoys, the West River Middle, and the River Middle, and the East River Middle, which was a spherical gas buoy; between the rows of buoys on the north and south side the traffic passed. A short time before this collision the Trinity House placed four gas buoys, known as 1, 2, 3, and 4, which are now shown on the chart, and took away the light from the buoy called the East River Middle. Those gas buoys were placed in the position shown on the chart, and a notice was published on the 6th May, which ran as follows: "It is intended on or about the 7th July next to place four red conical lighted buoys to mark the northern side of the deepest water through Sea Reach. The width of the deepest water is at present about 650ft. The buoys will be named Sea Reach, numbered from seaward one to four, and will lie in about 26ft. at low water spring tides." Then follows approximately the situation of the buoys, and the notice further says: "The light on the East River Middle buoy will at the same date be discontinued, and the spherical buoy thereat (painted in black and white horizontal bands) will be surmounted by a diamond top mark. Further notice will be given when the above changes have been made." I understand those changes were made on or about the 7th July. Now, the buoys that were so put are not only lighted buoys, but they are conical buoys of uniform colour; and that appears to be in accordance with the uniform system of buoyage on the coast of England, particulars of which are set out in the Channel Pilot. The statements of information contained in that book as to this system are as follows: "(2) The term 'starboard hand' shall denote that side which would be on the right hand of the mariner either going with the main stream of flood, or entering a harbour, river, or estuary from seaward; the term 'port hand' shall denote the left hand of the mariner under the same circumstances. (3) Buoys showing the pointed top of a cone above water shall be called conical, and shall always be starboard hand buoys as above defined. (4) Buoys showing a flat top above water shall be called can, and shall always be port hand buoys as above defined." I need not refer to 5 and 6, they refer to another class of buoy, but No. 8 says: "Starboard hand buoys shall always be painted in one colour only. (9) Port hand buoys shall be painted of another characteristic colour, either single or parti-

colour." So that apart from any legal considerations we have four lighted conical buoys of uniform colour on the right hand side as vessels go up between those buoys and the south side, and we have on the south side several buoys which are can-shaped. There are the black and white chequer, the East Blyth, and the Yantlet, all can buoys and parti-coloured, and anybody seeing those buoys with knowledge of the locality, guided by the uniform system of buoyage adopted on the coast of England, would at once treat the passage between those two sets of buoys as being a passage on the north of which are starboard hand buoys and on the south of which are port hand buoys, within the meaning of the terms to which I have just referred in that statement of the system of buoyage. The effect of what has been done is that in accordance with the recognised practice of buoyage, there is an indication by means of the buoys of a narrow channel, within the meaning of art. 25, to the southward of the red conical buoys, and the evidence shows that that indication has been acted upon. It would not be reasonable, at any rate at night, and I am dealing with a night collision, and it is not necessary to go beyond the particular case, so far as my decision is concerned, though my observations may be more general, to hold that a vessel following those distinct starboard hand buoys is to be held to be wrong for treating the southern part of the river between those buoys and the buoys on the southern side as a narrow channel. The cases of *The Corennie* (*ubi sup.*), *The Minnie* (*ubi sup.*), and *The Oporto* (*ubi sup.*) are not directly in point, because there are differences which have been pointed out in argument, and to which I need not refer; but they do show that, physical conditions remaining the same, the alteration in lights and other marks which affect the usual way of navigating a particular part does have the effect of making what may be termed a large piece of water a narrow channel as to part of it because of the convenience which the marking and lights give for the purpose of navigation. What the precise effect of this is upon the northern piece of water which lies between the lighted buoys which mark the northern side of the deepest channel and the black buoys—namely, the West and East River Middle, I do not feel quite clear; and it is not necessary to decide whether that is a separate narrow channel or not. There is, however, this difficulty which I pointed out in the course of the argument, that, having two sets of starboard hand buoys going up river, if vessels going up river acted in in accordance with the recognised practice they would treat them as starboard hand buoys, but vessels coming down should not treat them as being other than starboard hand buoys and would require to keep right away to the south side of the river, acting for the port hand buoys. There is that difficulty, and it may well be—I am not sure whether it is or not—that this has the effect of leaving the greater part of the navigable water for vessels going up, and the smaller part of the navigable water for vessels going down. I am not sure what the exact position is as to that, and it is not necessary that I should determine that; but what I think is clear is that if vessels bound by the practice and by the reason of the thing do use the south channel, guided by the starboard hand buoys on the one hand and by the port hand buoys on the other, they do treat, and are right in treating, that as a narrow channel. I have asked the Elder Brethren who assist me what their view about that point is, and they consider that as matters stand, and as they stood at the time of this collision, vessels using the channel to the southward of the lighted red buoys do treat, and are right in treating, it as a narrow channel. It may be that the central part of this navigable water of the Thames might have been indicated by buoys of a description which were neither starboard hand nor port hand buoys. That is not a matter on which I feel competent to express an opinion, but it may possibly be that, having regard to certain difficulties which the facts of this case have brought out, the Elder Brethren of the Trinity House may consider whether it is well that matters should remain as they are, or whether the buoys should be such as would merely indicate that the central line of the river there is the central line, and not a line which has a starboard hand character. I must hold that the plaintiffs cannot be held to blame for proceeding as they did, and as the great bulk of the traffic appears to have proceeded, treating these buoys as marking the starboard hand of the narrow channel. The result must be that the *Gustafsberg* must be held alone to blame for this collision.

Solicitor for the plaintiffs, *Charles Harvey*.
Solicitors for the defendants, *Stokes* and *Stokes*.

Notice to Mariners (No. 4).—East Coast of England.—River Thames.—Sea Reach.—Trinity House, London, E.C., 19th Jan. 1905.—It is intended on or about the 9th Feb. next, without further notice, to substitute four pillar-shaped gas-lighted buoys for the four red conical gas-lighted buoys now marking the northern side of the deepest water through Sea Reach. The pillar buoys will be painted red, numbered from seawards 1 to 4, and will exhibit lights of the same character as those shown by the conical buoys.—By order, A. OWEN, Secretary.

Dec. 9, 10, *and* 12, 1904.

(Before GORELL BARNES, J.)

THE BRITANNIA. (*a*)

Collision—Fog—Fog signal heard forward of the beam—Duty of steam vessel to stop—Regulations for Preventing Collisions at Sea 1897, *art.* 16.

Two steam vessels came into collision in a dense fog off the coast of Portugal. Those on board the R., *the plaintiffs' vessel, while proceeding dead slow on a course of S.S.W., heard another vessel on the port quarter, which was apparently overtaking her, sounding a fog signal. While so proceeding those on the* R. *heard about three points on their port bow some distance away the fog signal of the* B. *The* R. *did not stop on first hearing the fog signal of the* B., *but the engines of the* R. *were reversed when the* B. *was seen about three lengths off on the port bow. The* B., *while proceeding slow on a course of N.* ½ *E. magnetic, heard the fog signals of two*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

vessels, one on each bow, and then heard the fog signal of the R. *a long way off. When it was distinctly made out and found to be one and a half points on the starboard bow, the engines of the* B. *were stopped, and after the fog signals of the two other boats had drawn clear of the* B. *her engines were again put ahead and the collision shortly after occurred.*

Held, that both vessels were to blame for the collision for not stopping their engines in accordance with art. 16 *of the collision regulations, for with regard to the plaintiffs' vessel, the* R., *the vessel on her port quarter was not a circumstance which justified her in departing from the rule, for the overtaking vessel was bound to stop when she found she was coming up with the* R.*; and with regard to the defendants' vessel, the* B., *the fact that a fog signal seemed a long way off could not excuse a departure from the rule, for distance and bearing cannot be exactly determined in a fog.*

ACTION of damage.

The plaintiffs were the owners of the steamship *Ribera*; the defendants and counter-claimants were the owners of the steamship *Britannia*.

The collision occurred about 7.10 a.m. on the 15th Sept. 1904, off the coast of Portugal, near the Burlings, the wind at the time being a light air and the weather a dense fog.

The case made by the plaintiffs was that the *Ribera*, a steamship of 3582 tons gross register, manned by a crew of twenty-eight hands all told, was on a voyage from Sunderland to Genoa with a cargo of coal. The *Ribera* was proceeding on a course of S.S.W. by compass with another vessel sounding her whistle apparently on the port quarter and overtaking her. The *Ribera*, with her engines going dead slow, was making about two or two and a half knots; her whistle was being regularly sounded for the fog, and a good lookout was being kept on board her. In these circumstances those on board the *Ribera* heard about three points on the port bow some distance away the fog signal of the *Britannia*. The *Ribera* immediately answered with a long blast, and thereafter the two ships approached each other, sounding their whistles, that of the *Britannia* broadening with each succeeding whistle. Presently, after a longer interval than that between any of her former signals the *Britannia* suddenly blew a long blast, and came into sight about three points on the port bow, about three ship's lengths off, apparently acting under a starboard helm. Thereupon the engines of the *Ribera* were reversed full speed, her whistle was blown three short blasts twice, and her helm was put hard-a-port, but the *Britannia* came on, and with her starboard side about the after rigging, struck the stem and port bow of the *Ribera*, doing her considerable damage.

The case made by the defendants was that the *Britannia*, a steamship of 3129 tons gross register, manned by a crew of thirty-six hands, was on a voyage from Patras to Liverpool. The *Britannia* was on a course of N. ¼ E. magnetic, and was proceeding at a speed of between two and three knots, the minimum speed at which the vessel could be kept under control. Her whistle was being sounded regularly for the fog, and a good look-out was being kept on board of her. In these circumstances, and while the whistles of two vessels, one on each bow of the *Britannia*, were drawing clear, the whistle of a third vessel, which proved to be the *Ribera*, was heard a long way off. As soon as it was distinctly made out, and found to be about one and a half points on the starboard bow, the engines of the *Britannia* were stopped, and when she had lost her way her whistle was kept sounding two long blasts, in accordance with the regulations. Meanwhile, as she lay stopped, the first-named whistles slowly drew clear astern, and the whistle of the *Ribera* gradually broadened until it was nearly abeam on the starboard side. The engines of the *Britannia* were then set on ahead slow, and single long blasts were again blown on her whistle; but shortly afterwards the *Ribera* suddenly loomed through the fog abeam heading for the *Britannia* and coming on at great speed. Two short blasts were instantly blown on the whistle of the *Britannia*, her helm was put hard-a-starboard and her engines full speed ahead, in the hope of going clear, but the *Ribera* came on apparently under port helm, and with her stem struck the starboard side of the *Britannia* aft, doing much damage.

Both the plaintiffs and defendants charged each other with a breach of art. 16 of the Regulations for the Prevention of Collisions at Sea, which is as follows:

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.

Aspinall, K.C. and *A. D. Bateson* for the plaintiffs, the owners of the *Ribera*.—The fog signal which was heard by those on the *Ribera* on her port quarter had to be taken into account when navigating for the fog. The presence of a vessel in that position was a circumstance within the meaning of the latter part of art. 16, which made it dangerous for the *Ribera* to stop when she first heard the fog signal of the *Britannia*. The *Britannia* brought about the collision by not stopping on hearing the first signal of the *Ribera* and then starboarding across the course of the *Ribera*.

Pickford, K.C. and *Noad* for the defendants, the owners of the *Britannia*.—Those on the *Ribera* are to blame for not stopping. Even if their engines had been stopped for so long that all their way had been lost, the vessel on their port quarter would have avoided them, for the *Ribera's* whistle would have been sounding the two prolonged blasts at intervals of not more than two minutes prescribed by art. 15, which would have told the vessel on their port quarter that the *Ribera*, though under way, was stopped and had no way on her. The *Britannia* did not infringe art. 16 by not stopping at once. She did stop as soon as the *Ribera's* fog signal was distinctly heard on the starboard bow, and was kept stopped until the fog signal of the *Ribera* got almost abeam. Even if there was an infringement of art. 16, it in no way contributed to the collision, and the *Britannia* therefore is not to blame:

The Fire Queen, 57 L. T. Rep. 312; 6 Asp. Mar. Law. Cas. 146; 12 P. Div. 147.

The *Koning Willem I.* (88 L. T. Rep. 807; 9 Asp. Mar. Law Cas. 425; (1903) P. 114) was also referred to.

A. D. Bateson in reply.

GORELL BARNES, J.—This collision took place between the *Ribera* and the *Britannia* on the 15th Sept. 1904, about 7.10 a.m., off the coast of Portugal, in the neighbourhood of the Burlings. The *Ribera*, a steamer of 3582 tons gross register, was on a voyage from Sunderland to Genoa with a cargo of coal. She was proceeding about S.S.W. by compass, and was going at dead slow speed according to her case, and was sounding her whistle for fog. The *Britannia*, an iron screw steamship of 3129 tons gross register, was bound from Patras to Liverpool with a cargo of fruit, and was on a course of about N. ½ E. magnetic. The weather on this occasion was a dense fog, and these two vessels, when visible to each other, were an extremely short distance apart, the plaintiffs say three lengths, the defendants 150ft. The plaintiffs' case, shortly stated, is that while going dead slow, making about two to two and a half knots, and sounding their whistle, and having another vessel on the port quarter apparently overtaking them, they heard a whistle from the *Britannia* about three points on the port bow. It is alleged that the *Ribera* answered, and that the two vessels approached, each sounding their whistles, that of the *Britannia* broadening with each succeeding whistle; that afterwards the *Britannia* suddenly blew a long blast and came into sight about three points on the port bow, about three ships' lengths off, apparently acting under a starboard helm; that the engines of the *Ribera* were thereupon reversed full speed, her whistle blown three short blasts twice, and her helm put hard-a-port; but that the *Britannia* came on, and with her starboard side about the after rigging, struck the stem and port bow of the *Ribera* doing considerable damage. That is the plaintiffs' case, and it only needs stating, in my judgment, to show that the plaintiffs have no case, so far as they themselves are concerned, because it is obvious that the engines of their vessel were not stopped in accordance with art. 16 of the collision regulations. They kept on at the speed at which they were going until they ran into the other ship, except that, immediately before the collision, it is said, they reversed their engines. The surveyor called on behalf of the plaintiffs considered that the *Ribera* at the time of the collision had a speed of about three knots, and that appears to be in accordance with the damage done, because the stem of the *Ribera* cut into the *Britannia*. The *Ribera* therefore is clearly to blame unless those on board her can offer some excuse for not stopping their engines and for keeping on at about three knots in a fog so thick that the vessels could only see each other at an extremely short distance. The plaintiffs, in order to get out of that difficulty, suggest that they were reasonable and acted properly in not stopping their engines, because they had another vessel on their port quarter, and they were therefore afraid that if they stopped the vessel on their port quarter might come up and overtake them. That seems to me, and the elder brethren assisting me agree with me, to be a flimsy excuse. That other vessel, four points on the port quarter in the locality in which she was, was probably going the same way as the *Ribera*; and there seems to be no adequate reason for not stopping the engines of the *Ribera* upon first hearing the fog signal of the *Britannia*, simply because another vessel was sounding a fog signal some distance away four points on the port quarter. Even if it were necessary for the vessel on the *Ribera's* port quarter to act for the *Ribera* she would have heard the *Ribera's* fog signals—first, her single long blast signal, and then, when the *Ribera's* way was off by reason of her engines being stopped, the two prolonged blast signals for a vessel under way but stopped and having no way on her. There is really nothing in the excuse, and I think the plaintiffs' documents in the case do not support it at all. The difficulty was felt by counsel for the plaintiffs, and the substance of their case was an attack upon the defendants.

The defendants' case is of a different character, but it raises more or less similar points. Their case is that they were proceeding on a course N. ½ E. magnetic, at a speed of between two and three knots, when they heard the whistles of two other vessels, one on each bow; that whilst these two whistles were clearing they heard the whistle of a third vessel, the *Ribera*, a long way off, and then there comes a remarkable paragraph in the statement of defence, which is as follows: "As soon as it was distinctly made out and found to be about one and a half points on the starboard bow the engines of the *Britannia* were stopped, and when she had lost her way her whistle was kept sounding two long blasts, in accordance with the regulation. Meanwhile, as she lay stopped, the first named whistles slowly drew clear astern, and the whistle of the *Ribera* gradually broadened until it was nearly abeam on the starboard side; the engines of the *Britannia* were then set on ahead slow, and single long blasts were again blown on her whistle, but shortly afterwards the *Ribera* suddenly loomed through the fog abeam, heading for the *Britannia*, and coming on at great speed; two short blasts were instantly blown on the whistle of the *Britannia*, her helm was put hard-a-starboard and her engines full speed ahead, in the hope of going clear, but the *Ribera* came on apparently under port helm, and with her stem struck the starboard side aft of the *Britannia*, doing much damage." Now, on that, and on the defendants' evidence, it is clear that the *Britannia* did not stop her engines at the time when she first heard the sound of the *Ribera's* whistle. She afterwards stopped them, when she had distinctly made out the whistle and found it to be a point and a half on the starboard bow. How they found that out is to me a mystery. It is said that there was no reason for stopping at first, because the whistle was a long way off, and other ships were of assistance in judging the situation and distance, and that there was therefore no breach of art. 16 by the *Britannia*. That is a view of this case with which I cannot agree. It appears to me that it was the positive duty of those on board the *Britannia* to stop their engines as soon as they heard that whistle for the first time. It is not true to say that because a whistle sounds distant those on the ship hearing it are entitled to treat it as distant. Many cases in this court have shown that an apparently distantly sounding whistle is really close to. Again, it is not correct to say that a whistle having been heard can be located so

as to be certain it is at a precise bearing on the bow. Case after case in this court shows that it it is not so. It seems to me, having regard to the general features of this case, that it was known that that whistle was the whistle of a vessel which must have been coming the other way, although they may at first have thought it was a vessel which they were overtaking, and it was their bounden duty under art. 16 to stop their engines. I do not desire to be a party to weakening the effect of that rule. If one was to hold that, upon hearing a whistle which sounded to be distant, a vessel was justified in not stopping, although its position was not ascertained, except that it sounded a long way off, every case in this court would be that the whistle sounded such a long way off that those who heard it were justified in not stopping their engines. In this case the defendants say: "Well, but it would not have made any difference at all if we had stopped, because when we heard it again at a later period, and made it out, we did stop our engines, and kept them stopped for some ten or fifteen minutes." It was argued that, having stopped so long as that, it could not have made any difference if the engines had been stopped when the whistle was first heard. That is an argument which one cannot possibly agree with. One might feel some difficulty in dealing with such an argument if one was not bound by rules and was free to consider mere contribution to the collision, though even in that case it would be very difficult to hold in such a case as this that there was no contribution to the collision by a vessel which did not stop in the first instance. But the rules have been dealt with over and over again, and before one can acquit them of blame one must see that the non-stopping could by no possibility have contributed to the collision. In this case, if the *Britannia* had stopped her engines in the first instance, her progress would have been stopped, and she would not have reached the place of collision at the time she did, and the other vessel would have gone across her bows. There would have been altogether different results, and, in my opinion, this point entirely fails.

There is, however, another point in this case upon which I have taken the opinion of the Elder Brethren. That point is this: The defendants say that after they had stopped their engines for something like ten or fifteen minutes the *Ribera* was heard sounding a fog signal, and that the fog signals were upon the starboard hand of the *Britannia* till the *Ribera* got about a mile away and nearly abeam; that the defendants then set their engines slow ahead for four minutes; and that suddenly they saw the *Ribera* 150ft. off on the starboard beam. The defendants say, having contended that there was no object in stopping their engines in the first instance, that, at any rate, they navigated with caution afterwards, and cannot be held to blame for not navigating with caution in such circumstances. That all depends upon whether one is prepared to accept the story told by the defendants in this particular case, and I am not prepared to do so. It seems to me hopeless to contend that the sound of the whistle of the *Ribera* was really ever brought anywhere near on their beam by the motion of the two vessels on their original courses, and I have come to the conclusion that the defendants were not justified in this case in keeping on as they did for four minutes or so in the circumstances which must have happened. What looks probable is that this vessel, the *Britannia*, stopped, and lay stopped for some little time, with a swell acting from a northerly direction, and that she may, and in fact must, have fallen away somewhat from her original heading, and this so-called broadening of the sound of the other vessel's whistle was in reality produced by alteration in the heading of the *Britannia*. The story told by the *Britannia's* witnesses is an extremely improbable one. It appears to me that when this vessel, the *Britannia*, was going ahead for four minutes she was in fact running into danger the whole time. She must have been, in fact, running towards the other vessel the whole time. Though her engines were put ahead a very short time before the collision she was run into whilst still going at a speed of three knots; and, taking the facts in this case to be such as I have indicated, I have asked the Elder Brethren whether, in their opinion, it was cautious and prudent navigation to go on at slow speed, working steadily ahead, for four minutes without making absolutely certain of the position of the other vessel. They think it was not. That the defendants' vessel fell off somewhat in the way I have suggested seems to be probable, because I cannot believe that the whole angle of the blow, which was a right angle, was produced by the plaintiffs porting at the last moment. It must have been contributed to by alterations on the part of the defendants' vessel. The result is that on these grounds I think the defendants' vessel must also be held to blame for the collision, and my judgment must be that both ships are in fault.

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

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

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, May 29, 1905.

(Before MATHEW and COZENS-HARDY, L.JJ.)

NELSON *v.* EMPRESS ASSURANCE CORPORATION LIMITED; FABER, Third Party. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Third party procedure—Marine insurance—Policy of reinsurance—"Indemnity"—Order XVI., r. 48.

In an action against an underwriter upon a policy of marine insurance, the defendant applied for leave to issue and serve, under Order XVI., r. 48, *a third party notice upon the underwriter of a policy of reinsurance.*

Held, that the contract of reinsurance was not a contract of "indemnity" so as to form ground for third party proceedings within the meaning of Order XVI., r. 48.

APPEAL by Faber from an order of Bigham, J. at chambers affirming a decision of the master.

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

The action was brought upon a policy of insurance effected by J. H. Cooper and Co. on behalf of the plaintiff with the defendants.

By this policy, dated the 2nd June 1902, the plaintiff insured against the usual marine risks seven bulls, thirty heifers, and one cow and calf on board the steam ship *Highland Scot* on a voyage from the United Kingdom to Buenos Ayres:

On and (or) under deck; including all risks of mortality, jettison, and washing overboard; warranted free from all claim (except for general average, salvage, and special charges) in respect of animals which may walk ashore or are capable of walking after leaving the ship at port of destination, but to include risk of mortality for three days after landing of animals . . . each animal to be deemed a separate insurance . . . and, in case of any loss or misfortune, it shall be lawful to the assured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the said subject-matter of insurance without prejudice to this assurance; to the charges whereof the said corporation will contribute according to the rate and quantity of the sum herein assured.

On the 5th June 1902 the defendants reinsured by a policy of reinsurance which was underwritten by Faber, the present appellant, and other underwriters.

This policy was expressed to be a reinsurance of the Empress Assurance Corporation on the cattle as per original policy of the 2nd June and to apply to the above-mentioned policy, and to be subject to the same clauses and conditions as the original policy and to pay as might be paid thereon. It contained the following clause:

Warranted free from particular average, jettison, washing overboard, and mortality, unless caused by the ship being stranded, sunk, on fire, or in collision, this to be of such a nature as may be reasonably supposed to have caused or led to the damage claimed for.

The policy also contained a sue and labour clause similar to that in the original policy.

By his points of claim the plaintiff alleged that there had been a constructive total loss of all the animals by perils insured against, and he also made a claim under the sue and labour clause.

Alternatively, he claimed as for a partial loss and for a proportion of his costs under the sue and labour clause.

The defendants obtained leave from the master to issue and serve a third party notice upon Faber under Order XVI., r. 48.

Upon Faber's appeal to the judge at chambers, Bigham, J. affirmed the order of the master.

Faber appealed.

Scrutton, K.C. and *Leck* for Faber.—The court has no jurisdiction to make this order. A contract of reinsurance is not, strictly speaking, a contract of indemnity. It therefore affords no ground for third party procedure under Order XVI., r. 48. The contracts of insurance and reinsurance are independent contracts. The underwriter of the policy of reinsurance does not contract merely to indemnify the underwriter of the original policy against the claim that may be made under the original policy:

Mackenzie v. *Whitworth*, 2 Asp. Mar. Law Cas. 490; 33 L. T. Rep. 655; 1 Ex. Div. 36;
Johnston v. *Salvage Association*, 6 Asp. Mar. Law Cas. 167; 57 L. T. Rep. 218; 19 Q. B. Div. 458.

Secondly, assuming that the court had jurisdiction to allow a third party notice to be issued, this case is one in which that jurisdiction ought not to be exercised. The matter is one for the discretion of the court, and, as the terms of the two policies here are not identical, great inconvenience would be caused. The factor's servants and assigns of the assured under the original policy would not be the same as the factor's servants and assigns of the assured in the policy of reinsurance:

Uzielli and Co. v. *Boston Marine Insurance Company*, 5 Asp. Mar. Law Cas. 405; 52 L. T. Rep. 787; 15 Q. B. Div. 11.

There is no authority to be found anywhere for bringing in a reinsurer in such a case as this as a third party.

Carver, K.C. and *F. T. R. Bigham* for the defendants.—This policy of reinsurance is a contract of indemnity within Order XVI., r. 48. Faber has agreed to pay the defendants whatever the defendants may become liable to pay under the policy of the 2nd June 1902. In *Johnston* v. *Salvage Association* (*ubi sup.*) there was no question of reinsurance. Even if there should be some little difficulty with regard to the sue and labour clause, yet, as regards the main point of the plaintiff's claim, there is no doubt that Faber has agreed to indemnify the defendants.

Scrutton, K.C. in reply.

Mathew, L.J.—In my opinion this appeal must be allowed. The rule under which a defendant may bring in a third party has been in existence for many years, but I think that this is the first occasion on which it has been sought to apply the rule to a marine policy of reinsurance. The reported cases show that contracts of insurance and reinsurance are independent of each other, the original underwriter being entitled to reinsure himself by reason of the interest which he has acquired in the subject-matter of the original insurance. The condition that the underwriter of the policy of reinsurance is to pay as may be paid on the original policy does not import that the contract is one of indemnity. The assured under a policy of reinsurance must show, like any other assured, that there has been a loss of the subject-matter of the insurance by a peril insured against by the policy of reinsurance. It is argued that a contract of reinsurance is a mere contract of indemnity within the meaning of Order XVI., r. 48. We have to consider the nature of the contract of reinsurance. If it were nothing more than an agreement to indemnify, the underwriter of the original policy, when sued on his contract, might give notice to the underwriter of the policy of reinsurance that, if that underwriter would not pay, he would defend the action and would afterwards claim to be indemnified by him against the costs of the defence. No one ever heard of such a position being assumed by the assured under a policy of reinsurance. Moreover, it would be very inconvenient to make the underwriter of the policy of insurance a third party in respect to some part only of the subject-matter of the action on the original policy. It might turn out that no question of liability common to the original underwriter and the underwriter of the policy of reinsurance was ultimately decided in the action, and then the third party would have been brought in and additional expense incurred for nothing.

For these reasons I think that the appeal must be allowed.

COZENS-HARDY, L.J. — I agree, and have nothing to add.

Appeal allowed.

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

Solicitors for the third party, *Waltons, Johnson, Bubb,* and *Whatton.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

April 18 *and May* 29, 1905.

(Before KENNEDY and RIDLEY, JJ.)

AUSTIN FRIARS STEAM SHIPPING COMPANY LIMITED (apps.) *v.* STRACK (resp.).

SAME (apps.) *v.* STRACK AND OTHERS (resps.). (*a*)

Seaman—Wages—Agreement for ordinary voyage—Carriage of contraband of war—Termination of voyage by capture of ship—"Loss" of ship—Right of seaman to wages and damages—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 158.

A seaman entered into an agreement with the owners of a British ship, and signed articles to serve as a seaman on board the ship on a trading voyage to the East and to different ports in the East, the voyage not to exceed two years, and to end at a final port of discharge in the United Kingdom. During the course of the trading war broke out between Russia and Japan, and after the declaration of war the ship was employed in carrying contraband of war. While on one of these voyages, with contraband of war on board, the vessel was seized by a Russian gunboat, and she and her cargo were confiscated by a prize court. The master knew, but the crew did not, that the ship was carrying contraband. The crew were sent back to London, via St. Petersburg, and suffered considerable hardships on the journey through insufficiency of food and sleeping accommodation.

Held, that the capture of the ship was not a "loss" of the ship within the meaning of sect. 158 *of the Merchant Shipping Act* 1894; *that the termination of the voyage was not "by reason of the loss" of the ship within the meaning of that section, but was by reason of the act of the owners in carrying contraband of war, and that in consequence the character of the voyage and its risk and danger were altered, and that there was therefore a breach of the agreement by the owners which entitled the seaman to his wages up to the date of his arrival in London and to damages.*

TWO cases stated by an alderman and justice of the peace for the city of London, sitting as a court of summary jurisdiction at the Guildhall Justice Room, the first being as to the wages of a seaman and the second as to damages.

1. On the 10th Sept. 1904 the respondent (Johannes Strack) took out a summons under sect. 164 of the Merchant Shipping Act 1894, against the appellants, claiming a sum of 35*l.* 2*s.* 2*d.*, balance of wages alleged to be due from them in respect of his services as a seaman on board the steamship *Cheltenham* from the 24th Nov. 1903 to the 30th Aug. 1904, and continuing wages up to the date of final settlement under sect. 134 of the Merchant Shipping Act 1894.

On the 16th Sept. 1904 the parties attended before the magistrate on the summons, when the appellants admitted the respondent's claim up to the 2nd July 1904 (which they had always been willing to do).

The claim was amended accordingly, and, after hearing the matter, the summons was adjourned till the 17th Sept., on which day, the appellants having in the meantime paid the respondent's wages up to the 2nd July 1904, the magistrate gave judgment for the respondent and adjudged the appellants to pay the balance of wages up to the 30th Aug. 1904—namely, 9*l.* 13*s.* 4*d.*—and the sum of 16*l.* 16*s.* for costs.

2. The following facts were either admitted or proved before the magistrate:—

(*a*) The respondent was a seaman who at the time of the matters hereinafter mentioned was serving as a seaman on board the British steamship *Cheltenham.* The appellants were the owners of the *Cheltenham.*

(*b*) The respondent on the 24th Nov. 1903 signed on the articles of the *Cheltenham,* then at Bremerhaven, to serve as boatswain on the vessel at the rate of 5*l.* per month. The articles of agreement, so far as is material, were as follows:

The several persons whose names are hereto subscribed and whose descriptions are contained herein, and of whom five are engaged as sailors, hereby agree to serve on board the said ship in the several capacities expressed against their respective names on a voyage from Bremerhaven *viâ* port in Bristol Channel to Colombo and (or) any ports or places within the limits of 75° N. and 63° S. latitude, trading in any rotation, and to end at a final port of discharge in the United Kingdom or continent of Europe between the Elbe and Brest inclusive. Period not to exceed two years' trading and time to reach the United Kingdom or Continent if vessel so bound direct at end of trading term. If above trading ends, from any cause except wreck, or if such time expires while vessel is abroad and not bound direct for United Kingdom or Continent as stated, the crew agree to ship in any other British vessel provided by the master (bound direct for United Kingdom or Continent) at not less than the same rate of wages. It is agreed that when British seamen shipped in the United Kingdom are discharged on the Continent as above the master "shall furnish the means of sending them back" (with maintenance) to the nearest port in the United Kingdom served by regular steamers, and the crew agree to such port as the port in the United Kingdom to which they may be so sent back. The crew further agree at master's option to proceed from the port of final discharge as above to a port in the United Kingdom for loading or otherwise.

(*c*) The *Cheltenham* left Bremerhaven on the 25th Nov. 1903, and, after loading a cargo of coals at Barry, arrived at Colombo on the 10th Jan. 1904. Thence she proceeded to Rangoon, where she arrived on the 26th Jan., and loaded a cargo of rice, and sailed for Yokohama on the 9th Feb., where she arrived on the 7th March 1904.

(*d*) Early in Feb. 1904 war was declared betwen Russia and Japan. On the 12th of that month a Royal Proclamation announcing that fact appeared in the *London Gazette,* and on the 19th Feb., 1st March, 18th March, and 22nd

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

March there appeared various notices as to contraband of war in the *London Gazette*, which were produced before the magistrate.

(*e*) On the 11th March 1904 the *Cheltenham* was chartered by the appellants to Messrs. Makino and Umeura, contractors for the Chemulpho Railway Company, for the term of six calendar months, to be employed in trading between Muroran and Otaru and Japan coast ports and Chemulpho and Southern Korean ports in such lawful trades as the charterers or their agents should direct. The *Cheltenham* then made several voyages between Japan and Korea, carrying various descriptions of railway material which had been declared contraband of war by the Japanese and Russian Governments. Whilst at Yokohama, between the 7th and 19th March, the respondent endeavoured to obtain information as to what was contraband of war, a letter being written by one of the crew to the German Consul at Yokohama for information on the subject, but no reply was received. This was the only step taken by the respondent or any of the crew to ascertain if the cargo was contraband of war. On the 2nd July 1904, whilst proceeding from Otaru to Fusan, in Korea, with a similar cargo, the *Cheltenham* was captured by the gunboat *Gromoboi*, belonging to the Russian Vladivostok Squadron. A prize crew was put on board and she was taken as a prize of war to Vladivostok, where she arrived on the 4th July. On the 7th July a prize court was held at Vladivostok and the vessel and her cargo were confiscated. The decision of the prize court was declared to the captain and crew of the *Cheltenham* on the 11th July. The appellants did not appeal from such decision. There was no vessel at Vladivostok in which the crew could be sent home, and the captain at once applied to the proper authority at Vladivostok to have them sent home *viâ* St. Petersburg. This was ultimately arranged; and on the 29th July the captain and the respondent and the rest of the crew left Vladivostok, *viâ* the Trans-Siberian Railway, for St. Petersburg, where they arrived on the 18th Aug. On the 23rd Aug. they left St. Petersburg as passengers in the steamship *Kurga*, and arrived in London on the 30th Aug. 1904.

(*f*) The travelling expenses and maintenance of the respondent were provided partly by the Russian Government and partly by the appellants until the arrival in London.

(*g*) At St. Petersburg the respondent was offered his wages up to the 2nd July 1904, the date when the *Cheltenham* was captured. This was refused. Subsequently he was offered his wages up to and including the 30th Aug. 1904, the date of his arrival in London. This offer was also refused by the respondent, who intimated his intention of claiming damages for breach of contract contained in the ship's articles.

(*h*) The respondent did not know that the *Cheltenham* was carrying such cargo as was within the declaration of Russia and Japan as to contraband of war. The appellants' agent, the master of the ship, did know, but did not communicate his knowledge to any of the crew.

(*i*) An account of wages, made up to the 30th Aug. 1904, was made up by the master and given to the respondent in accordance with sect. 132 of the Merchant Shipping Act 1894, showing a balance due to the respondent of 35*l.* 2*s.* 2*d.*

3. On the 1st Sept. 1904 the respondent and other members of the crew of the *Cheltenham* issued a summons under the Employers and Workmen Act 1875, as amended by sect. 11 of 43 & 44 Vict. c. 16, claiming damages against the present appellants for breach of the agreement contained in the ship's articles for the voyage in question. The matter came before the same magistrate, sitting as a court of summary jurisdiction, at the Guildhall Justice Room on the 9th Sept. 1904; and he found that the appellants had committed a breach of the said agreement, and awarded the respondent and the other members of the crew the sum of 10*l.* each as damages for breach of the said agreement.

4. On behalf of the respondent it was contended that he was still on the articles and was entitled to wages as a debt to the 30th Aug. 1904, and to continuing wages under sect. 134 of the Merchant Shipping Act from determination of the voyage until a final settlement. The following authority was referred to as showing that a seaman was entitled to wages for a period during which he was not actually engaged as a seaman — viz., *Beale* v. *Thompson* (4 East, 546; 3 B. & P. 405).

5. On behalf of the appellants it was contended (1) that the respondent's right to wages terminated with the capture of the vessel on the 2nd July 1904, or at latest on the 11th July 1904, when the decision of the prize court was known, the vessel being "lost" within the meaning of sect. 158 of the Merchant Shipping Act 1894 immediately she was seized. The case of *The Woodhorn* (92 L. T. 113) was referred to. (2) That, having recovered judgment for damages for breach of the said agreement, he could not be entitled to wages under the agreement after the date of the breach thereof.

6. The magistrate held that, as after the 30th Aug. 1904 there was a *bonâ fide* dispute within the meaning of sect. 134 of the Merchant Shipping Act 1894, the respondent was not entitled to wages after that date. He decided that he was entitled to wages up to that date, and adjudged the appellants to pay him the balance from the 2nd July 1904 to the 30th Aug. 1904 —viz., 9*l.* 13*s.* 4*d.*—and the sum of 16*l.* 16*s.* for costs.

The question of law for the opinion of the court was whether the magistrate was right in holding that the respondent was entitled to wages up to the 30th Aug. 1904.

If the court should be of opinion that the magistrate was right, then his judgment was to stand; if not, it was to be quashed and such order made as the court should see fit.

The second case, as to damages, came before the same magistrate, and was heard on the 9th Sept. 1904.

The second case stated that on the 1st Sept. 1904 a summons was issued by the respondent and eighteen others, who were members of the crew of the steamship *Cheltenham*, against the appellants (who were the owners) under the Employers and Workmen Act 1875 (as amended by 43 & 44 Vict. c. 16, s. 11), claiming 10*l.* damages for each man for breach of the agreement contained in the ship's articles.

The case was heard on the 9th Sept. 1904, when the appellants were ordered to pay to each of the respondents the sum of 10*l.* as damages and one sum of 10*l.* 10*s.* for costs.

The facts stated in this case were the same as in the first case, with the following addition to par. (*f*): The travelling expenses of the respondents from Vladivostok were paid partly by the Russian Government and partly by the appellants. In addition to certain provisions supplied by the captain to each of the seamen they were also provided by the appellants with a sum of one rouble per day for the first five days of the journey to St. Petersburg, and afterwards with 1 rouble 25 copecks per day, in order to purchase food, but which sums the respondents complained were not sufficient to get them one good meal a day in consequence of the scarcity of provisions. The respondents complained at the trial of the sleeping accommodation on the railway and of the difficulty of obtaining sufficient food during the journey, and afterwards of the accommodation and food at St. Petersburg.

The respondents contended that there had been in law a breach of the agreement contained in the articles and that they were entitled to damages in consequence of such breach. They did not claim damages in the nature of wages, as the appellants had offered the respondents their wages up to the 30th Aug., but only for the risks and privations the respondents had endured by reason of the breach of contract.

It was argued that the appellants' action was illegal, but that, whether it was illegal or not, the appellants had broken their contracts with the respondents in exposing them to risks they had not contracted for. The case of *The Justitia* (6 Asp. Mar. Law Cas. 198; 57 L. T. Rep. 816; 12 P. Div. 145) was referred to.

It was further contended that the respondents declined to take their wages, as to have done so would have precluded their taking these proceedings, and sect. 136 of the Merchant Shipping Act 1894 in support of that contention was referred to.

On behalf of the appellants it was contended that there was nothing illegal in carrying contraband of war; that the vessel was "lost" within the meaning of sect. 158 of the Merchant Shipping Act 1894 immediately she was seized; and that the agreement was then put an end to, and that there was no breach of contract. The case of *The Friends* (4 Ch. Rob. 143) was referred to.

The respondents, in reply, contended that "loss" only meant destruction by perils of the sea or capture by the King's enemies, and that the appellants had brought about the loss by their own acts.

The magistrate held that in law there had been a breach of the agreement by the appellants. He found that the respondents had sustained injury in consequence, and assessed the damages at 10*l.* in respect of each man.

The question of law for the opinion of the court was whether on the facts above stated the magistrate was right in holding that the appellants had committed a breach of contract and the respondents were entitled to recover damages.

If the court should be of opinion that the magistrate was right, his decision was to stand; if not, it was to be reversed, and judgment was to be given for the appellants.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

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) . . . (*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. 136 (1). Where a seaman is discharged, and the settlement of his wages completed, before a superintendent, he shall sign in the presence of the superintendent a release, in a form approved by the Board of Trade, of all claims in respect of the past voyage or engagement; and the release shall also be signed by the master or owner of the ship, and attested by the superintendent. (2) The release, so signed and attested, shall operate as a mutual discharge and settlement of all demands between the parties thereto in respect of the past voyage or engagement.

Sect. 158. Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period.

Sect. 164. A seaman, or apprentice to the sea service, or a person duly authorised on his behalf, may as soon as any wages due to him, not exceeding fifty pounds, become payable, sue for the same before a court of summary jurisdiction in or near the place at which his service has terminated, or at which he has been discharged, or at which any person on whom the claim is made is or resides, and the order made by the court in the matter shall be final.

Scrutton, K.C. (*Dawson Miller* with him) for the appellants.—The first case is as to wages, and sect. 158 of the Merchant Shipping Act 1894 is the section upon which that question turns. Before the Merchant Shipping Act the seaman was not entitled to wages unless freight was earned. Sect. 157 of the Act provides that the right to wages shall not depend on the earning of freight. Sect. 158 gives the seaman a greater right, and gives him a right to wages up to the time of the termination of the service where such termination is caused by reason of the "wreck or loss" of the ship, although no freight has been earned. The capture of the ship was a "loss" of the ship within the meaning of that section. The time when the ship was captured was the time when the ship was "lost" to the owners, and by sect. 158 the wages are to cease on the wreck or loss of the ship. The contention for the respondent that there was no wreck or loss of the ship and that therefore the wages went on is not well founded. Then the second case is as to damages, and as to that, as there was no breach of the agreement, there was nothing in respect of which the respondent could claim damages. In the section "loss" is distinguished from "wreck," and it means anything which deprives the owner of the possession of the ship, which the capture in this case did. The act of capture defeated the rights of the seaman and put an end to his wages: (*The Friends*, 4 Ch. Rob. 143). The carrying of contraband of war is not an offence against the law of nations or the law of this country; it is not illegal by the law of this country: (*Ex parte Chavasse*; *Re Grazebrook*, 2 Mar. Law Cas. O. S. 197;

12 L. T. Rep. 249; 34 L. J. 17, Bk.). The decision of Lord Westbury, L.C. in that case shows that this was a perfectly lawful voyage. The ship was carrying railway material, and was engaged in a trade that could lawfully be carried on. The case of *The Justitia* (6 Asp. Mar. Law Cas. 198; 57 L. T. Rep. 816; 12 P. Div. 145) is an altogether different case from the present. In that case damages were awarded to the seamen, but it was entirely owing to the fact that they had incurred hardships through the vessel being employed for purposes other than those contemplated by the agreement. The seamen were, in fact, employed for quite a different service from that which the agreement contemplated, whereas, in the present case, the seaman was employed precisely as contemplated by the agreement, and, as the agreement entered into was for a lawful voyage and a lawful trade, the loss falls upon the seaman, the shipowners, and cargo alike. The decision of the magistrate was therefore wrong. *The Malta* (2 Haggard, 158) was also referred to.

Robson, K.C. (*Pilcher* with him) for the respondent.—The question is not whether it is lawful to carry contraband or not, but whether, when a shipowner enters into a contract with a seaman, he is entitled to put on the seaman risks never contemplated by the contract. The agreement in this case was for an ordinary commercial voyage, and the employers had no right to change that voyage into a voyage for the carrying of contraband of war, and the case finds that the cargo was contraband of war. It was the carrying of railway material for the construction of railways for the conveyance of Japanese troops. That change from the agreed voyage necessarily involved greater risks and dangers to the seamen than they had agreed to. The respondent was entitled to treat as a breach of the contract the appellants' employment of him on a voyage which would expose him to greater danger than he originally had reason to anticipate when he entered into the service—that is, to dangers other than the ordinary perils of the sea. By so doing, and by deliberately putting their ship in peril of capture, as they did, they became liable to the seamen in damages (*The Justitia*, *ubi sup.*), and also for the wages until their arrival in London: (*Burton* v. *Pinkerton*, 2 Mar. Law Cas. O. S. 494, 547; 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340). Kelly, C.B. in that case said (16 L. T. Rep., at p. 424) that, as war had broken out between Peru and Spain, it was a breach of the contract with the seaman to place the vessel under the orders of a Peruvian who was causing her to act in concert with two Peruvian ships of war, "and so exposing the crew to the danger at any moment of the loss of their liberty or of their lives." That applies to this case, as the master deliberately put his ship in peril of capture. In *O'Neil* v. *Armstrong, Mitchell, and Co.* (8 Asp. Mar. Law Cas. 63; 73 L.T. Rep. 178; (1895) 2 Q. B. 70, 418) it was held by the Court of Appeal that, as the continuation of the voyage would, through the breaking out of war between Japan and China, have exposed the seaman to greater risks than those which he contracted to run, the seaman was justified in leaving the ship, and was entitled to recover the stipulated sum, notwithstanding that the voyage was not completed. Charles, J., in delivering the judgment of the Divisional Court in that case (72 L. T. Rep., at p. 778; (1895) 2 Q. B., at p. 77), said that 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," entitled the plaintiff to treat his conduct as a breach. That clearly shows that, apart altogether from the question of legality or illegality, the increased risk was a breach of the agreement. Under the proclamation of the Government the respondent's duty was not to go on if the vessel was carrying contraband of war. [KENNEDY, J.—How do you make the wages run up to the 30th Aug., the date of arrival in London?] Under sect. 134. The vessel was captured owing to the act of the owner himself, and therefore the owner himself, by putting the vessel and crew under a risk not contemplated by the parties, has brought about the state of things which terminated the contract, and, that act 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." The master was bound to send the respondent home; during all that time his wages were running, as he was not bound to treat the contract as determined, and under sect. 134 he was entitled to his wages until the 30th Aug. He is also entitled to damages. In both the cases referred to there was a claim for damages as well as a claim for wages. Under sect. 136 the seaman, on the settlement of his wages, is bound to sign a release, but in the present case the respondent was justified in refusing to sign on account of his claim for damages. Clearly there was not a "loss" or "wreck" of the vessel within the meaning of sect. 158, as what is relied upon as the "loss" of the vessel—namely, the capture—was brought about by the appellants' own act in sending contraband of war to a port of a belligerent.

Dawson Miller in reply.—"Loss" or "wreck" within sect. 158 means loss or wreck however caused. As to the question of damages, the cases cited of *Burton* v. *Pinkerton* (*ubi sup.*), *O'Neil* v. *Armstrong, Mitchell*, and *Co.* (*ubi sup.*), and *The Justitia* (*ubi sup.*) were all cases where illegality under the Foreign Enlistment Acts came in, and where the seaman was asked to carry out a contract which was in fact illegal. In the present case the respondent must be taken to have entered for a voyage which was lawful.

Cur. adv. vult.

May 29.—The judgment of the court (Kennedy and Ridley, JJ.) was read by

RIDLEY, J.—These were two cases stated for the opinion of the court by a justice of the peace for the city of London, the first relating to a claim for wages made by a seaman under the Merchant Shipping Act 1894, and the latter to a claim for damages in respect of the same employment made by him under the Employers and Workmen Act 1875, as amended by 43 & 44 Vict. c. 16, s. 11. It appears that Strack, the seaman, on the 24th Nov. 1903, signed on the articles of the British steamship *Cheltenham*, belonging to the appellants, and then at Bremerhaven, as boatswain at the rate of 5*l.* per month, upon an agreement the material part of which was as

follows: [His Lordship then read the terms of the agreement and the whole of the facts as set out in the case, and proceeded:] On the 1st Sept. 1904 Strack and other members of the crew issued a summons under 43 & 44 Vict. c. 16, s. 11, claiming damages against the appellants for breach of the agreement contained in the ship's articles; and upon this summons the magistrate awarded 10*l.* to Strack and to each of the crew. On the 10th Sept. 1904 Strack took out a summons under sect. 164 of the Merchant Shipping Act 1894, claiming the sum of 35*l.* 2*s.* 2*d.*, for balance of wages due up to the 30th Aug., and for continuing wages up to the date of final settlement under sect. 134 of that Act. At the hearing on the 16th Sept. the appellants admitted the claim up to the 2nd July, and the special case states that the summons was adjourned for the claim to be amended. The appellants then paid the wages due up to the 2nd July 1904; and on the further hearing on the 17th Sept. the magistrate gave judgment for the balance remaining due for wages between the two dates — namely, 9*l.* 13*s.* 4*d.*, and costs; but he declined to allow a claim for anything after the 30th Aug. on the ground that there was then a *bonâ fide* dispute within the meaning of sect. 134. It was argued for the appellants that the ship when she was taken was "lost" within the meaning of sect. 158 of the Merchant Shipping Act 1894 and that Strack was, therefore, entitled to wages only up to that date—that is to say, the 2nd July 1904. By that section: "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to the time of such termination, but not for any longer period." It seems to us very doubtful whether the word "loss" would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such terminations of a voyage as are brought about by the perils of the sea. But however that may be, it seems clear that the section was not intended to include cases where the service terminates not owing to capture by the King's enemies, but from the wilful action of the captain and owners, and not resulting either directly or indirectly from any peril or hurt affecting the ship itself or preventing the continuance of the voyage.

The case of *O'Neil* v. *Armstrong, Mitchell, and Co.* (8 Asp. Mar. Law Cas. 63; 73 L. T. Rep. 178; (1895) 2 Q. B. 70, 418) was referred to on the argument, and appears to us to have a decided bearing upon the question before us. In that case the plaintiff shipped as fireman on a torpedo-ship constructed by the Japanese Government by the defendants for a voyage to Yokohama. The ship left the Tyne on the 31st July 1894, and war was declared between Japan and China on the 3rd Aug. The plaintiff became aware of this, and at Aden, after a proclamation had been read on board warning the crew against any breach of the Foreign Enlistment Act 1870, he and his fellow sailors left the ship and were sent home by the Board of Trade. The plaintiff sued for balance of wages, and for damages for non-fulfilment of the contract. The nominal defendants accepted responsibility for the satisfaction of the plaintiff's claim to the extent of the liability, if any, of the captain of the vessel. It was held in the Queen's Bench Division and in the Court of Appeal that the plaintiff was entitled to recover both wages and damages, inasmuch as the defendants admitted responsibility for the captain of a vessel whose owners (represented for the purpose of the action by the defendants) had by the declaration of war altered the character of the voyage during its continuance, and exposed the plaintiff and crew to dangers greater and other than those originally anticipated. It was not a case in which something had occurred beyond the control of either party, such as was *Appleby* v. *Myers* (16 L. T. Rep. 669; L. Rep. 2 C. P. 651), by which the voyage had been terminated, but a case in which its discontinuance resulted directly from the action of the owners. There the risk was altered because after the outbreak of hostilities the Japanese vessel of war became liable to capture by the enemy, and for that outbreak of hostilities the owners were responsible. In the present case the risk was altered because after the outbreak of hostilities between Japan and Russia the captain, acting for and as agent for the owners, and therefore the owners, undertook a venture materially different from the character of the voyage in regard to which the seaman's contract was made. They knew (although the crew did not) that railway material had been declared to be contraband when they chartered the vessel for the voyages, on one of which she was seized and captured: (see *Burton* v. *Pinkerton*, 2 Mar. Law Cas. O. S. 494, 547; 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340). It is true that the carrying of contraband is not illegal (*Ex parte Chavasse*; *Re Grazebrook*, 2 Mar. Law Cas. O. S. 197; 12 L. T. Rep. 249; 34 L. J. 17, Bk.), but merely exposes the neutral who engages in such a venture to the risk of seizure and confiscation; but the question does not turn upon the legality or illegality of the voyage and its object, but upon whether, after its inception, the risk and danger are materially varied by any alteration in its conditions for which the owners are responsible. It seems clear that, when the owners engaged in the business of carrying cargo which they knew to be contraband, they did so alter the conditions of the voyage. That was the cause of its termination, and not a "loss" of the ship within the meaning of sect. 158 of the Merchant Shipping Act. In *O'Neil* v. *Armstrong, Mitchell, and Co.* (*ubi sup.*) the plaintiff was entitled by the articles to the lump sum of 30*l.* on arriving at Yokohama, and having received a portion of that sum on account the court gave him judgment for the balance. Upon this contract Strack was entitled to be paid at the rate of 5*l.* a month till his arrival in the United Kingdom—that is to say, the 30th Aug. We are of opinion that the magistrate's decision in awarding the balance due up to that date was right. In regard to damages, there was jurisdiction, in the view which we have already expressed as to the breach of contract, to award damages (see *The Justitia*, 6 Asp. Mar. Law Cas. 198; 57 L. T. Rep. 816; 12 P. Div. 145), and we see no reason, considering the hardships involved in the homeward journey of the crew, in holding that the amount awarded in the present case is in point of amount unreasonable.

Appeals dismissed in both cases.

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

Solicitors for the respondents, *Pattinson* and *Brewer*.

Saturday, July 1, 1905.

(Before Lord ALVERSTONE, C.J., DARLING and JELF, JJ.)

LLOYD (app.) *v.* SHEEN (resp.). (*a*)

Seaman — Wages — Agreement for ordinary voyage—Discovery by crew that cargo is contraband of war for belligerent port—Refusal to proceed on voyage—Termination of service —Claim for wages—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 134, 158.

A seaman signed articles to serve on board a British ship for a voyage not exceeding two years to ports in the East, proceeding to Hong Kong and thereafter trading to ports in any rotation and ending at a port in the United Kingdom. War then existed between Russia and Japan, and coal had been declared contraband of war. The vessel left with a cargo of coal to Hong Kong or Shanghai as might be ordered at Singapore. On the voyage to Singapore the cargo was sold for Nagasaki in Japan, and on the arrival of the ship at Singapore the master received orders from the owner to go to Nagasaki instead of Hong Kong. At Singapore it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong Kong. They refused to proceed to Nagasaki on account of the increased risk and danger in going to a belligerent port with contraband of war. It was then arranged by the master that the crew should remain at Singapore and that he would call for them on his way back. He took another crew on board, went to Nagasaki, delivered the coal, and left that port, but on her way back the ship was driven ashore, was got off, and was taken to Hong Kong. It was not proved that she became a wreck. The crew were sent home. One of the seamen claimed his wages up to the date of his arrival in London, upon the ground that the agreement was broken by the owner when the ship was ordered to Nagasaki. When he made the agreement he had no knowledge that he would be required to sail with contraband of war to a belligerent port.

Held, that, there having been no wreck or loss of the ship which would terminate the service under sect. 158 *of the Merchant Shipping Act* 1894, *and there having been no termination by the discharge of the seaman under the terms of the contract or under the provisions of the Act, either at home or abroad, the seaman was entitled to his wages up to the date of his arrival in London.*

CASE stated by an alderman of the city of London, sitting as a court of summary jurisdiction at the Guildhall Justice Room.

On the 31st Oct. 1904 a summons was issued by the respondent, Jeremiah Sheen, under the Merchant Shipping Act 1894, against the appellant, Tom Lloyd (trading as Lloyd and Co.), claiming balance of wages due to the 24th Oct. 1904 for service as an able seaman on board the steamship *Agincourt*, 17*l.* 12*s.* 6*d.*, and for maintenance from that date to the 7th Nov. 1904, 1*l.* 12*s.*, and further for wages, lodging, and maintenance to date of final settlement. To this claim the appellant put in a counter-claim, a copy of the claim and counter-claim being annexed to the case. The counter-claim claimed certain deductions from the wages which were allowed, and also damages for expenses incurred at Singapore, and for two days' detention of the vessel there through the refusal of the plaintiff to proceed.

1. On the 7th Nov. 1904 the parties attended before the magistrate in pursuance of the summons. The case was adjourned till the 10th Nov. With regard to the counter-claim, the magistrate held that there was no authority under the Merchant Shipping Act 1894 (under which these proceedings were taken) to take into account a counter-claim for damages, and therefore declined to consider it at all, except with regard to the first five items, which were admitted by the respondent, and were deductions authorised to be made in settling the account of wages. He gave judgment for the respondent for 17*l.* 18*s.* 2*d.*, being the agreed amended balance of wages due after proper deductions up to the 24th Oct. 1904, and the sum of 15*l.* 15*s.* for costs.

2. At the hearing the following facts were either admitted or proved:—

(*a*) The respondent on the 22nd April 1904 signed articles of agreement at Barry to serve as an able seaman on board the steamship *Agincourt*, of which the appellant was owner, at the rate of 3*l.* 15*s.* per month wages, for a voyage described in the articles as

> Not exceeding two years' duration to any ports or places within the limits of 75° N. and 60° S. latitude, commencing at Barry, proceeding thence to Hong Kong, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by master.

(*b*) The *Agincourt* left Barry under a charter-party with a cargo of Welsh coal to Hong Kong or Shanghai, as might be ordered by the charterers at Singapore. She proceeded *viâ* Natal to Singapore. At the time of the signing of the articles a state of war existed between Japan and Russia, and coal was described as contraband of war in the declaration made by each of those countries, and in the notices in the *London Gazette* as to contraband dated the 12th Feb. 1904, 19th Feb., 1st March. 18th March, and 22nd March, which were put in. These facts were known to all the parties, The coal was sent out as a speculation, and insurance was effected against war risks before the vessel left. The cargo was sold for Nagasaki when the vessel was between Natal and Singapore. On her arrival there on the 27th June, the master received orders from the appellant to proceed to Nagasaki instead of Hong Kong. The crew did not know that she was going to any place other than Hong Kong till they reached Singapore. On the 28th June it first came to the knowledge of the crew that the ship was to go to Nagasaki instead of Hong Kong. With the exception of the officers, they then went in a body to the master and objected to go to Nagasaki on account of the danger. They had heard that ships had been shot at and one (the *Knight Commander*) had been sunk. The master offered the respondent and

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

each member two months' extra pay to go on. This offer was declined by the respondent and fourteen other members of the crew, who desired to see the shipping master. On the 29th June these were put on shore with their kits, and the master went with them to the shipping master's office. It was finally arranged by the master that the crew should remain at Singapore, and he would call for them on his way back from Nagasaki. The respondent and the other seamen who refused to go to Nagasaki were left behind at the Sailors' Home at Singapore. One seaman and the officers remained on the steamer, Chinese having been engaged as substitutes for the men left behind. On the 30th June the vessel proceeded on her voyage to Nagasaki. She arrived there on the 12th July and discharged her cargo, and left that port on the 25th July bound *viâ* Singapore to Calcutta. On the 1st Aug., on her way back to Singapore, she was driven ashore at Hainan Island, off the coast of China, 400 miles S.W. of Hong Kong, and the appellant was informed on the 8th Aug. Notice of abandonment was given by the appellant to the underwriters. On the 20th Aug. 35 per cent. of the amount insured was paid to the appellant. It was not proved to the satisfaction of the magistrate that the vessel became a total wreck. There was no evidence that the crew then on board had to abandon her. The vessel was got off, and was at the time of the hearing at Hong Kong. The respondent and the other members of the crew who were left behind remained (except for a part of the time, during which the respondent was ill in hospital) in the Sailors' Home till the 4th Sept. During his stay board and lodging were provided for him at the Sailors' Home at the cost of the appellant. He further received a weekly allowance of 2 dollars for the first five weeks and a further sum of 3 dollars from the shipping master shortly before he left Singapore, the total of 13 dollars being paid out of money supplied by the appellant. On the 4th Sept. 1904 he was sent under a Board of Trade order with the others to London from Singapore as a distressed British seaman on board the British steamship *Benlarig* at the cost of the appellant. They arrived in London on the 23rd Oct., and on the 24th Oct. applied to the appellant for their wages, but were refused. At the time of the hearing of the summons the master of the *Agincourt* was still in China, and he had not been in Singapore again since the 30th June. The ship's papers, including the articles of agreement and log, and the respondent's continuous certificate of discharge, which were on board the vessel at the time of her going ashore, were sent by post to the appellant, but did not arrive in this country until after the summons was issued—namely, on the 31st Oct. 1904. Without these documents the men could not be paid off in due form.

(*c*) The port of Nagasaki was within the limits of trading described in the articles of agreement. The respondent refused to go there on account of the risk owing to the cargo being contraband of war to be delivered in a port of one of the belligerent Powers. In all other respects he was willing to carry out his agreement, which was entered into without any knowledge that he would be required to sail with contraband of war to a port of one of the belligerent Powers.

(*d*) No offer was made to the respondent to pay him off at Singapore and give him a formal discharge, as required by sect. 186 of the Merchant Shipping Act 1894.

(*e*) The alteration of the voyage to Nagasaki was made entirely to suit the arrangements of the appellant with the charterers, and it was not proved to the magistrate that there was any consideration of safety which should have prevented the ship from going to Hong Kong.

3. On behalf of the respondent (the complainant) it was contended: (1) That the contract contained in the articles of agreement was broken by the appellant when the vessel was ordered to Nagasaki instead of to Hong Kong. (2) That he was thereby released from further obligation under the articles of agreement, and became entitled to be discharged and paid his wages. (3) That in the alternative the engagement of the respondent had never been terminated, as he had remained at Singapore with the consent of the master as agent of the appellant. (4) That under sect. 134 of the Merchant Shipping Act 1894 he was entitled to wages until the time of final settlement, and to compensation for the cost of lodging and maintenance from his arrival in this country until such settlement.

4. It was contended on behalf of the appellant: (1) That the voyage of the *Agincourt* as carried out was not illegal. (2) That the carriage of contraband goods to a belligerent port was not illegal. (3) That the respondent, having signed the articles of agreement after the commencement of hostilities between Russia and Japan with the full knowledge of the same and of the nature of the cargo, was bound in performance of the agreement to proceed with the *Agincourt* to Nagasaki. (4) That the agreement was that the voyage should extend to any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude for a period of two years, and that it was not of the essence of the contract that the *Agincourt* should call at Hong Kong at any fixed point of the voyage, or before proceeding to Nagasaki, or at all. (5) That the respondent's refusal to proceed on the voyage was in breach of the agreement, and that his right to wages thereunder ceased by reason of and at the date of that breach. (6) That the failure to pay the wages of the respondent (if any were due) before the date of the summons was due to his own default, and that a reasonable dispute as to liability existed.

The magistrate was of opinion on the facts above stated: (1) That the respondent, considering the risks he was asked to run in going to a belligerent port with contraband of war which he had not agreed to do on signing articles, was justified in refusing to proceed to Nagasaki, and had not, by that refusal, committed a breach of the agreement. (2) That as he was not formally discharged at Singapore in accordance with the provisions of the Merchant Shipping Act, and did not intend to waive any of his rights under the agreement but remained there with the consent of the appellant's agent, he was still entitled to be paid his wages under the agreement.

The magistrate therefore made an order as above set forth for the payment of 17*l.* 18*s.* 2*d.*, the proper amount of wages due up to the 24th Oct. 1904, the day of arrival in London, and 15*l.* 15*s.* for costs. He considered that after the 24th Oct. there was a "reasonable dispute as to liability" within the meaning of sect. 134 of

the Merchant Shipping Act 1894, and therefore made no order for wages, &c., beyond that date.

The question of law upon which this case was stated for the opinion of the court was whether the magistrate was right in holding that the respondent was entitled to wages up to the 24th Oct. 1904.

If the court should be of opinion that the magistrate was right, then his judgment was to stand; if not, it was to be quashed.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 134. In the case of foreign-going ships . . . (*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. 158. Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period.

Dawson Miller for the appellant.—The decision of the magistrate was not justified by the facts. He finds that sect. 186 applies to the case, and that, as there was no proper discharge at Singapore within the meaning of that section by paying the respondent off there in accordance with the section, he was still entitled to his wages. Sect. 186 does not apply to the case at all, as it only applies to discharges outside the British dominions, and Singapore was not such a port. There are two points in the case. The first and main point is that the seamen had no right to refuse to proceed from Singapore to Nagasaki, and the respondent, having refused at Singapore to proceed with the ship, committed a breach of the agreement and was not entitled to wages after that date. The alleged excuse for not proceeding was that the ship was carrying contraband of war, but the mere carrying of contraband of war, even to a belligerent port, is not illegal (*Ex parte Chavasse; Re Grazebrook*, 2 Mar. Law Cas. 197; 12 L. T. Rep. 249; 34 L. J. 17, Bk.), and there was nothing in the agreement itself which prohibited the carrying of contraband of war. Assuming that the master was entitled to go to Nagasaki in time of peace as he was, and that the crew were bound to proceed there, then there is nothing to excuse their refusal to go there in the fact that Nagasaki was then a belligerent port. The mere fact that Hong Kong was named as one of the ports of the voyage did not bind the ship to go to that port, and when the crew got to Singapore and learnt there that the ship was not going to Hong Kong, that was no reason for their refusal to go on. There was therefore no legal excuse for the respondent's refusal at Singapore to proceed with the ship, either upon the ground that it did not go to Hong Kong or upon the ground that it went to Nagasaki, a belligerent port, and the respondent's wages ceased as from that date. Then the second point is that when the vessel was driven ashore on the 1st Aug. there was a "wreck" or "loss" of the ship within the meaning of sect. 158, and that the respondent's wages ceased at that date, assuming that he was entitled to wages up to that date:

The Woodhorn, 92 L. T. 113.

The underwriters treated that as a loss of the ship. The case of *Austin Friars Steam Shipping Company* v. *Strack* (*ante*, p. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315) is different from this case on the facts. He referred to

O'Neil v. *Armstrong, Mitchell, and Co.*, 8 Asp. Mar. Law Cas. 63; 73 L. T. Rep. 178; (1895) 2 Q. B. 418.

A. Neilson for the respondent.—The decision of the magistrate in awarding wages to the respondent up to the date of his arrival in London was right. At the time when the respondent signed the agreement he did not know and was not told that the ship was to carry contraband of war to a belligerent port. That is expressly found in the case. Clause (*c*) of par. 2 says that the respondent refused to go to Nagasaki "on account of the risk owing to the cargo being contraband of war to be delivered in a port of one of the belligerent Powers," and then it is added—which is very important—"In all other respects he was willing to carry out his agreement, which was entered into without any knowledge that he would be required to sail with contraband of war to a port of one of the belligerent Powers." When the ship arrived at Singapore then for the first time the crew were told that the ship was going to Nagasaki with contraband of war. The risk was thus materially increased, and, owing to the increased risk and danger, the respondent was justified in refusing to proceed to Singapore. He rightfully refused to go, and was entitled to his wages as from that date. A seaman signs on under sect. 113, and in sect. 114 the terms and conditions of the agreement are specified. Sect. 127 deals with the discharge of a seaman in England after the termination of the voyage, and the discharge must be in presence of a superintendent. Sects. 131 to 134 deal with the payment of wages, and sect. 134, upon which the respondent relies, says that, unless in certain events, none of which has taken place here, the wages run on and are payable until the final settlement. By sect. 166 wages are not to be recoverable abroad, and by sect. 158 they are not to be payable after the wreck or loss of the ship. Sect. 186 deals with the discharge of seamen abroad, and if the service terminates in a foreign port and the master elects, under sub-sect. 2, to provide the seaman with a passage home, then the passage must be to the port at which he was originally shipped, or a port in the United Kingdom agreed to by him:

Purves v. *Straits of Dover Steamship Company*, 8 Asp. Mar. Law Cas. 566; 81 L. T. Rep. 35; (1899) 2 Q. B. 217.

Under sect. 134 there is no final discharge until the seaman is discharged at home, and his wages

run on until the final discharge, and sect. 188 prohibits the seaman's discharge abroad unless sanction or a certificate is obtained. The inference from these sections is that the wages run on until the seaman is properly discharged abroad under the section, or is properly discharged at home; and, unless he is properly discharged abroad, his wages run on until he is discharged at home under the articles before the superintendent, if there has not been a termination by "wreck or loss" within sect. 158. As to the second question, it is found that there was no wreck or loss of the ship, and the appellant did not purport to discharge the respondent under that section. The magistrate says: "It was not proved to my satisfaction that the vessel became a wreck," and so on. Therefore, there being no wreck under sect. 158, and no proper discharge abroad, the wages were payable until the discharge in London. This question was decided in *Austin Friars Steam Shipping Company* v. *Strack* (*ubi sup.*). He referred to

Burton v. *Pinkerton*, 2 Mar. Law Cas. O. S. 547; 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340;

O'Neil v. *Armstrong, Mitchell, and Co.* (*ubi sup.*).

Dawson Miller in reply.—The magistrate finds that after the 24th Oct. there was a "reasonable dispute as to liability" within the meaning of sect. 134, and that therefore no wages were due after that date. If the dispute was reasonable at that date, *à fortiori*, it was reasonable at an earlier date as the circumstances had not changed, and therefore the wages would cease at an earlier date than the 24th Oct. Whether there was a "wreck" or not, there was a "loss" of the ship within sect. 158, which would cause a cessation of the wages. The contract was to proceed to Hong Kong, and that was regarded as the port of discharge; there was nothing in these articles to prevent the cargo being discharged at Hong Kong, and then a fresh cargo being shipped for Japan.

Lord ALVERSTONE, C.J.—This case raises a very important point, and but for the assistance we have received from the arguments of counsel I should have wished to have taken time to consider the matter. I am aware, however, that the matter presses, and therefore I think, inasmuch as the case can be carried further if necessary, it is desirable that we should give judgment at once, as, after hearing the arguments, I am clearly of opinion that the magistrate was right. I think, if it is to be taken as a term of the contract that the seamen knew that they were contracting to serve on a ship which might take contraband of war to a Japanese port, it would have been a difficult thing to have supported the magistrate's decision. On the true effect of the finding of the magistrate and of the facts as we now know them, and not in any way confining ourselves to what I may call the mere statement of the facts as set out in the case, but looking at the documents and at the findings in the case, I come to the conclusion that there was no such contract. The articles were to serve for a period "not exceeding two years' duration to any ports or places within the limits of 75° North and 60° South latitude," which practically included the whole of the East, "commencing at Barry, proceeding thence to Hong Kong, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe within home limits as may be required by master." I call attention to the fact that Singapore is not mentioned there at all. Therefore, so far as the knowledge of the seaman is concerned, on the face of the articles it was a contract to go first to Hong Kong, and under ordinary circumstances, apart from express notice, that would mean a contract to deal with the cargo at Hong Kong, and the trading even to Hong Kong was, upon the articles, to be a trading for a period not exceeding two years in all between these foreign ports. I do not say that the ship might not be sent on from that place, but at any rate it cannot be said that that is a contract whereby the first port of destination was to be a hostile port. Then, upon the second part of the case, it is not immaterial to observe, with reference to what has happened in this case, that there is also a clause in the agreement which must not be altogether overlooked: "If the above trading ends from any cause except wreck, or if such time expires"—that is, if the two years expires—"while the vessel is abroad and not bound direct for the United Kingdom or Continent as stated, the crew agree to ship in any other British vessel provided by the master bound direct for United Kingdom or Continent at not less than the same rate of wages." That has only a bearing upon what subsequently happened, and upon what is the evidence before the court and before us as to the true conclusion to be drawn from what subsequently happened. A charter-party is referred to in the case, and it is not quite clear to my mind on the facts of this case whether the crew are to be taken to have known of the charter-party. I have no doubt they did, because the places where a vessel is chartered for and is clearing for are such things as seamen generally know; but if they knew what the charter-party was, then if we look at the charter-party it makes it quite plain that there was no suggestion of a distinction then of a Japanese port, because it is "To carry the cargo *viâ* the Cape of Good Hope to Hong Kong or Shanghai (charterer's option as ordered at Singapore) or as near thereunto as she can safely get." I refer to that merely for the purpose of showing that if the seamen were entitled to look at the charter-party and did know of the charter-party, it would be seen from it that the port of discharge was to be either Hong Kong or Shanghai as ordered at Singapore; and I refer to it because in these cases under the Merchant Shipping Act where the justices base their finding on the true facts, if they have compendiously referred to anything else we ought to pay attention to it. I call attention to it to show that if I am right in the view I take about the articles, if the seamen knew about the charter-party, it would not have given them any notice that they were going to Nagasaki, or a Japanese port. I mention that, not for the purpose of saying that we ought to rely on the charter-party for the purpose of varying the magistrate's finding, but as showing, if anything, that it confirms that finding; and no doubt the reason it was put in was because it is mentioned in the beginning of par. (*b*) in the statement of the case by the magistrate. Further, the case finds that "The coal was sent out as a specula-

tion, and insurance was effected against war risks before the vessel left. The cargo was sold for Nagasaki when the vessel was between Natal and Singapore"—that is, when the vessel was some four or five weeks out; and I have no doubt that perfectly honestly the cargo owners or charterers had got a bargain which they were entitled to make to sell their cargo and then to exercise their right of ordering the ship to a certain port. When the ship got to Singapore on the 27th June, the master got orders from the appellant to go to Nagasaki instead of Hong Kong; it is found that the crew did not know that she was going to any place other than Hong Kong until they reached Singapore. The crew then in a body raised the objection to going. I have no doubt that what was occurring in the East with reference to other ships would naturally make them apprehensive. The master did not insist on his right to take them on; he did not take them before the shipping authorities and treat them as seamen who had broken their contract; and he did not enforce whatever powers he might have under the Merchant Shipping Act, either by getting the certificate under the section to which I shall have to refer or otherwise, but he offered them two months' extra pay to go on. They refused it, and it was finally arranged between the master and the crew that they should remain at Singapore, and that he would call for them on his way back from Nagasaki, and then he shipped a Chinese crew and went on. I think the true conclusion to be drawn from that is, not that there was any precise agreement as to what was to happen with regard to the venture, but that there was an arrangement assented to by the master that he should not terminate the contract then and there—that he should not act as if they had broken the contract; but that, in the difficulties in which he was, they, not being willing to take his extra wages and not being willing to go on, were to remain and be available when he got back. It was not put as an obligation on the crew to ship and work the ship again when he came back, which I think is the inference which the magistrate has rightly drawn. The ship did not get back; she got to Nagasaki and discharged her cargo without difficulty. She then went ashore on Hainan Island, which is not very far from Singapore, on her way back, and at the time of the hearing she was at Hong Kong. It is said, and I come to the conclusion, that the crew were justified in declining to continue the venture and to continue to serve, going upon this voyage which involved extra risk to them, both to their lives and their safety, and their possible detention, and that they are within the principle which my brothers Kennedy and Ridley assented to in the case of *Austin Friars Steam Shipping Company* v. *Strack* (*ubi sup.*), and within the cases there referred to in their judgment of *O'Neil* v. *Armstrong, Mitchell, and Co.* (8 Asp Mar. Law Cas. 63; 73 L. T. Rep. 178; (1895) 2 Q. B. 418) and *Burton* v. *Pinkerton* (2 Mar. Law Cas. O. S. 547; 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340). In other words, they are within that class of cases which have held that, where the risk is substantially increased, and the knowledge of the increase of the risk and danger comes to the crew in the course of the voyage, and was not known to them at the time of signing the articles, they may raise objection and say that the master is not entitled to call upon them to discharge those duties, and that they have remedies against the master or the owner, as the case may be, for breach of contract. That being the state of things, and dealing for the moment with what was happening between the time when the crew were left at Singapore on the 27th June and the 1st Aug., when the vessel was driven ashore, the first point that counsel for the appellant contends is that he comes within sect. 158. [His Lordship read sect. 158.] I think the latter part of that section is not unimportant. It is quite possible in a certain case, if the crew are not willing to proceed, or are unable to proceed because they will not do what they are called upon to do, that, in addition to other remedies, the master, besides treating the crew as seamen who have broken their contracts with the master, may be able to get some such certificate as is mentioned in that section. The master did not do so in this case. He did not claim, and the owner did not claim, in aid any certificate granted under sect. 158.

But counsel for the appellant says that there was a wreck or loss of the ship. The magistrate as to that has found: "It was not proved to my satisfaction that the vessel became a wreck. There was no evidence that the crew then on board had to abandon her. The vessel was got off, and was at the time of the hearing at Hong Kong." I desire to point out that we have nothing whatever to do with the notice of abandonment or the action of the underwriters. It has been held over and over again that those are matters which affect the shipowner and the underwriters. Notice of abandonment is often given, though it is not accepted, for the purpose of arrangement and of ultimately deciding the legal rights of the parties. The real rights of the parties are not known until afterwards. It cannot mean that the question whether there is a wreck or loss for this purpose is to depend upon the particular view taken by underwriters; it has to depend upon the facts. The magistrate has here found that there was no evidence that the ship was wrecked, and, in the face of that finding, it is impossible to say that sect. 158 applies. I see no reason why the vessel should not have come back to Hong Kong and have picked up this crew and have gone on. I do not know whether that could have been done or not; I merely say that the owner has not, in my opinion, justified the right to say that the wages of the crew determined on the 2nd Aug. because of the wreck or loss of the ship. That being so, what are the rights of the parties? Here comes in the difficulty, and I think on the whole the code enables us to see the true solution of it. In my opinion, this was a contract to go to Hong Kong and serve for two years, and, if the venture came to an end other than by wreck, there was an obligation upon the owner under the contract to find employment, and therefore wages, for these men until their return home, or to the Continent. There is evidence that this contract was to continue from the point of view of wages. Even if I am wrong upon that point, I think the contention for the respondent is right, that you must show either a discharge in England or a discharge abroad. That is the way in which the Act has been framed for the protection of seamen; they must be discharged

before the superintendent in England with certain safeguards and certain rights and obligations on the part both of the owner and of the seamen—an obligation on the part of the seamen to allow certain deductions, and to submit to certain claims, and a right in certain respects, as we have known from cases that have come before us under this Act, to make certain other claims on the occasion of the discharge. It is not suggested that there was a discharge in England until after the 24th Oct. or by that date, and it is not suggested that there was a discharge abroad. I refer to the material sections of the Act that have been called to our attention. Sects. 113 and 114 deal with agreements with the crew, and the form, condition, and the terms of such agreements. Sect. 158 I have already called attention to. Sect. 186 is the section which relates to the discharge of seamen in foreign countries, and I point out that no certificate was given by the master in this case to the seamen under the Act. I call attention to sect. 188, which prohibits a master from discharging a seaman abroad unless he has given him a certificate which states that the cause of the seaman being left behind is unfitness or inability to proceed to sea. I think those sections show that the Act contemplated that the contract continues until there is a discharge under that part of the Merchant Shipping Act. I say that in addition to what I have put forward and called attention to upon the terms of the contract itself. In my opinion, whether the articles of agreement are regarded, or whether the Merchant Shipping Act is regarded, there is in this case no evidence of such a discharge under the terms of the contract or under that part of the Merchant Shipping Act, either at home or abroad, as would enable the owner to say that the wages had ceased. That being so, I think sect. 134 (*c*) applies. That section says: "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." I think that means final settlement either by the terms of the contract itself, or by the terms of the Merchant Shipping Act—that is to say, the discharge abroad, or the discharge at home, or it may be a wreck or loss under sect. 158 when the wages cease. I think that is really involved in sect. 166, sub-sect. 2, which enables the seaman to recover in addition to his wages, which would be payable upon the engagement, a sum for compensation in certain events, in the event of his having a claim in respect of matters to which he has been subjected which have increased the burden upon him or caused him discomfort prior to the actual termination and settlement of the contract. I therefore come to the conclusion that in this case the seaman was justified in saying that he would not go beyond Singapore. The master having acquiesced in that and kept the contract alive, intending to return and pick up his crew and make them serve the remainder of the two years, and not having shown that there was a wreck or loss within sect. 158, and not having proved a discharge at any date prior to the 24th Oct., I am of opinion that the decision of the magistrate was right in allowing the wages, subject to the deductions which were allowed, up to the 24th Oct. It was a right decision, and therefore I think this appeal must be dismissed.

DARLING, J.—I am of the same opinion, but, as I arrive at the same conclusion by a somewhat different road, it will perhaps be convenient that I should give my own view of this matter. The contract upon which this action is brought was made at Barry, and the respondent undertook that he would serve as one of the crew on the *Agincourt* for a period not exceeding two years' duration to any ports or places within the limits which were set out, commencing at Barry, proceeding thence to Singapore, thereafter trading to ports in any rotation, and to end in such port in the United Kingdom as might be required by the master. It was argued first of all that this contract was broken by the appellant when his ship did not go to Hong Kong, and that the respondent thereupon—that is to say, when he reached Singapore, and found that the ship was not going on to Hong Kong—was entitled to say: "I will not go any further in the ship; I will put an end to the contract, and I will have my wages or proper compensation under the Merchant Shipping Act." I do not think that there is anything in that point. It seems to me that it was not of the essence of the contract that the ship should go to Hong Kong in the first instance. When they got to Singapore the crew learnt that when the ship was between Natal and Singapore it had been decided that the ship should not go to Hong Kong, but should go to Nagasaki, a port in Japan. Nagasaki is a port within the area within which the respondent had agreed to serve as one of the crew of the *Agincourt*, and I do not see, if he had been told after going to Singapore that he was to serve as one of the crew to Nagasaki, what excuse he could have made. I do not think there was anything essential in the ship going to Hong Kong, touching there, and then going to Nagasaki. Therefore I think there is nothing in that point. But when the respondent with the rest of the crew got to Singapore, they learnt that the ship was to go to Nagasaki, which was a port of a Power then at war with Russia, and they knew that what was on board—namely, coal—was contraband of war, and that therefore they might be stopped by a Russian ship, and the ship and cargo might be confiscated. Thereupon the crew said that they would not go. My view of the matter is that if the cargo was not contraband of war, then the crew had no excuse for not going directly or indirectly to the port of Nagasaki. But there is nothing illegal in carrying contraband of war, and therefore I do not see any legal reason under which the crew at Singapore could justify themselves in saying that they would not go to Nagasaki. The reason that they gave was because the ship carried contraband of war, but, as there is nothing illegal in carrying it, I cannot see that they were justified legally in saying at Singapore, "We will not go on." That being so, it appears to me that at that point possibly the master might by the ordinary means have compelled the crew to serve out their voyage and go to Nagasaki, or, if they would not do it, possibly he might

have discharged them at Singapore and have said: "You refuse to carry out your contract to sail in this ship for a reason which is a bad reason, therefore I discharge you; you have broken the contract." It is not necessary to decide that question, and I do not affect to decide it. I am inclined to think he might have done one or the other of these things, but as a matter of fact he did neither. What he did, as I think, was this: He and the crew made what the magistrate called an arrangement. My view of it is that that was not a final arrangement, and what they did was this. They said: "We will not treat this as a breach of contract; we will not treat it as a breach that you did not touch at Hong Kong in the first instance; we will not treat it as a breach that you, the crew, have refused to go to Nagasaki. We have to continue to sail about for a couple of years hence, and we will make this interim arrangement." The master says: "I will leave the crew at Singapore and get a Chinese crew, go on to Nagasaki with this coal, discharge it there, pay the crew"—because that is what he did—"to wait at Singapore till the ship comes back," and then the crew would go on board at Singapore and would resume the voyage, and there would have been an interval in which the crew would still remain, in my view, the crew of the ship serving under contract, but their work being done, rather than have constant disputes, by Chinese; and I have no doubt the profits were such as to make it perfectly reasonable that the master on behalf of the owner should enter into such an arrangement as that. Then if the ship had come back to Singapore, my view of the matter is that the crew would have gone on board, the Chinese crew would have left, and the voyage would have been resumed under the contract. Unfortunately the ship went ashore at Hainan Reef on the 1st Aug. The crew did not wait—I suppose some arrangement was made that they should not—beyond the 4th Sept. On the 4th Sept. they were put on board another ship and brought back to England. There was no wreck proved. Therefore the question of what should be done or how the contract would be terminated if a wreck had taken place does not to my mind arise at all. Then the crew are entitled, in my view, to be paid their wages during all this time until they get back to a port in the United Kingdom to which they ultimately come, unless it can be shown that there was a discharge or other termination of the contract before that period within the Merchant Shipping Act. We have heard the various sections read; I entirely agree with what my Lord has said about them, and I do not for myself desire to say anything further about them. I am satisfied, for the reasons he has given, that there was no discharge of the crew or other termination of the contract within the Merchant Shipping Act, and therefore it enured until the crew arrived at a port in the United Kingdom, and that the respondent, who brought this action, is entitled to the wages which he has claimed.

JELF, J.—I am of the same opinion. I do not think it necessary to decide in this case whether the seamen had a right to say that, under the circumstances, they had not entered into this bargain entitling them to be sent, and making it necessary for them to go, on a dangerous voyage which they had not contemplated. It seems to me it is unnecessary to decide that, because it is agreed between the parties, and it is, indeed, argued on both sides, that during the period that the seamen were left behind at Singapore they were left upon the terms—I agree with my brother Darling—the temporary terms, that they should be treated during that time as still entitled to their wages until they should resume their position of seamen upon the ship when she came back from Nagasaki. Therefore that carries the case, as it seems to me, down to the time of the alleged wreck, and when the alleged wreck took place—if it really was a wreck and if the facts brought the case within sect. 158—that would be a termination of the services of the seamen. But upon the findings of this case it seems to me clear that that cannot be established, and therefore under sect. 134 the wages continued right up to the final settlement.

I only wish to add a few words with regard to one argument raised by the counsel for the appellant, founded on sub-sect. (*c*) of sect. 134. He said that the magistrate finds that after the 24th Oct. there was a reasonable dispute as to the liability, and he argues that because the circumstances remained the same, if there was a reasonable dispute as to liability at that time, then there must have been a reasonable dispute as to liability before that time, and therefore you arrive at the termination under these words: "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, . . . the seaman's wages shall continue to run and be payable until the time of the final settlement thereof." I think that the reasonable dispute which caused the delay in this case was a dispute arising as described in the case when it says that the ship's papers had not arrived; then the question arose as to what the facts were, and that was not cleared up until afterwards. If it had not been for that reasonable dispute, I take it that the wages would still have gone on running and been payable until some later date when the final settlement took place; but, inasmuch as there was that reasonable dispute, that is the *terminus ad quem*, and that is the time of the termination. In all other respects I agree with the judgment of my Lord.

Appeal dismissed.

Solicitors: for the appellant, *Botterell* and *Roche*; for the respondent, *Leonard Tubbs*.

Wednesday, May 10, 1905.

(Before CHANNELL, J.)

HOULDER *v.* WEIR. (*a*)

Charter-party—Lay days—"Sundays excepted"—Vessel taking in ballast as well as discharging.

By a charter-party it was provided that the ship was to load a cargo of coal and deliver the same at A. Bay, and the cargo was "to be received from alongside according to the custom and law of the port of destination free of expense and risk to the ship at the average rate of not

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

less than 120 tons per weather working day, Sundays and holidays excepted, time to count twenty-four hours after arrival in Algoa Bay and captain's notification to charterers' agents that vessel is ready to deliver, demurrage (if any) to be paid at the rate of 4d. per net registered ton per running day."

The cargo consisted of 3483 tons of coal, and on two Sundays during the period of the discharge of the cargo, the cargo was discharged.

On certain other days during the discharge of the cargo, which were weather working days and none of them Sundays, the vessel was not only discharging cargo, but was also taking in ballast, which latter operation retarded and reduced the discharge of the cargo.

The vessel could not safely have discharged more than a certain portion of her cargo at A. Bay without taking in ballast, and to have done so would have endangered the ship and the cargo remaining on board.

Held, that, on the true construction of the charter-party, the charterers were entitled to thirty lay days for the discharge of the cargo, and that the two Sundays would not count as lay days, but were in the nature of working overtime; also that the charterers were not entitled to treat the days upon which ballast was taken in as not counting as lay days, as the delay so caused was not a breach of obligation on the part of the owners.

SPECIAL CASE stated by an arbitrator.

On the 9th Aug. 1901 the charter-party of the ship *Comliebank* was entered into between A. Weir and Co., the owners of the vessel, and Houlder Bros. and Co. Limited, the charterers.

By the charter the vessel was to load at Cardiff a cargo of about 3500 tons of coal, and deliver the same at Port Elizabeth, Algoa Bay.

The question in dispute was as to the amount of demurrage payable by the charterers in respect of the discharge of the cargo at Algoa Bay.

By the charter the cargo was

To be received from alongside according to the custom and law of the port of destination, free of expense and risk to the ship, at the average rate of not less than 120 tons per weather working days, Sundays and holidays excepted, time to count twenty-four hours after arrival in Algoa Bay and captain's notification to charterers' agents that vessel is ready to deliver, demurrage (if any) to be paid at the rate of 4*d.* per net registered ton per running day.

The vessel arrived in Algoa Bay on the 15th Nov. 1901, and the arbitrator found that the 19th Nov. was the first lay day, and his award proceeded on that basis.

The cargo consisted of 3483 tons of coal, the whole of which quantity, with the exception of three tons, could have been discharged in twenty-nine weather working days at the stipulated rate of not less than 120 tons per weather working day, but as the charterers were not bound to discharge at any quicker rate, and, as there would have remained three tons to discharge after the expiration of the twenty-ninth day if the cargo had been discharged at that rate, the arbitrator held, subject to the opinion of the court, that the charterers were entitled to thirty lay days for the discharge of the cargo, and his award proceeded on that basis.

All the thirty-five days from the 19th Nov. to the 23rd Dec., both inclusive, were weather working days, but five of such days were Sundays. On two of such Sundays cargo was discharged, the consignees paying the extra expenses attendant on such discharge.

It was alleged that there was an agreement between the master of the vessel and the receiver of the cargo that the consignees should pay, as they did, in fact, pay, such extra expenses and remuneration to the crew for working on Sundays, and that such Sundays should not count as lay days.

It was contended by the owners that the master had no authority to make such agreement, and that the Sundays on which work was, in fact, done must count as lay days. Subject to the opinion of the court, the arbitrator held that as the charter expressly excluded Sundays from the computation of the lay days, Sundays could not be counted, whether work was in fact done on them or not, and whether the master did or did not make such agreement that they should not count, and his award proceeded on that basis. If the fact was material he found that the master did purport to make the alleged agreement that such Sundays should not count. He submitted to the court the question whether such agreement was within the authority of the master, and he found as a fact, that the master's only authority, if any, was that implied in his office or appointment as master.

If all the weather working days, excepting Sundays, from the 19th Nov. to the 23rd Dec. count as lay days, the thirty lay days to which he held the charterers were entitled expired on the 23rd Dec., and the vessel then came on demurrage.

The further question, however, arose as to certain of these days—viz., the 18th, 19th, 21st, and 23rd Dec. All these days were weather working days and none of them were Sundays, but on each of those days the vessel was not only discharging cargo, but was also taking in ballast, which latter operation necessarily retarded and reduced the rate of the discharge of the cargo.

It was contended by the charterers that these days should not count as lay days, or, at all events, not as whole lay days—(*a*) because the ballasting was for the benefit of the ship and they did not have the full benefit of the days for discharging purposes; (*b*) because there was, as they alleged, a custom of the port that days on which ballasting and discharging went on together should not count as lay days; (*c*) because the master, as they alleged, expressly agreed with the receivers that such days should not count as lay days.

The arbitrator thought that the charter amounted to an absolute contract by the charterers that the vessel should be discharged within the time stipulated ($\frac{3483}{120}$ days) unless the discharge within that time were prevented by the default of the shipowner or of those for whom he was responsible, and that there was no condition or contract by the owners that circumstances during all the weather working days allowed should permit of the discharge at the maximum rate or at any particular rate. He did not think that there had been any default by the owners or by any one for whom they were responsible.

He found as facts: That the *Comliebank* could not have discharged more than a certain portion of her cargo at Algoa Bay without taking in ballast, and that to have done so would have endangered the ship and the cargo remaining on board. That the discharge of her cargo necessarily would be, and was to some extent, impeded and delayed by the operation of taking in ballast. That the charterers, when they entered into the charter and agreed to the average rate of discharge, knew, or ought to have known, that there would be a point in the discharge when the rate of discharge would be affected by the necessity for taking in stiffening as the discharge proceeded. He was satisfied that up to the end of the 23rd Dec. the ballasting, in fact done, was required for the safety of the ship and cargo, and that it was done in a reasonable way and so as not to interfere unnecessarily with the discharge of cargo. No general custom of trade as to counting or not counting as lay days days on which ballasting and dischaging proceed together was proved or suggested, and he knew of no such custom. He found that if the master agreed that such days should not count as lay days he had no authority to make such agreement which would be inconsistent with the charter; the master's only authority in this respect being such as is implied in his office as master.

The award of the arbitrator proceeded on the basis that the 18th, 19th, 21st, and 23rd Dec. do count as lay days. The discharge of the cargo was completed on the 27th Jan. 1902. Assuming that the 23rd Dec. 1901 was the last lay day, and excluding, in accordance with the agreement of the owners, all days after that date on which ballasting only was done, there were twenty-four running days on which the ship was on demurand no more, and the award proceeded on that basis. If Sundays on which work was done should count as lay days, and if, therefore, the 20th Dec. 1901 was the last lay day, there were twenty-seven running days on which the vessel was on demurrage, and no more.

The questions for the opinion of the court are: (1) Whether on the facts found by the arbitrator on the 19th Nov., or some other, and what, day, was the first lay day. (2) Whether, having regard to the quantity of cargo discharged, the charterers were entitled to twenty-nine or thirty lay days, or to some other and what time, for discharging. (3) Whether the Sundays on which cargo was discharged should be reckoned as lay days. (4) Whether days on which the vessel was taking in ballast as well as discharging should be reckoned as lay days.

J. A. Hamilton, K.C. and *Leck* for the charterers.

Pickford, K.C., *Balloch*, and *F. O. Robinson* for the shipowners.

The following cases were referred to:

Yeoman v. *The King*, (1904) 2 K. B. 429;
Budgett v. *Binnington*, 6 Asp. Mar. Law Cas. 592; 63 L. T. Rep. 742; (1891) 1 Q. B. 35;
The Katy, 71 L. T. Rep. 709; 7 Asp. Mar. Law Cas. 527; (1895) P. 56.

CHANNELL, J.—In my opinion the arbitrator in this case was right on all the points decided by him in his award. As to the first question raised, that has not been argued, but it has been admitted that on the facts found in the award he was right in finding that the 19th Nov. was the first lay day. The next point that arises is as to the number of lay days and whether the charterers were entitled to twenty-nine or thirty for discharging. That depends upon the true construction on the clause in the charter-party, which provides that the cargo was to be received from alongside according to the custom and law of the port of destination free of expense and risk to the ship at the average rate of not less than 120 tons per weather working day, Sundays and holidays excepted. I think that clearly means, to be received in the time calculated at the average rate of not less than 120 tons a day—that is to say, the cargo is to be discharged at the average rate of 120 tons per day, and so the cargo ought to be discharged in the number of days to be arrived at by taking an average rate of not less than 120 tons per day. I think *Yeoman* v. *The King* was an exceptional case, and although the court held there that a fraction of a day might be considered, it seems to me rather an exception to the general rule that fractions of a day are not to be considered, and it may well be that the reason for that decision was owing to the words of the charter-party. On the true construction of the charter-party in this case I think that as the charterers were entitled to twenty-nine days and a fraction of a day for the discharge of their cargo they were entitled to thirty days.

The next point was whether Sundays on which work was done and cargo was discharged ought to be treated as lay days or not. By the charter-party Sundays were expressly excluded, and neither party was bound to work on those days, and if any work was done on Sundays it could only be with the permission of the master. In my opinion, if work is done on Sundays with such permission whether or not any extra expense incurred was paid by the consignees, what is done is merely working overtime and would not make those Sundays count as lay days. But here, further, it is found that that the permission to work on those days was only given upon the condition that the Sundays should not count as lay days. The last question is whether the days upon which the vessel was taking in ballast as well as discharging cargo should be reckoned as whole lay days. The answer to that question depends on whether those days on which the discharge of the cargo had been somewhat delayed by the ship taking in ballast were within the statement of Lord Esher in *Budgett* v. *Binnington* that "if the shipowner by any act of his has prevented the discharge though the freighter's contract is broken, he is excused." It has been contended on behalf of the charterers that, as the discharge of the cargo had been delayed on those days by the act of the owners, such days should not count as lay days. The act, however, which prevented the charterers from having a full day was not a breach of any obligation on the part of the shipowners to give the charterers all facilities for the discharge. In order that the charterers could succeed on that point they must show that the delay had been caused by an act of the shipowners or someone for whom they were responsible which would amount to a breach of such an obligation on the part of the shipowners. Here there had not been a breach of obligation, but merely the performance of a necessary operation, no less for

the protection of the cargo than for the protection of the ship. Under these circumstances it is just as if the discharge of the cargo was prevented by something beyond the shipowner's control, and so, so far as the charterers are concerned, these days must be treated as whole days.

Judgment accordingly.

Solicitors: *Templer, Down,* and *Miller*; *Thos. Cooper* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Nov. 8, 18, 19, *and Dec.* 13, 1904.

(Before GORELL BARNES, J.)

THE OLE BULL. (*a*)

Compulsory pilotage — Trinity House out-port district—Termination of compulsory employment of pilot—"Into and out of" Harwich Harbour—Definition of "into Harwich Harbour"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 622, 633.

A steam vessel, inward bound from a foreign port, was boarded outside Harwich Harbour by a pilot duly licensed to pilot "into and out of" Harwich Harbour, and was brought to an anchor by the pilot inside the harbour to wait until the tide had risen sufficiently to enable her to proceed to her discharging berth. The tide having risen, the pilot took her to her berth, and while she was being berthed she collided with and damaged another vessel.

Pilotage into the harbour was admittedly compulsory, but it was contended that the owners of the vessel entering the harbour were liable for the damage done, because the pilotage ceased to be compulsory when the vessel was anchored in the harbour, and because the work done by the pilot in taking the vessel to her discharging berth was a voluntary service performed in consideration of a fee paid by the shipowner in addition to the pilotage rate.

Held, that the owners of the vessel entering the harbour were not liable for the damage done, as the pilotage was compulsory until the vessel had reached the place in the harbour to which she was destined to go.

ACTION of damage by collision.

This case came before the court on an agreed statement of facts, and raised the question whether the *Ole Bull* was, under the circumstances mentioned in the case, compulsorily in charge of a pilot at the time of the collision. If the court was of opinion that the *Ole Bull* was in charge of a compulsory pilot, judgment was to be pronounced for the defendants with costs; if it was of opinion that the pilot was not compulsorily in charge, judgment was to be pronounced for the plaintiffs with costs, the amount of the damages to be assessed by the registrar.

The plaintiff was Thomas John Moran, the owner of the dredger *Sliedrecht II.*

The defendants were the owners of the *Ole Bull* of the port of Bergen.

The following facts were agreed:—

Shortly before 1.30 p.m. on the 12th Sept. 1903 the *Sliedrecht II.* was lying moored at or near the west side of the West Quay at Harwich. While she was so moored she was run into and damaged by the Norwegian screw steamship *Ole Bull,* a vessel of 1640 tons gross and 1041 tons net register. The *Ole Bull* was, at the time in question, on a voyage from Apalachicola, in the United States of America, to Harwich with a cargo of sawn wood and deals.

John Green, a pilot duly licensed to conduct vessels from Sizewell Bank Buoy up the North Channel to Gravesend and into and out of Harwich Harbour, had boarded the *Ole Bull* about 8.30 a.m. on the 12th Sept. near the Sunk Light and took charge of her, and at 11.45 a.m. brought her to an anchor in the Stour at a spot about 180 yards to the northward of the north end of the West Quay within the port and harbour of Harwich.

That spot was a usual and proper place for vessels to lie at anchor and discharge cargo when unable to discharge at a quay.

The tide had not then flowed sufficiently to enable the *Ole Bull* to reach any quay berth at Harwich at which her cargo could be discharged.

While the *Ole Bull* was at anchor she was visited and cleared by the Customs, and a boat was sent ashore for orders as to the place at which she was to discharge her cargo, which were given for the west side of the West Quay.

John Green might have been properly paid off and discharged when the vessel came to an anchor, but he remained on board the *Ole Bull* after she was anchored, and about 1 p.m., the tide having flowed sufficiently, the anchor was under his orders hove up, and he proceeded to navigate the *Ole Bull* to the berth at which she was to be discharged.

In the course of such navigation and while in the act of going alongside the berth, one rope having been carried from the ship to the quay, the *Ole Bull* fell against the *Sliedrecht II.* and did the damage complained of.

The berth to which the *Ole Bull* was being navigated for the purpose of discharging her cargo is situate on the western side of the West Quay above mentioned, and to the southward of the place where the *Sliedrecht II.* was lying.

Harwich is one of the Trinity House out-port districts, and the limits of the district were, by a notice published in the *Gazette* of the 19th Nov. 1852, extended to include the river Stour, so that the pilotage district is now comprised within the following limits:

To and from the Wallet, Hoseley Bay, or the Sunk Light into and out of Harwich Harbour and up and down the river Stour to Manningtree and *vice versâ*, and to and from all parts and places within the said limits.

The agreed statement of facts also contained the following paragraphs:

8. Pilotage rates have been fixed by the Trinity House of Deptford Strond for the Harwich district as follows: (A) 1. From the sea or Orfordness to Harwich Harbour. 2. From the Rolling Grounds to Harwich Harbour. 3. From Harwich Harbour to the above-mentioned places the rate varying in each case according to the distance and to size and character of the vessel. (B) There are certain rates for pilotage up and down the Stour. (C) Boarding money. A charge varying according to the size of the vessel for putting a pilot on board. No other rates have been fixed by the Trinity House.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

9. A payment of 10*s.* to 1*l.* according to tonnage is by usage charged and paid for taking any vessel from an anchorage in Harwich Harbour to a quay berth and berthing her, or for mooring her with two anchors. A vessel may be so taken from such an anchorage to a berth and berthed by an unqualified pilot without infringing any regulations of the port or any orders which the harbour master is legally empowered to give. Vessels which arrive in Harwich Harbour in charge of compulsory pilots are in fact frequently left by compulsory pilots at their anchorage and then taken from anchorage to a berth and berthed or so moored at Harwich by unlicensed persons. Moneys earned by pilots under heads A, B, and C have to be accounted for to the Trinity House, and are paid into a common fund. Moneys earned as stated in par. 9 hereof, when charged by and paid to pilots, are properly retained by them, and are not accounted for to the Trinity House or paid into a common fund.

10. The following sums were paid to the said John Green in respect of his services on the occasion in question, and he gave a receipt for the same in the following terms: "Received of Messrs. Groom and Son the sum of seven pounds six shillings for the pilotage of the s.s. *Ole Bull* from sea to Harwich and mooring: Pilotage (vessel exceeding 14ft. draft), 3*l.* 3*s.*; pilot cutter (vessel over 1000 tons register), 3*l.* 3*s.*; mooring alongside berth, 1*l.*; total, 7*l.* 6*s.*"

The first-mentioned sum represents the pilotage rate chargeable under par. 8, A 1, hereof. The second sum represents boarding money, and the third sum is the charge for berthing the ship. If the *Ole Bull* had proceeded direct from sea to her discharging berth at the West Quay without anchoring to wait for water, the said sum of 1*l.* would have been charged by the said Green for mooring her in her berth if she had been berthed by him.

The defendants, while reserving to themselves the right to object to the admissibility and to comment upon the value, effect, or relevancy of such evidence or the competence of the witness to speak to such matters as were not questions of fact, further admitted that William Groom, one of the sub-commissioners of pilotage for the Harwich district, would state "that it was open to the master of the *Ole Bull* to say to the pilot upon coming to an anchor that he did not require his services any further, and to pay him off there and then; that the pilot could have demanded his money in respect of the pilotage as soon as he dropped his anchor within the limits of the harbour; that in his opinion compulsory pilotage ceased as soon as the pilot brought his vessel to a safe anchorage within the limits of the harbour; and that any service that was performed afterwards was an additional service of a voluntary character for which the pilot was entitled to additional pay.

The following are the material parts of the sections of the Merchant Shipping Act 1894 which were referred to during the progress of the case:

582. Subject to the provisions of this part of this Act a pilotage authority may by by-law made under this part of this Act: (6) Fix the rates and prices or other remuneration to be demanded and received for the time being by the pilots licensed by them, and alter the mode of remuneration of those pilots in such manner as they think fit, so, however, that no higher rates or prices are demanded or received in the case of the Trinity House than those set out in the table contained in the twenty-first schedule to this Act, and in the case of any other pilotage authority than those which might have been lawfully fixed or demanded by that authority under any Act, charter, or custom in force immediately before the first day of May in the year one thousand eight hundred and fifty-five.

596. An unqualified pilot may, within any pilotage district, without subjecting himself or his employer to any penalty, take charge of a ship as pilot: (c) For the purpose of changing the moorings of any ship in port, or of taking her into or out of any dock, in cases where the act can be done by an unqualified pilot without infringing the regulations of the port, or any orders which the harbour master is legally empowered to give.

598 (1). If an unqualified pilot, whether within a district in which pilotage is compulsory or outside such a district, assumes or continues in the charge of a ship after a qualified pilot has offered to take charge of the ship, he shall for each offence be liable to a fine not exceeding fifty pounds.

622 (1). Subject to any alterations to be made by the Trinity House and to the exemptions under this part of this Act, pilotage shall be compulsory within the London district, and the Trinity House out-port districts. (2) If a master of a ship navigating within those districts, after a qualified pilot has offered to take charge of the ship, or made a signal for the purpose, either himself pilots the ship without possessing a pilotage certificate, or employs or continues to employ an unqualified person to pilot her, he shall for each offence be liable, in addition to any other penalty under this part of this Act, to a fine not exceeding five pounds for every fifty tons burden of the ship, if the Trinity House certify in writing, under their common seal, that the prosecutor may proceed for the same.

633. An owner or master of a ship shall not 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 that ship within any district where the employment of a qualified pilot is compulsory by law.

Nov. 8.—*Balloch* for the plaintiff, the owner of the *Sliedrecht II.*—On the facts stated the *Ole Bull* was not at the time of the collision in charge of a compulsory pilot. It is admitted that after the *Ole Bull* anchored at 11.45 a.m. the pilot could have been properly discharged, and that an unlicensed person might afterwards have moored her. [GORELL BARNES, J.—It will, I think, be very difficult for the defendants to make out that their vessel was in charge of a compulsory pilot if the facts and the legal position of the parties are stated accurately.]

Bailhache for the defendants, the owners of the *Ole Bull*, asked for an adjournment to enable the defendants to call further evidence.

The adjournment was granted, the defendants paying the costs of and occasioned by the adjournment.

Nov. 18 *and* 19.—The defendants called the principal clerk in the Pilotage Department of the Trinity House, London, who stated that at the time of the collision there was a usage that the pilots at Harwich should be paid a berthing fee, and they got it when they could.

On the 1st March 1904 the Trinity House for the Harwich district had issued a notice which gave the table of rates which might be charged by the pilots for piloting vessels, and which contained the following paragraph:

In addition to the above rates, the following charges for any of the under-mentioned services shall be paid—namely, for removing a vessel from her moorings or at anchor to any part of the harbour and leaving her berthed in safety, or for piloting into Felixstowe Dock,

and berthing the vessel at the request of the master, for either of these services 10s. for vessels of 500 tons register and under, 15s. for vessels exceeding 500 tons and under 1000 tons, and 20s. for vessels above that tonnage.

Balloch for the plaintiff, the owner of the *Sliedrecht II.*—After the *Ole Bull* came to an anchor in Harwich Harbour there was no obligation on her master to employ a pilot, so when the collision happened the pilot was not compulsorily in charge. The pilot is licensed "to conduct vessels into and out of Harwich Harbour," and it is agreed that "he might have been properly paid off and discharged when the vessel came to anchor." He in fact remained on board, but he did so to perform a voluntary service for which he received additional pay which was distinct from the pilotage rate. Once the *Ole Bull* was anchored, no special knowledge was needed to navigate her to her berth; therefore the compulsory pilotage contemplated by sect. 633 of the Merchant Shipping Act 1894, in the course of which the owner is not responsible for damage occasioned by the fault of the pilot, had come to an end, and the pilot was not then doing the work of a "qualified pilot acting in charge" within the meaning of that section, but was doing work which is admittedly often done by unqualified persons. The pilot would not be entitled under sect. 598 of the Act to supersede anyone engaged to berth the vessel, for the vessel could have been taken from her anchorage to her berth by an unqualified pilot without infringing the provisions of sect. 596, sub-sect. (*c*), of the Act—that is, without "infringing the regulations of the port or any orders which the harbour master is legally empowered to give." The notice of the 1st March confirms this view, for it recognises that the customary charge for berthing is something distinct from the compulsory pilotage rate levied under by-laws made by virtue of sect. 582 of the same Act. This extra charge is similar to the charge made by the Liverpool pilots for taking a vessel alongside a landing stage, which was a charge additional to the pilotage rates:

The Servia; The Carinthia, 78 L. T. Rep. 54; 8 Asp. Mar. Law Cas. 353; (1898) P. 36.

Bailhache for the defendants, the owners of the *Ole Bull*.—The *Ole Bull* was admittedly under compulsory pilotage up to the time she anchored in the harbour; it is submitted that the compulsory pilotage continued till the vessel reached her final place of discharge within the Harwich district. The pilot took charge of the *Ole Bull* by compulsion of law at the Sunk Light, and, having remained on board and continued in charge, was "acting in charge of the ship within a district where the employment of a qualified pilot is compulsory by law" within the meaning of sect. 633 of the Merchant Shipping Act 1894. It is an admitted fact that, if the vessel had proceeded straight to her discharging berth, the pilot would still have charged the extra sum for berthing her, so that payment is not of itself any evidence that the pilotage ceased when the vessel was anchored. The temporary stoppage did not terminate the compulsory pilotage:

The Rigborgs Minde, 49 L. T. Rep. 232; 5 Asp. Mar. Law Cas. 123; 8 P. Div. 132.

The facts in this case are not the same as in the case of *The Maria* (16 L. T. Rep. 717; L. R. 1 A. & E. 358). In that case the *Maria* had finished her voyage and discharged her cargo, and then, in moving to another dock, had collided with another vessel. The fact that a vessel anchors to wait for the tide does not of itself put an end to the compulsory pilotage:

The Mercedes de Larrinaga, 90 L. T. Rep. 520; 9 Asp. Mar. Law Cas. 571; (1904) P. 215.

The statement that the pilot might have been properly paid off and discharged when the vessel came to an anchor does not conclude the legal position; it only indicates that at Harwich, when a vessel has temporarily anchored, other persons than the pilot who brought the vessel in may berth her. As to the extra payment, the case of *The Servia*; *The Carinthia* (*ubi sup.*) is not analogous, for in that case the pilot did something which was outside his duty; in this case the pilot only did what it is admitted he would have done if the *Ole Bull* had not anchored. The pilot, being in charge in a district for which he was licensed, was not in the position of a servant of the shipowner:

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

The Charlton, 73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29.

Balloch in reply.—The principle laid down in *General Steam Navigation Company* v. *British and Colonial Steam Navigation Company* (*ubi sup.*) does not apply, for in that case the shipowner was paying a rate which covered the pilot's services to a point beyond that at which the collision occurred:

The Suesex, 90 L. T. Rep. 549; 9 Asp. Mar. Law Cas. 578, at p. 583; (1904) P. 236.

Here there is evidence of a fresh contract between the pilot and the master, after the vessel had come to anchor, to do work which it was unnecessary for a qualified pilot to be engaged to do. In *The Rigborgs Minde* (*ubi sup.*) the question turned on an Act of Parliament which does not refer to this district. In *The Mercedes de Larrinaga* (*ubi sup.*) the pilot was to take the vessel to Eastham Locks and was charging one sum for doing so; the pilotage rate there covered all the work done by the pilot, but in this case there is a rate for bringing the vessel into the harbour and a charge for berthing her, which might be done by an unqualified person, and it was while the *Ole Bull* was being berthed that the accident happened.

Cur. adv. vult.

Dec. 13.—GORELL BARNES, J.—There has been a statement of facts in this case, in the nature of a special case, which raises a point as to compulsory pilotage in the port of Harwich. The plaintiff is Mr. T. J. Moran, the owner of the dredger *Sliedrecht II.*; the defendants are the owners of the Norwegian steamship *Ole Bull*. On the 12th Sept. 1903 the *Sliedrecht II.* was lying moored at or near the west side of the West Quay at Harwich. That quay is to the westward of the railway terminus at Harwich, and there is a small inlet to the west of that quay shown on the chart. The case stated shows that "the foreshore to the west of the quay has been dredged out in the manner shown on the chart." The *Sliedrecht II.*, while lying moored in that place

was run into and damaged by the steamship *Ole Bull*, which was at that time on a voyage from Apalachicola to Harwich with a cargo of sawn wood and deals. The defendants in par. 3 of the statement of facts admit "that if the *Ole Bull* was not compulsorily in charge of a pilot at the time when the *Sliedrecht II.* was so damaged, the plaintiff is entitled to recover damages from the defendants in respect of the said collision." The *Ole Bull* appears to have been brought into the port of Harwich by a man named John Green, who was a pilot, and who was licensed to pilot, among other places, into and out of Harwich Harbour. His certificate is dated the 14th June 1882, and so was granted to him prior to the time of this disaster. I do not know whether the certificate is renewed from year to year, but he is treated in this case as holding the Trinity House licence to pilot into and out of Harwich Harbour. He had boarded the *Ole Bull* about 8.30 a.m. on the 12th Sept. near the Sunk Light and took charge, and at 11.45 a.m. he brought the *Ole Bull* to an anchor in the Stour. That is a little to the northward of the inlet into which she was to be moved, and is within the port of Harwich, The statement of facts sets out that that spot "is a usual and proper place for vessels to lie at anchor and to discharge cargo when unable to discharge at a quay." Then follows this important statement: "The tide had not then flowed sufficiently to enable the *Ole Bull* to reach any quay berth at Harwich at which her cargo might be discharged. While the *Ole Bull* was at anchor there she was visited and cleared by the Customs authorities, and a boat was sent ashore for orders as to the place at which she was to discharge her cargo, which were given for the west side of West Quay. At 1 p.m., the tide having flowed sufficiently, the anchor was under the pilot's orders hove up, and he proceeded to navigate the *Ole Bull* to the place at Harwich where she was to be discharged, and in the course of such navigation and while in the act of going alongside a berth at the said quay, one rope having been carried from the ship to the quay and made fast thereon, and while navigating over the part of the foreshore so dredged out, the *Ole Bull* fell against the *Sliedrecht II.* and did the damage complained of." The only question I have to determine is whether the pilotage is compulsory or not. If it is, the defendants are not to be treated as responsible for the damage done; but if the pilotage is not compulsory, then the defendants are responsible. The point is a short one, and the main question raised is: Whether the pilotage ceased to be compulsory when the *Ole Bull* came to an anchor, or whether it continued to be compulsory until she was moored to the quay. The plaintiff says it ceased when the ship dropped her anchor; the defendants say it continued until the vessel got to the quay. The plaintiff puts the case in this way: He says that this pilotage is into or out of the port of Harwich—"into" is the point here—and that the pilot gets a certain rate, set out in par. 8 of the statement of facts, for piloting from sea or Orfordness to Harwich Harbour, and from the Rolling Grounds to Harwich Harbour, and that that rate covers what he has got to do to bring her to the anchorage; and that afterwards, if the ship moves from the anchorage to a berth for discharging at the quay, she has to pay, by usage, 10*s.* or 1*l.*, according to her tonnage, for the pilot taking her from the anchorage to the quay berth and mooring her. The plaintiff then points out that it is admitted in the statement of facts that "A vessel may be so taken from such an anchorage to a berth and berthed by an unqualified pilot without infringing any regulations of the port or any orders which the harbour master is legally empowered to give. Vessels which arrive in Harwich Harbour in charge of compulsory pilots are, in fact, frequently left by compulsory pilots at their anchorage and then taken from anchorage to a berth and berthed or so moored at Harwich by unlicensed persons." Shortly stated, the plaintiff says that this ship was compulsorily piloted to the anchorage, and that then the pilot's duties ceased to be compulsory, and that from the anchorage to the quay the pilot was voluntarily employed at a slight additional remuneration of 10*s.* or 1*l.* The defendants say that the pilot was compulsorily employed right through from first to last until he got to the quay, and that the temporary anchoring to wait for the tide makes no difference. I thought at the time this case was first presented to me that the statement of the legal position of the parties, or those concerned in such matters as this—the pilots, for instance—was so worded as to state the law in such a form as to put the defendants out of court, because par. 6 commences with this statement: "The said John Green might have been properly paid off and discharged when the vessel came to an anchor as aforesaid, but he remained on board." That, and other passages which it is not necessary to go into, led, in my mind, to the conclusion that as this case was drawn it was in fact stating that the compulsory pilotage legally determined at the anchorage, and that after that there was a voluntary agreement to proceed on. The matter being of some importance outside this particular case because it affected the question of pilotage at Harwich generally, the case was on the application of the defendants' counsel adjourned that evidence might be given as to how this matter was dealt with and how it arose. The case has now to be treated as if those statements of legal effect were not in it, and one must apply the law applicable to the facts partly upon the evidence given and partly on the statement of facts. Taking those facts together, there is nothing in this case to show that anything took place between the master and the pilot which had the effect of making a distinct new bargain between them. The pilot went on from the anchorage to the quay, and, whatever the legal position is, apart from any special contract that was made between the parties, they seem to have gone on in the ordinary course of business What does that ordinary course amount to? It seems that the ordinary course leaves the matter open to decision as to what the real legal obligation and duty of the two parties is—that is to say, whether pilotage into Harwich means pilotage to the place where the ship is destined to be discharged, or means pilotage to any spot in the harbour where she may chance to be brought to for temporary purposes. I say that because all the evidence and the agreed facts show that, as a matter of fact, pilots have been paid their pilotage rate for proceeding to an anchorage, and have obtained a payment afterwards of some small sum for taking a vessel from an anchorage to her proper place of discharge. The impression which is left on my

mind by these matters is that the pilots have succeeded in getting this extra payment because of the fact that they are delayed when they come to an anchorage, and have to waste time waiting till the ship can be moved into the place to which she is destined to be moved. They have, rightly or wrongly, succeeded in getting that sum, and since the matter has been brought out more prominently the Trinity House have made an alteration. A circular put in evidence before me, dated the 1st March 1904, deals with the Harwich district, and contains the rates from the sea to Harwich Harbour, and gives the figures. Then it contains the following paragraph: [The learned judge then read the paragraph set out above, and continued:] Substantially, this circular, in a sense, authorised what had been going on for some time—namely, a rate charged into the harbour and an extra charge if the vessel is removed from moorings or an anchorage to any part of the harbour and berthed. That really gives the go-by to the question in the case, which is, What is the duty of the pilot on the one hand, and the obligation of the shipowner on the other, with regard to the termination of the compulsory employment? Even if there is an extra rate now to be paid, or an extra sum was in former times asked for and obtained, for taking the vessel from the spot at which she has anchored to the berth, that is not at all conclusive of what the compulsion is and when the compulsion ceased. The duration of the compulsion seems to turn upon the true construction of the Acts of Parliament coupled with the licence as to what is to be done. It is admitted, for the purpose of this case, that the pilotage is compulsory into and out of Harwich Harbour, and so the question comes to be, What is pilotage into Harwich Harbour? Does it mean that the ship is to be brought to any point in Harwich Harbour at which she is compelled to stop, and then the pilotage ceases to be compulsory? Or does it mean compulsory as long as she is still proceeding to the destination in the port to which she has to go?

The exact point to be decided is not. as far as I can ascertain, covered by any distinct authority, and the only observations which I can find which seem to me directly to bear upon it are observations which I myself made in the case of *The Mercedes de Larrinaga* (*ubi sup.*). That case is reported, and the observations to which I refer are to be found on pp. 230-232 of the report appearing in the Law Reports. This case may be considered, first of all, from the point of view as to what would have been the position if the vessel had been brought straight from the sea to the mooring berth, without any interruption at all. It seems to me that in that case the pilotage would be compulsory from first to last. It would be pilotage into the harbour, and pilotage to a point which was already fixed upon. Then the question arises, Can it make any difference whether the ship is anchored, compulsorily but temporarily, because of the state of the tide? I cannot see that it makes any difference at all. If it did, it would be sufficient to anchor a ship at any spot within the limits of the harbour, and then say the pilotage ceased. I can see no difference between the two positions. It seems to me that the meaning of pilotage into a harbour, where the words are general, must be determined by the place in the harbour to which the vessel is intended and destined to go, and if for any temporary purpose she is interrupted in getting there, by tide, wind, or fog, she is none the less *in itinere* to the place to which she has to go. I take the general view of this case which is presented by some of those Mersey cases which deal with inward-bound ships, and are practically on the same lines. Those cases are referred to in the judgment I gave in the *Servia* and *Carinthia* (*ubi sup.*). Therefore I do not think it would have made any difference if there had been any independent arrangement for payment from the anchorage to the berth; but there was not, in fact, any such arrangement, and it was left open, on the footing of what was usually done in port. I think, therefore, that, notwithstanding the fact that extra payment has been asked for and seems now to be regularly made, it makes no diffence to the compulsion, but only fixes the rate of payment. The result, in my judgment, is that the *Ole Bull* was compulsorily in charge of a pilot at the time of the said collision, and I understand from the statement of facts that, as the court is of that opinion, judgment is to be pronounced for the defendants with costs.

Solicitors: for the plaintiff, *Rawle, Johnstone, and Co.*; for the defendants, *Thomas Cooper and Co.*

Dec. 13 *and* 14, 1904.

(Before GORELL BARNES, J.)

THE ASHTON. (*a*)

Collision — Crossing ships — Narrow channel — Regulations for Preventing Collisions at Sea— Arts. 19, 21, 22, 23, 25.

A collision took place in the river Humber close to Clee Ness Buoy between a steam trawler coming up river from the North Sea to Grimsby and a steamship proceeding down river from Grimsby to Hamburg. The trawler had the steamship's green light open to her red light.

Held, that arts. 19, 21, *and* 25 *of the collision regulations applied, and that the trawler was to blame for porting and so not keeping her course, and for being on the wrong side of the channel; and that art.* 22 *applied, and that the steamship was to blame for starboarding and so attempting to cross ahead of the trawler.*

The water in the Humber between the Bull and Clee Ness buoys on the south side and the buoys on the north side is a narrow channel.

ACTION of damage.

The plaintiffs in this action were the Monarch Steam Fishing Company Limited, the owners of the steam trawler *King Stephen*. The defendants were the owners of the steamship *Ashton*.

The action was brought to recover the damage sustained by the plaintiffs by reason of a collision which occurred between the two vessels about 1 a.m. on the 11th May 1904. The owners of the *Ashton* also counter-claimed for the damage sustained by their vessel.

The case made by the plaintiffs was that the *King Stephen*, a steel steam trawler of 162 tons gross register, manned by a crew of nine hands all told, was in the river Humber on a voyage from the fishing grounds in the North Sea to

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Grimsby. The wind was north-west, a light air; the weather was fine and clear, and the tide was nearly high water with a force of about one and a half knots.

The *King Stephen* was proceeding up the Humber on the starboard side of the channel between Bell Buoy and Clee Ness Buoy, on a course of N.W. magnetic, and was making about eight knots. Her regulation underway lights were being duly exhibited, and were burning brightly, and a good look-out was being kept on board of her. In these circumstances those on the *King Stephen* saw the masthead and green lights of the *Ashton* about one and a half miles off, and about two points on the port bow, and almost immediately afterwards the red light of the *Ashton* came into view. The helm of the *King Stephen* was ported to allow the *Ashton* plenty of room to round Clee Ness, and one short blast was sounded on her steam whistle, and the helm was afterwards steadied. Shortly afterwards the red light of the *Ashton* was shut in, but after a short interval it was again opened, whereupon the helm of the *King Stephen* was ported a little more, and one short blast was again sounded on her whistle, and the engineer was ordered by telegraph to stand by the engines, and the helm was steadied. But the *Ashton*, again shutting in her red light, came on at a high rate of speed, and, although when those on board the *King Stephen* saw that a collision was inevitable the engines of the *King Stephen* were stopped and reversed full speed and her helm was put hard-a-port, the *Ashton* with her starboard side about 30ft. abaft the stem struck the port side of the stem of the *King Stephen*, doing her great damage. The plaintiffs alleged that those on the *Ashton* improperly starboarded their helm and failed to keep out of the way of the *King Stephen*, and improperly attempted to cross ahead of her.

The case made by the defendants was that the *Ashton*, an iron screw steamship of 1031 tons gross register, manned by a crew of twenty-two hands all told, and bound from Grimsby to Hamburg with cargo and passengers, was in the Humber a little above Clee Ness Buoy and below Burcom Buoy. The wind was north-north-west, a light breeze; the tide was the last of the flood of the force of from two to three knots, and the weather was fine and clear. The *Ashton* was making about ten knots over the ground on a course S.E. by E. $\frac{3}{4}$ E. magnetic, and was heading to pass a clear berth from the Clee Ness Buoy. Her regulation lights were being duly shown, and were burning brightly, and a good look-out was being kept on board of her. Whilst so bound those on the *Ashton* saw the masthead and red lights of the *King Stephen* four points on the starboard bow, and one and a half to two miles off. The helm of the *Ashton* was slightly starboarded and then steadied, and, as the masthead and red lights of two steamers bound up the river on her port bow were in sight somewhat nearer than the *King Stephen*, no starboard helm signal was sounded on her whistle. The red light of the trawler broadened on the starboard bow, and the vessels would have passed all clear without any risk of collision, but as she came nearer the trawler was seen to be suddenly closing in under a port helm. The engines of the *Ashton* could not be reversed without certainty of collision, but were at once stopped, and the helm put hard-a-starboard, and two blasts blown on her whistle in answer to a short blast from the trawler. The latter, however, still came on at great speed under a hard-a-port helm, and with the port side of her stem struck the starboard side of the *Ashton* in the way of the fore gangway, doing her damage.

The defendants charged the plaintiffs with improperly porting and failing to keep her course, and with navigating on the wrong side of the channel.

The collision regulations applicable to the case are as follows:

Art. 19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

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 or reverse.

Art. 25. In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which is on the starboard side of such vessel.

Aspinall, K.C. and *R. H. Balloch* for the plaintiffs, the owners of the *King Stephen*.—Those on the *King Stephen*, seeing from time to time the red light of the *Ashton*, did right to port and so allowed the *Ashton* more room to round Clee Ness Buoy. Art. 25 does not apply, but, if it does, art. 19 applies also:

The Leverington, 55 L. T. Rep. 386; 6 Asp. Mar. Law Cas. 7; 11 P. Div. 117.

The *Ashton* therefore is to blame for starboarding and so attempting to cross ahead of the *King Stephen*.

Robson, K.C. and *Batten* for the defendants, the owners of the *Ashton*.—Those on the *King Stephen* could never have seen the red light of the *Ashton*, and so ought not to have ported. Arts. 19 and 21 of the collision regulations apply, and by porting those on the *King Stephen* broke art. 21. Those on the *King Stephen* also infringed art. 25, for the *King Stephen* was being navigated on the wrong side of the channel. The *Ashton* is not to blame for starboarding, for the vessels were not crossing in such a way as to involve risk of collision.

GORELL BARNES, J.—The collision in this case took place about 1 a.m. on the 11th May 1904. The plaintiffs say it occured in the river Humber, in the vicinity of Clee Ness Buoy; the defendants say a little above Clee Ness Buoy. The angle at which the collision took place is not in dispute; the blow leads forward, and the *Ashton* with the starboard side some distance from the stem came against the port side of the stem of the *King Stephen*. Both vessels were damaged. [After stating the case made by the plaintiffs, the learned judge proceeded:] In effect the plaintiffs' case is to suggest that the vessels were in such a position that the *King Stephen*, seeing the red light of the *Ashton*, ported and kept away, allowing more room, but that the *Ashton* produced the

collision by starboarding and not keeping out of the way of the *King Stephen*. [The learned judge then stated the case made by the defendants, and continued:] The great inconsistency between the two cases is that on the defendants' case those on the plaintiffs' vessel could never have seen the red light of the defendants' vessel. The case involves the consideration of the rules applicable to the navigation in this locality—namely, the narrow channel rule and the crossing rules. The plaintiffs contend that they were not in a position in which they could be held to be wrong with regard to the side of the channel on which they were navigating, and that in a sense there is no channel. The defendants say that the plaintiffs were on the wrong side of the channel, and are to blame for being so. The navigation of this place is clear from the chart. The river runs from Hull downwards past the Middle red light out to the Bull, and the port of Grimsby lies, coming down, on the starboard hand, and any vessels coming out of Grimsby have to get into the main stream by passing out first near the Spar Buoy and then by No. 4 buoy, which is called the Burcom Buoy, and then have to round under a port helm near the Clee Ness Buoy, and so get straight down to the Bull. There seems no doubt that the ordinary course of navigation is what I have indicated, and that the traffic treats that part of the river opposite Clee Ness Buoy as a narrow channel in which vessels going down pass close to the Clee Ness Buoy, and vessels coming up ought to give the Clee Ness Buoy a wide berth and keep well to the northward of it. My impression is that art. 25 applies to this locality, and that vessels which come out properly should round the Clee Ness Buoy, and that vessels going in should keep well away from the Clee Ness Buoy. I do not think, however, it makes any practical difference whether the strict terms of art. 25 apply or not, because it is obvious that any vessel coming out from Grimsby must come as the defendants' ship came, quite close round the Clee Ness Buoy, and that vessels coming up must make an allowance for that position, and the incoming ship would have to allow the down-coming one room to pass there. The first thing to determine is whether the collision took place close to the buoy or not. The plaintiffs contend that it was a quarter of a mile from the buoy; the defendants say two or three lengths from it. My impression is, after hearing the evidence, that the collision took place close to the Clee Ness Buoy, in such a position that the down-coming vessel was jammed up close to the buoy, and that that vessel could only go down with difficulty. Therefore, if this case had depended upon that point alone, I should have thought the plaintiffs' vessel was wrong in being in the position in which she was. My impression is that the plaintiffs' vessel was coming up the river very close to the line of the Clee Ness Buoy, but I do not think that it was quite so broad on the bow of the defendants' vessel as they say.

The next matter to consider is whether the crossing rule, art. 19, applies to this locality. I think it does; the traffic up and down the river has to go past, in this locality, the traffic coming out of Grimsby, which has, speaking in general terms, to go across it to get into position; and vessels at certain times and places seem to me necessarily to be in the position of crossing vessels. The plaintiffs, in order to get rid of that difficulty, suggested that they kept seeing touches of the red light of the defendants' ship, and therefore ported. On the other hand, the defendants say their position was such that their red light could never have been seen by the plaintiffs, and that is the view I accept. With a vessel coming out of Grimsby in the natural course as the defendants' vessel was coming, with the Spurn light slightly on their starboard bow, it is almost impossible for the plaintiffs ever to have seen the red light of the defendants' ship. It is possible that, if the defendants' ship was finding her way through different craft, she might then have altered so much as to show her red light, but that was not really suggested, and my view is that the plaintiffs never were in a position to see that red light, and wrongly ported from first to last. If the crossing rule applies, it is clear that the plaintiffs' vessel had no business to port at all; she had to keep her course and speed. Even if the rule does not apply, it makes no practical difference, because you have the position of one vessel approaching with her green light showing and another with her red light showing, and you would have that position for a considerable time. You have a position of danger which, when you consider the angle of the blow, shows that the plaintiffs' vessel was running into danger and ported to such an extent as really to create that danger in a violent way, and kept on without reversing her engines until the very last moment. The engines on the plaintiffs' vessel only went astern ten or twelve revolutions before the collision; therefore they must have been reversed at the very last moment, and my view is that the great alteration which produced this blow leading forward was produced by the plaintiffs' action, and that the alteration in the heading of the defendants' vessel was much slighter. The plaintiffs were not only running into danger from the first, but brought it about more effectively at the last, and did nothing to counteract it by stopping and reversing their engines. On any view of the case the *King Stephen* must be held to blame.

There remains the question whether the defendants' vessel is to blame. It may be to blame for two reasons. Assuming that the crossing rule applies, I am not prepared to accept the defendants' story that the plaintiffs' vessel was so broad upon their starboard bow as they say. The crossing rules are as follows: [The learned judge then read arts. 19 and 22 of the collision regulations, and proceeded:] The only way in which the defendants can escape from liability, if these rules apply, is by showing that the vessels were not crossing so as to involve risk of collision. If they could make out that art. 19 could not apply, then art. 22 would not apply. That is the way in which the defendants placed their case, for the master of the defendants' vessel, who was navigating, speaking generally, with care, said that he saw the masthead and red lights, bearing about four points on the starboard bow, a mile and a half off, and that he starboarded as a matter of precaution, and then kept his course. If there was no risk of collision in the position in which the vessels were then, why starboard as an act of precaution? That shows that in acting as he did, taking the position of the other vessel to be as broad as he said it was, he was acting as

a matter of precaution, and therefore considered that there was a risk. Then he described why he did not whistle when he starboarded, and said that he took a second bearing and the other vessel had broadened a point. In reality the plaintiffs' ship had only broadened half a point, because half a point had been produced by the starboarding of the defendants' ship. The question I have to consider is whether it can be said that at the outset there was no risk of collision. The ground upon which the defendants put it must be that having regard to their speed, and the other vessel approaching them at a slower speed on the starboard side, there really was no risk of collision. That is a view that neither I nor the Elder Brethren can accept, because, although it is said that the vessel broadened, she broadened very slightly. Action had been taken as a precaution against the very risk which turned out to be the real risk, and in those circumstances it is impossible to say that the rules as to keeping out of the way and not crossing ahead of the other ship are inapplicable. The defendants were within those rules, and their vessel ought not to have attempted to cross ahead of the other ship. If there was any difficulty in porting at that time, it could have been avoided either by stopping the engines and waiting until the red light had crossed their bows or by running away under hard-a-starboard helm, although that is probably not nearly so advisable a course as stopping and waiting. This very point is referred to in the notes to art. 22 in Mr. Stuart Moore's Rules of the Road, where he says: "By this rule a steam vessel should port to a red light on her starboard bow. She may, however, stop without porting and wait till the other vessel has passed." Then there is this further view of the matter upon which the Elder Brethren also advise me—that is, even supposing the crossing rules do not apply, you still have two vessels approaching, one showing a green light and the other showing a red light, and at a certain period risk is created by the plaintiffs' vessel porting her helm. The captain of the defendants' vessel said that he stopped his engines and put his helm hard-a-starboard, blowing two blasts, when the other ship was about a length off, and that he did not reverse, as it would have canted the defendants' steamer towards the other vessel. Now, assuming that the most alteration was by the plaintiffs' vessel, that alteration was a large one. It was one which would require time to execute, and the moment it was seen that this other vessel was not going on broadening, and was porting, the engines of the defendants' vessel, in the opinion of the Elder Brethren, should have been stopped and reversed. That is in accordance with sound sense and judgment, because, if that had been done, the collision could not have happened, for the other vessel would have ported right across the defendants' vessel. The result is that, although the main blame rests with the trawler, both ships must be held to blame.

Solicitors: for the plaintiffs, *Deacon, Gibson,* and *Co*, agents for *Grange* and *Winteringham*, Great Grimsby; for the defendants, *Crump* and *Son*, agents for *Jackson* and *Co.*, Hull.

Dec. 15 and 16, 1904.

(Before GORELL BARNES, J.)

THE SKIPSEA. (*a*)

Collision—River Tyne—Vessel coming out of dock—Duty to keep out of the way—Regulations for Preventing Collisions in the Tyne—Rules 21 and 22.

A steam vessel leaving a dock on the north side of the Tyne was making to cross the river to the south side to get on to her starboard side of the river before proceeding to sea when she sighted another steam vessel attended by a tug coming up the river on the north side, and came into collision with her.

Held, that rules 21 and 22 of the Tyne Regulations applied, and that the vessel leaving the dock and making to cross the river was to blame for not waiting until the upcoming steamship had passed, and for not clearly signifying to the upcoming steamship her intention to wait.

ACTION of damage.

The plaintiffs were the owners of the steamship *Vernon*. The defendants and counter-claimants were the owners of the steamship *Skipsea*.

The plaintiffs brought their action to recover the damage they had sustained by reason of a collision which occurred between the two steamships about 5.45 p.m. on the 14th Sept. 1904 in the river Tyne off the entrance to the Northumberland Dock. The weather at the time was fine and clear, the tide was flood of the force of about a knot and a half, and the wind was north-east a light breeze.

The case made for the plaintiffs was that the *Vernon*, a screw steamship of 982 tons gross register, manned by a crew of sixteen hands all told, was, whilst on a voyage from the Tyne to Rochester with a cargo of coal, in the river Tyne, just outside the Northumberland Dock, and inside the line of the northern bank of the river below the entrance. The *Vernon*, which was intending to cross on to the south side of the river in order to proceed down if the way should prove clear, was heading in a direction towards the south shore and down river, and was making about one and a half knots through the water, with engines working slow, in a position to cross over to the south side. Just before the *Vernon* came out of the lock a long blast had been sounded on her steam whistle, and a good look-out was being kept on board of her. In these circumstances those on the *Vernon* saw the *Skipsea* with a tug made fast ahead coming up the river about three to four hundred yards off, and bearing about three points on the port bow of the *Vernon*. With a view to keep out of the way of the *Skipsea* and her tug, and to let them continue their course, the helm of the *Vernon*, which was a little to starboard, was at once put hard-a-starboard and two short blasts were sounded on her steam whistle, and shortly afterwards her engines were stopped. The *Skipsea*, as she approached, instead of keeping her course up river and passing outside the *Vernon* as she could and ought to have done, was heard to sound one short blast on her steam whistle, and she and her tug were seen to be altering as if under port helm. The helm of the *Vernon* was immediately put hard-a-port and her engines put full speed

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

astern, and three short blasts were sounded on her steam whistle, but the *Skipsea* came on at considerable speed, continuing to alter as if under port helm, and so towards the *Vernon*, and with her port bow struck the port side of the stem and the port bow of the *Vernon*, doing her considerable damage. Shortly before the collision the *Skipsea* was heard to sound three short blasts on her steam whistle, and was seen to let go her anchor.

The plaintiffs charged the defendants (*inter alia*) with neglecting to keep their course up river, with improperly porting, and with failing to slacken their speed or stop and reverse their engines.

The case made by the defendants was that the *Skipsea*, a steel screw steamship of 2993 tons gross register, manned by a crew of twenty-four hands all told, was in the river Tyne, between the Albert Edward and Northumberland Docks, in the course of a voyage from Rotterdam to Dunstan-on-Tyne in water ballast. The *Skipsea* had the steam tug *Rainbow* made fast ahead, and was in charge of a duly licensed Tyne pilot. She was proceeding up the river on the north side of the channel with her engines stopped, and was making about one and a half knots an hour. Her whistle had been sounded a long warning blast as she approached the commissioners' staithes, and a good look-out was being kept on board of her. In these circumstances those on the *Skipsea* saw the *Vernon* about a quarter of a mile off, and bearing about half a point on the starboard bow. The *Vernon*, which had come out of Northumberland Dock, was heading across the river, and when she was sighted the helm of the *Skipsea* was ported a little and then steadied, and her whistle was sounded one short blast, which signal was shortly afterwards repeated. The *Vernon*, which gradually drew across the bows of the *Skipsea*, sounded two short blasts on her whistle in answer to each of the latter's signals, and shortly afterwards when the *Vernon*, being on the port bow of the *Skipsea*, was seen to be canting under a starboard helm and to be coming towards the *Skipsea*, causing danger of collision, the engines of the latter vessel were put full speed astern, and the whistle was sounded three short blasts, and this signal was subsequently repeated. The *Vernon* sounded two short blasts in answer to each of the *Skipsea's* three-blast signals, and she continued to swing under a starboard helm, and, coming rapidly towards the *Skipsea*, with her stem and port bow struck that vessel on the port bow a little abaft the collision bulkhead a heavy blow, causing her damage. Just before the collision the *Skipsea's* tug slipped her towrope, and the starboard anchor of the *Skipsea* was let go.

The defendants charged those on the *Vernon* with failing to keep clear of the *Skipsea*, with improperly starboarding, and with neglecting to navigate to her proper side of the river as soon as practicable.

The Tyne Rules applicable to the case are as follows:

21. Every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing or mooring, or other place, shall be navigated as soon as practicable to the side of the river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel.

22. Every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel.

Laing, K.C. and *R. H. Balloch* for the plaintiffs, the owners of the *Vernon*.—The *Skipsea* and her tug should have kept their course up the river. The *Vernon*, in order that she might not cause an obstruction to passing traffic by attempting to cross the river at that time, was, in accordance with rule 22 of the Tyne Rules, waiting for the *Skipsea* and her tug to pass. The *Vernon* was almost stationary, having just enough way on to counteract the last of the flood. The *Skipsea* brought about the danger by porting instead of keeping on her course up the river.

Aspinall, K.C. and *D. Stephens* for the defendants, the owners of the *Skipsea*.—Those on the *Skipsea* knew that the *Vernon* was coming out of the dock, and when they saw her she had some headway. Those on the *Vernon* were therefore right in porting in order to keep on their starboard-hand side of the river and to let the *Vernon* cross the river. If the *Vernon* had proceeded on there would have been no collision, but those on board her starboarded and so brought her into her wrong water. She vacillated, and misled the other ship. The *Vernon* is solely to blame for the collision, as it was her duty to keep out of the way of the *Skipsea*:

The Thetford, 57 L. T. Rep. 455; 6 Asp. Mar. Law Cas. 179.

GORELL BARNES, J.—This collision took place between the steamship *Vernon* and the steamship *Skipsea* about 5.45 p.m. on the 14th Sept. 1904 a little below the Northumberland Dock entrance. The weather at the time was fine and clear, and the tide was flood of the force of about a knot and a half. The *Vernon*, a vessel of 982 tons gross register, was bound from the Tyne to Rochester with a cargo of coal, and was therefore proceeding out of the Northumberland Dock entrance with the object of going down the river. The *Skipsea*, a steel screw steamship of 2993 tons gross register, was inward bound in water ballast from Rotterdam to Dunstan-on-Tyne, which is above the Northumberland Dock, with a pilot in charge and a tug ahead of her. She was proceeding up the river. The two vessels collided not very far from the upper buoy of what is marked on the chart as No. 3 tier, well over to the north side of the channel. The collision was at a very fine angle, the port bow of the *Skipsea* being touched apparently by the port bow and stem of the other vessel. The rules which are applicable to the case are the Tyne Rules Nos. 21 and 22. Rule 21 is as follows: "Every vessel when under way, and requiring to pass over a part of the channel which is not within that half reserved for its navigation, for the purpose of proceeding to or from any landing, mooring, or other place, shall be navigated so as to cause no obstruction, injury, or damage to any other vessel; and every vessel continuing its navigation, after reaching such landing or mooring, or other place, shall be navigated as soon as practicable to the side of the

river specified as the proper side for its navigation, and so as to cause no obstruction, injury, or damage to any other vessel." Rule 22 provides that "Every vessel crossing the river, and every vessel turning, shall be navigated so as not to cause obstruction, injury, or damage to any other vessel." Rule 21, referring to the part of the channel reserved for a vessel's navigation, must be read with reference to those rules which require a vessel proceeding inward and up river to keep on the north side, and a vessel proceeding out to sea to go down on the south side of the river, so that each shall pass the other port to port. These rules have been dealt with in the case of *The Thetford* (*ubi sup.*) and others, but they indicate that the crossing vessel must be so navigated as not to cause obstruction to another vessel; that the crossing vessel may cross if there is time and opportunity to do so without hampering another vessel, and that another vessel which sees a vessel about to cross must act reasonably with regard to that crossing vessel, and, if the crossing vessel requires a little more room to assist her in crossing, that room must be given. It is give and take; but I am not going too far to say that the weight of it is principally upon the vessel crossing. She must see that she has room to cross, and, if she has, she should do it. The case on the part of the plaintiffs is that they were acting in such a way as to show that they were proceeding to keep away to the northward of the upcoming ship, and that the upcoming ship really had no difficulty in passing to the southward. The defendants' case is that the upcoming ship had the other vessel in a position in which they at first thought she would cross, and that they acted accordingly, and some of the defendants' witnesses say that the other vessel did in fact get across them and then came swinging back. That is an exaggeration; it is not likely that the *Vernon* would do that; it is not the evidence of the pilot of the *Vernon*, and those who gave it have been led away by the fact that their own bows were swinging round under the reverse action of their engines. There are one or two undisputed facts which the case may be decided on. One of them is that the vessel coming out of dock is coming out at an angle across the river, and moving at about a knot and a half through the water, with engines moving slow ahead. Another undisputed fact is that the vessel coming up the river had received warning that a ship was coming out of dock and was proceeding up at slow speed, and had reversed the engines slightly to take her way off still more, and that she was also coming up river under a proper mode of navigation. The plaintiffs say that the *Skipsea* was coming up in mid-channel; the defendants say she was coming up well over to the north side; neither are far wrong, for the discrepancy can be reconciled by noticing that the buoys of No. 3 tier stand out very considerably into the river and a vessel which appears to those on a vessel coming out of dock to be in mid-stream may still not be very far from the buoys on the north side and be well within her own water. The next matter that may be accepted is that the two vessels sighted each other about 400 yards apart; as soon as the *Vernon* was far enough forward from the gate of the basin to see past the corner wall both vessels could see each other, and the place of collision is not really in dispute; it was well to the north side of the channel, not very far from the upper buoy of No. 3 tier. Having regard to the place of collision, the state of the tide, and the distance at which these vessels saw each other, both vessels must have moved very nearly the same distance through the water to the spot of the collision from the time they first saw each other, and the vessel coming up had the tide with her and was moving in the stream of it. What is the general conclusion to be drawn from these facts? When one takes the general features of the case, the real solution lies in the answer to the question whether or not when those on the defendants' vessel first saw the *Vernon* they were justified in assuming that she was about to cross the river, and that they ought to take action to help her to do so, by giving room for that, or whether they ought to have assumed that she was going to remain on the side where she was and not attempt to cross. The pilot on the *Skipsea* said that he learnt from the pilot or someone on another steamer that a steamer was coming out of dock, and he said that he gave orders to stop, and told his tug to cease towing and gave a long warning blast. He had then two knots speed through the water, and he reversed a few revolutions. He saw the *Vernon* 400 yards off a little on the starboard bow, and gave one short blast which the *Vernon* answered with two. He thought she would cross and go into her proper water. He had ported a little when he first saw the *Vernon* and steadied and blew one blast, and she replied again with two. He saw she was acting under starboard helm, and he reversed and gave three short blasts. The effect of that is that he had committed himself, as soon as he saw this ship coming out, to the idea that she was crossing, and to acting in consequence for the purpose of keeping to the northward, so as to allow her to cross, and the question is whether those on the *Skipsea* were justified in that assumption, and what grounds they had for so acting. The plaintiffs contend that when the vessels came in sight of each other the *Vernon* was kept in such a position and acted in such a way that those on the *Skipsea* ought to have kept away to the southward of her. The defendants, on the other hand, say that the action of the *Vernon* was such as to indicate, in the first instance, that she was crossing the river, and that they acted at first as if that was the intention of the plaintiffs, and that the vessels were very close together. That the opportunity for the plaintiffs' ship to cross the river was not a good one is tolerably clear—possibly she might have got across if she had acted at once; but still I think that the more prudent course to take was that which she partially took—namely, not to attempt to cross after they had seen the *Skipsea* approaching at such a short distance. I cannot accept the details of either story *in toto*. The *Vernon* had, to use an expression of her master, just got her stem nicely clear of the lock gates, and it seems to me that those on the *Skipsea* would say, "That ship is coming out of dock and is moving ahead." If that was the impression to be conveyed, what ought the plaintiffs to do in such a position? It seems to me that they are then placed upon their election, either to cross the river or to stop where they are and to keep such a position as not to hamper or mislead the defendants, and those on the plaintiffs' vessel ought, in such a position, to

have indicated unmistakably to the defendants what their action was to be—if they were intending to cross, to act at once to do so; but if, on the other hand, it was not right to cross, and they determined to stop where they were, to indicate that in an unmistakable way. If the ship in the dock entrance was stationary, the up-coming ship could say, "I can go on and pass her," but if she was not stationary, having regard to this narrow waterway, then I think she should indicate properly what she was going to do. The proper way to do it was to have given three short blasts at once, and reversed her engines and kept in the lock or near the lock entrance. If it is said that might have tended with the tide to cant her head to starboard, it is not of much moment, because it would only have been for a short time, and it could have been counteracted by dropping the anchor while the other ship passed. She neither went across nor did she indicate with any definiteness what she was going to do. I think the defendants first blew a short blast, and then the *Vernon* blew two, but that would be contrary to the general spirit of the rules. Failure to indicate distinctly that she was going to stop where she was and not cross the river is really the cause of this trouble, because it leaves the up-coming ship, which was being navigated carefully and properly, and on which it is difficult to find any negligence or defect of management, in the position of thinking, "Well, I am not sure whether this ship means to stop or to cross. I think from her motion ahead she is going to cross, and she is not indicating properly that she is not going to do so." On that the *Skipsea* ports slightly and reverses her engines—there is some discrepancy as to that, and possibly at the end the engines were stopped because the vessel was canting so much to the northward; but I do not think that those on the *Skipsea* could have adopted any other manœuvres, and the result is that the *Vernon* is alone to blame for the collision.

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

Solicitors for the defendants, *Bottcrell* and *Roche.*

Monday, Dec. 19, 1904.

(Before GORELL BARNES, J.)

THE ANDRÉ THÉODORE. (*a*)

Necessaries—Insurance premiums—Payment by brokers—Right of broker and underwriter to recover by action in rem—*Admiralty Court Act* 1840 (3 *&* 4 *Vict. c.* 65), *s.* 6.

Sums paid by a broker as insurance premiums for the purpose of effecting insurances on the hull and safe arrival of a vessel or sums due to underwriters as premiums cannot be recovered by the broker or by the underwriters as necessaries within the meaning of sect. 6 *of the Admiralty Court Act* 1840; *and, as such sums are not necessaries, the broker and underwriters have no right to proceed against the ship* in rem.

ACTION brought by Charles J. Adams and Eugene Fimbel and La Compagnie d'Assurance Maritime la Gironde against the owners of the ship or vessel *André Théodore* to recover a sum due for necessaries supplied—namely, the amount of premiums due for the insurance of ship and freight on a voyage policy.

The proceedings were *in rem*, and the writ was issued on the 25th July 1904.

The action was originally instituted and the writ issued in the names of Charles J. Adams and Eugene Fimbel against the ship or vessel *André Théodore*, and the indorsement on the writ was originally as follows:

Plaintiffs, as agents of underwriters, claim against the *André Théodore* the sum of 3700*l.* for necessaries supplied — namely, the amount of premiums due for the insurance of ship and freight on a voyage policy.

On the 19th Aug. 1904 the writ was amended, and the name of La Compagnie d'Assurance Maritime la Gironde was added as a plaintiff, and the words "as agents of underwriters" were struck out of the indorsement, and the amended writ was served upon the ship on the 22nd Aug. 1904.

The *André Théodore* having been arrested and no appearance having been entered by her owners, on the 14th Sept. 1904 the plaintiffs moved before the Vacation judge that the vessel should be sold, and that order was, with the assent of the first mortgagees, made. The sale took place, and the amount of the proceeds were brought into the registry.

On the 4th Oct. 1904 the plaintiffs filed their statement of claim in which they alleged that the plaintiffs Adams and Fimbel were sworn insurance brokers carrying on business at Bordeaux, and at the request of the defendants effected insurances on the *André Théodore*, a French vessel then at Rouen, a French port, and that the other plaintiffs, La Compagnie d'Assurance Maritime la Gironde, underwrote the policies for the sums mentioned in the claim.

The claim then proceeded:

2. In respect of the said insurances, premiums of insurance became due and payable by the defendants to the plaintiffs, or one of them.

3. The said premiums of insurance were necessaries and expenses necessarily incurred for the benefit of the defendants to enable the said vessel to proceed to sea.

4. The following are the particulars

	Francs.
Policy No. 108,893, dated the 23rd July 1902, underwritten by the plaintiffs La Compagnie d'Assurance Maritime la Gironde for 5000 francs, the premium at 8 per cent. being	4000
Extension thereof No. 125,432, dated the 16th June 1904, the additional premium on amount underwritten by the said plaintiffs	1500
Policy No. 108,894, dated the 23rd July 1902, on safe arrival underwritten by the said plaintiffs for 25,700 francs and 3000 francs, in all 28,700 francs, the premium at 6 per cent. being	1722
Extension thereof No. 125,433, dated the 16th June 1904, the additional premium on the amount underwritten by the plaintiffs	645.75
Francs	7867.75

Which, at 25 francs per pound, equals 314*l.* 14*s.* 3*d.*

5. The said 314*l.* 14*s.* 3*d.* is still unpaid and owing to the plaintiffs for necessaries as aforesaid.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

6. The said policies of insurance are all French contracts made in France regarding a French ship registered at the port of Bordeaux, a French port, and by French law the plaintiffs are entitled to priority for the aforesaid unpaid premium over other debts due by the defendants.

The claim ended with a prayer for judgment against the ship, her tackle, apparel, and furniture for the sum of 314*l.* 14*s.* 3*d.* and costs.

The first and second mortgagees filed affidavits showing an interest in the *res* under arrest or the fund in court, and intervened in this suit. The first mortgagees after intervening in the suit did not further contest the claims, as the sale of the vessel realised sufficient to satisfy their claim on their mortgage and the claim of the plaintiffs in this action.

The second mortgagees, the Société Anonyme des Chantier et Ateliers de St. Nazaire (Penhoet), after intervening in the suit, proceeded to contest the plaintiffs' claim, and on the 5th Dec. 1904 delivered a defence.

By their defence they admitted that Adams and Fimbel, at the request of the Société de Navigation du Sud Ouest Société Anonyme, caused insurance policies to be effected for the sums mentioned in the claim on the *André Théodore*, and that the other plaintiffs underwrote such policies. They denied that the premiums were necessaries or expenses incurred for the benefit of the defendants to enable the *André Théodore* to proceed to sea, or that any sum was owing to the plaintiffs which gave them a cause of action against the ship or the proceeds of sale. They further denied that the court had any jurisdiction under 3 & 4 Vict. c. 65, or otherwise, to deal with the plaintiffs' claim, and did not admit that the law of France gave the plaintiffs' claim any priority over the claim of the mortgagees, and denied that the law of France governed any question of priority.

The following are the material parts of the sections of the Admiralty Court Acts which were referred to during the progress of the case.

Admiralty Court Act 1840, s. 6:

6. And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . for necessaries supplied to any foreign ship or sea-going vessel, and to enforce payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when . . . the necessaries were furnished in respect of which such claim is made.

Admiralty Court Act 1861, s. 5:

5. The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales: provided always, that if in any such cause the plaintiff do not recover twenty pounds he shall not be entitled to any costs, charges, or expenses incurred by him therein, unless the judge shall certify that the cause was a fit one to be tried in the said court.

Carver, K.C. and *D. C. Leck* for the plaintiffs. —The premiums of insurance are necessaries within the meaning of sect. 6 of the Admiralty Court Act 1840:

The Riga, 26 L. T. Rep. 202; 1 Asp. Mar. Law Cas. 246; L. Rep. 3 A. & E. 516.

[GORELL BARNES, J.—Can the paying of a premium be said to be a necessary supplied to a ship?] There is no distinction between necessaries supplied to the ship and necessaries for the voyage:

The Riga (*ubi sup.*).

The vessel could not sail unless she was insured. [GORELL BARNES, J.—These sums were not paid to enable the vessel to sail; they were only payments which were necessary to protect her owner.] The test of what is a necessary is what would a prudent man order under the circumstances of any particular voyage. Whatever is fit and proper for the service on which a vessel is engaged, and whatever expense is incurred if a prudent man would have incurred it, is within the meaning of the word "necessary":

Webster v. *Seekamp*, 4 B. & Ald. 352.

No owner who is prudent would send his ship to sea uninsured. It is true that insurance premiums paid to effect insurances for the benefit of shipbrokers have been held not to be necessaries:

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

But the facts in that case show they were not made for the owner's benefit or made in respect of the ship. Under the French code moneys advanced to pay premiums are a privileged debt. [GORELL BARNES, J.—Assume that to be so, how can you recover in this country by this action against the ship?] The court has sold the property on which these plaintiffs have got a charge, and they are entitled to ask that their interests should be protected.

Laing, K.C. and *Denis O'Conor* for the interveners, the second mortgagees.—*The Riga* (*ubi sup.*) is not an authority which is in favour of the plaintiffs. That case is difficult to understand, for the insurance was on freight, and was only effected on the authority of letters written after the vessel had sailed; so the insurance was not effected to enable her to sail, and it is difficult to see how on the principles laid down in the judgment the insurance premiums were recoverable. In *The Heinrich Bjorn* (*ubi sup.*) the matter was considered, and it was decided in that case that the word "necessaries" means something supplied or furnished to the ship, or something needed for the requirements of the vessel, and does not include payments made for the protection of the owner. That case is very strong in the interveners' favour, for there the money was advanced to buy necessaries, and the insurance premiums might have been said to have been part of the cost of the necessaries. Nothing that is not expended for the use of the ship can be said to be a necessary:

The Marianne, 64 L. T. Rep. 539; 7 Asp. Mar. Law Cas. 34; (1891) P. Div. 180.

No matter what rights the plaintiffs have under the French code, they have no right to proceed *in rem* against this vessel in this country for necessaries, and this suit should be dismissed. The dismissal of this suit does not prevent these plaintiffs from intervening in the mortgagees' action, only they will not be able to do so as necessaries men; they can in that intervention prove their alleged right to priority against the fund which they allege they possess under the code.

GORELL BARNES, J.—This is a suit by the plaintiffs against the ship or vessel *André Théodore*, and the writ appears to have been issued on the 25th July 1904. Under that writ the ship was arrested, and was ultimately sold under an order of the 14th Sept. 1904, which was in these terms: "Upon the application of counsel for the plaintiffs, counsel for interveners being present and consenting, and no one having appeared for the owners of the ship *André Théodore*, the judge ordered that a commission do issue for the appraisement and sale by the marshal of the said ship, such sale to be either by public auction or by private tender as shall appear to be more advantageous." I gather that order was made upon an affidavit which was made by the plaintiffs' solicitors showing the reasonableness of an early sale of this ship, having regard to the claims against her and the expense of keeping her. The writ to which I have referred was in the name of Charles James Adams and Eugene Fimbel against the ship or vessel *André Théodore*. Upon that writ the indorsement is this: "Plaintiffs, as agents of underwriters, claim against the ship *André Théodore* the sum of 3700*l.* for necessaries supplied—namely, the amount of premiums due for the insurance of ship and freight on a voyage policy." That writ was afterwards amended, and the name of La Compagnie d'Assurance Maritime la Gironde was added as a plaintiff, and the indorsement was slightly altered by striking out the words "as agents of underwriters," leaving the claim otherwise as I have said, and the usual proceedings in default were taken. The second mortgagees, or those parties who at the present moment are said to be second mortgagees, intervened, and the first mortgagees also intervened, and they were apparently the persons present who consented to the order for the sale of the vessel. The plaintiffs then filed a statement of claim in this suit, which alleges: "The plaintiffs Adams and Fimbel are sworn insurance brokers, carrying on business at Bordeaux, and at the request of the defendants effected insurances on the *André Théodore*, a French vessel then at Rouen, a French port, and the plaintiffs La Compagnie d'Assurance Maritime la Gironde underwrote the policies for the sums hereinafter mentioned. 2. In respect of the said insurances, premiums of insurance became due and payable by the defendants to the plaintiffs, or one of them. 3. The said premiums of insurance were necessaries and expenses necessarily incurred for the benefit of the defendants to enable the said vessel to proceed to sea." And then the particulars of the insurances are given: One of them is headed an insurance policy, dated the 23rd July 1902, underwritten by the plaintiff company for 50,000 francs, at a premium of 8 per cent. I should gather that it was a policy for a year. Then there is "extension thereof," dated the 16th June 1904, the additional premium on amount underwritten by the said plaintiffs. The policies apparently were extended. Then there is another policy, dated the 23rd July 1902, on safe arrival underwritten by the said plaintiffs for 25,700 francs and 3000 francs, in all 28,700 francs, at a premium of 6 per cent.; and an extension, also dated the 16th June 1904, for an additional premium, the total amount of the premiums being 7867.75 francs, which in English money amounts to 314*l.* 14*s.* 3*d.* The amount claimed on the writ was 3700*l.*—that is explained by the fact that it was thought other premiums for other underwriters would be included—but the action is now confined to the particular premiums relating to the policies to which I have referred. The statement of claim then continues: "5. The said 314*l.* 14*s.* 3*d.* is still unpaid and owing to the plaintiffs for neces aries as aforesaid. 6. The said policies of insurance are all French contracts made in France regarding a French ship registered at the port of Bordeaux, a French port, and by French law the plaintiffs are entitled to priority for the aforesaid unpaid premiums over other debts due by the defendants." And then they claim judgment against the defendants for the amount and costs. The writ appears to have been amended on the 19th Aug. pursuant to an order dated the 12th Aug. The order for the sale of the vessel was dated the 14th Sept. The amended writ was served on the ship on the 22nd Aug., and it is upon that amended writ that the action has now proceeded. Up to the present time the owners of the ship have not appeared; the only persons who have appeared are the first and second mortgagees; the first mortgagees are not, apparently, troubling very much to contest the claims. How far they have done so I do not know, but I gather the proceeds of sale are sufficient to pay them, and the contest which has arisen in the present matter is raised by the second mortgagees.

The way it arises is this, the second mortgagees, finding that the ship was under arrest in the present case, instituted a suit under the 3rd section of the Admiralty Court Act of 1840 to enforce their second mortgage. That section would enable them to do so when the ship was under arrest, or the proceeds of the vessel after arrest are in court, and the second mortgagees proceeded with their mortgage suit, but, when it came on, an objection was raised by the present plaintiffs, as they wished to get rid of this second mortgage so as to come ahead of it, that the second mortgage was an invalid one. Then it was said that, if the present plaintiffs have no valid claim, they would have no *locus standi* to contest the second mortgage, and that the court had better determine, in the first instance, whether the plaintiffs had a valid claim against the proceeds, and then, if they had none, there would be an end of their suit; if they had a valid claim, then they would be in a position to fight out their priorities as between themselves and the second mortgagees, and question in that contest the validity of the second mortgage. The matter stood over, therefore, in order that the present plaintiffs might bring on their default action, which they have done, and they have filed a statement of claim which has been delivered to the second mortgagees. To that statement of claim the second mortgagees have filed a defence, in which they admit that the plaintiffs, the insurance brokers, "at the request of the Société de Navigation du Sud Ouest Société Anonyme caused insurance policies to be effected for the sums mentioned in the statement of claim on the said *André Théodore*, and that the plaintiffs La Compagnie d'Assurance Maritime la Gironde underwrote such policies." Then they deny the other allegations and that the premiums were necessaries, or expenses incurred for the benefit of the defendants to enable the said vessel to proceed to sea; and they allege that the plaintiffs' claim discloses

no cause of action, and they traverse the suggestion that the plaintiffs have a priority by the law of France over other debts. The evidence which has been put before me on the part of the plaintiffs is the affidavit of Mr. Eugene Fimbel, which seems to state substantially what is found in the statement of claim, apart from this question of privileged debts in France. In the first paragraph of the affidavit he says that at the request of the defendants he effected insurances on the *André Théodore*, then at Rouen, a French port, and that other plaintiffs underwrote the policies. Then he states this: "The said premiums of insurance were necessaries, and expenses necessarily incurred for the benefit of the defendants to enable the said vessel to proceed to sea. Also the maritime insurance was compulsorily made in July 1902 in order to enable the defendants to obtain on the ship mortgages which were impossible to obtain without said formality being previously performed, and the insurance was effected for twelve months from leaving Rouen with the continuation clause." Then he produces the policies which are exhibited to the affidavit. He says the money is unpaid, and par. 7 of the affidavit is to this effect: "At the time the insurances were effected the *André Théodore* was being built at Rouen, where she was fitted out, and she left that port in the month of Jan. 1903 on a round voyage for Antwerp to ballast, and Puget Sound with general cargo, and from thence with lumber to Cardiff, where she arrived in June 1904." So that at the time the policies were taken out in July 1902, the ship was not yet built; she was not built until somewhere about Jan. 1903, and these policies appear to have been anticipatory policies, possibly, with a view of getting mortgages in anticipation; and those extensions were extensions upon those same two policies which I have referred to, carrying those policies on for a certain length of time. That is the position of the matter so far as it is necessary to state it, with one exception, and that is this: I have referred to the paragraph of the statement of claim, which alleges that these policies are French contracts made in France in regard to a French ship registered at the port of Bordeaux, a French port, and that by French law the plaintiffs are entitled to priority for the aforesaid unpaid premiums over other debts due by the defendants. At present no evidence has been offered upon that head, though it was contended that, if this matter were gone into, it could be shown that by French law there was a privilege of some kind attaching to these premiums; that matter has not at present been proved or gone into. The point that is taken on the part of the defendants is that the plaintiffs' claim as appears on the writ is for necessaries supplied to this ship, and, mainly, the amount of premiums due for insurances on ship and freight on a round voyage policy covering her for a certain period of the voyage and then extended, and that this is a suit which, by the terms of the writ, is confined to necessaries, and that, under the Act or Acts giving them the right to proceed, a suit so framed can only be a suit for necessaries within the sections which apply to this matter. The two sections which are material to refer to are sect. 6 of the Admiralty Court Act of 1840, which enacts: "The High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever . . . for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the . . . necessaries were furnished in respect of which such claim is made." There is also sect. 5 of the Admiralty Court Act of 1861, which runs thus: "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shown to the satisfaction of the court that at the time of the institution of the cause any owner or part owner of the ship is domiciled in England or Wales." Those are the two sections dealing with the matter. I am not sure, on referring to sect. 5, whether, strictly speaking, it can be said that, if these were necessaries, they come within this section, because the ship appeared to be registered at Bordeaux, and these insurances, as far as I can make out from the somewhat meagre evidence before me, were effected at Bordeaux, so that possibly sect. 5, which relates to necessaries supplied elsewhere than a port to which the ship belongs, might exclude that suggestion; but the earlier section in the Act of 1840 which I have referred to is not in the same terms when it applies to a foreign ship, which this ship was.

The result of this rather full statement of the position of the matter is that one has to consider whether this claim for the insurance premiums is a claim for necessaries within the meaning of the Act. It is contended on the part of the plaintiffs that these were necessaries supplied to this ship. On the other side it is said that they are not necessaries supplied to the ship within the meaning of the sections, and that they are to be treated as claims which give rise to no right to arrest this ship. Now, the words of the section are, "for necessaries supplied to any foreign ship or sea-going vessel," and then there come these words later on, "or necessaries furnished." Ordinarily speaking, those words mean, as was mentioned in several of the cases, matters which are necessary for the ship herself, and in order that she should perform her service. The words of the 5th section of the Act of 1861 are, "necessaries supplied to any ship," but I do not think it necessary to consider that section further for the reason I have mentioned. The cases which have been cited are two; the first is *The Riga* (*ubi sup.*), in which Sir Robert Phillimore gave a judgment fully considering the principles which govern this question, and I think the paragraph in his judgment which I am about to read gives a clear view of what he intended to express at that time. What he says is this: "It appears to me on a review of these cases in which the court seems to have proceeded tentatively, so to speak, with the new jurisdiction, and on a consideration of the language of both the statutes, that I must come to the conclusion that there is no distinction as to necessaries between the cases in which by the common law a master has been holden to bind his owner and suits for necessaries instituted in this court. This seems to have been Dr. Lushington's original opinion in *The Alexander*, and it seems to me strengthened by the language in the

subsequent statute, and was, I think, also the foundation of my decision in *The Underwriter* in 1868. I am unable to draw any solid distinction (especially since the last statute) between necessaries for the ship and necessaries for the voyage; and I shall follow the doctrine of the common law as laid down by the high authority of Lord Tenterden in the case of *Webster* v. *Seekamp*. In that case he says: 'The general rule is that the master may bind his owners for necessary repairs done, or supplies provided for the ship. It was contended at the trial that this liability of the owners was confined to what was absolutely necessary. I think that rule too narrow, for it would be extremely difficult to decide, and often impossible in many cases, what is absolutely necessary. If, however, the jury are to inquire only what is necessary, there is no better rule to ascertain that than by considering what a prudent man, if present, would do under the circumstances in which the agent in his absence is called upon to act. I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel as a prudent man would have ordered, if present at the time, comes within the meaning of the term "necessaries" as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable.'" Nobody in arguing this case has dissented, nor can I myself see any reason to dissent, from a single word which is there said, and, to my mind, that excludes the claim for necessaries in this case The argument addressed to me is that Sir Robert Phillimore, after laying down the law in the way that he did, proceeded to apply the principles, and, in so applying them, included a sum for insurance upon the freight, which is mentioned in certain articles in the petition, in the report of *The Riga*. I confess myself, on reading that case, that I am not able to understand, if the case is correctly reported, why he allowed, on the principles which he laid down, the premiums for insuring freight, because they do not appear to me to come within the principles which are laid down, or to come within the language of the statute, to which those principles are being applied. The other case which has been much referred to is the case of *The Heinrich Bjorn* (*ubi sup*) when it came before Lord Hannen in the first instance. It is not necessary to follow that case through its subsequent history, because this point about necessaries did not arise in the subsequent consideration of the case. What Lord Hannen said in that case is this, and I think it was a very strong case for allowing the premiums if they could be allowed: "The plaintiffs effected this insurance and paid premiums amounting to 68*l.* 6*s.* 8*d.*, and this is the first item in the claim for necessaries. I am, however, of opinion that premiums for insurance cannot be regarded as necessaries. The expression 'necessaries supplied' in 3 & 4 Vict. c. 65, s. 6, which gives the Admiralty Court jurisdiction over foreign ships, though it is not to be restricted to things absolutely and immediately necessary for a ship in order to put out to sea (see *The Perla*), must still be confined to things directly belonging to the ship's equipment necessary at the time, and, under the then existing circumstances, for the service in which the ship is engaged (see *The Alexander*). But the insurance of a vessel is something quite extraneous to this equipment for sea." I suppose the learned judge was excluding from the term "equipment for sea" such necessary expense incurred for moving the ship about for going to sea, such as port expenses, and so forth. Then he goes on: "And however prudent it may be for an owner to insure, it is a prudence exercised for his own protection, and not for the requirements of the vessel in the sense in which the word 'necessaries' is used in the statute." As I said, that was a strong case, because if I follow that case correctly, and without going into the somewhat complicated transaction which resulted in a certain position in that case, the net result of that position was that the plaintiffs advanced a certain sum to pay for necessaries, and they were authorised to cover the amount for insurances on the ship out and home at the owner's cost, and I should have thought it might have been put in that case that the cost of necessaries would include the cost of insuring, if it were a term upon which they were to be advanced that they were to be insured, because then it would be clearly, as it were, added to the price of the advances, or the recoupment for the advances; but the view that Lord Hannen took, which seems to me to be quite right, was that there is a broad distinction between money expended on actually fitting the ship out and working her and moving her, and dealing with her for the purpose of her navigation, and moneys which are merely expended for the purposes of protecting a shipowner in the event of her being lost. They are not in the least necessary for the ship; they are not supplied or furnished to the ship; they are mere moneys which are paid to insure the shipowner against his being out of pocket in case the ship is lost. He may or may not effect those policies; of course as a rule he does. Where the ship is one of a number in a fleet so numerous that the owners of the fleet can take their own line, and have their own underwriting account, they do not require to insure in the ordinary sense at all. It appears to me, therefore, that, applying the principles which Sir Robert Phillimore referred to in *The Riga* (*ubi sup*), and applying what Lord Hannen said in the case of *The Heinrich Bjorn*, it cannot be contended successfully that premiums of insurance such as those in this case are to be considered as necessaries supplied to or furnished to the ship. And the case is remarkable as illustrating to what extent the matter can be carried if they were to be so treated, because, as I have pointed out, these policies were effected long before the ship was completely built, and apparently were effected for the purpose of enabling the mortgages to be obtained, and had no relation, strictly speaking, to whether it was necessary for the purpose of providing, or fitting, or equipping the ship.

What follows from that view of this case? I think that the plaintiffs have entirely failed to support the claim which they made by their writ in this matter, which is for necessaries supplied, and that, therefore, they have no right of action in these present proceedings as framed against this vessel. It is said that they can make some sort of a case for a charge upon the ship by French law, and I am asked to allow this matter to stand over until they do so. The matter appears to have been

standing over since about the month of August last. It has stood over, so far as the particular contest is concerned between the second mortgagees and the plaintiffs, for two or three weeks, and we are not now in a position to be informed as to how the plaintiffs can put their case in the present proceedings to justify a claim for a charge or equitable mortgage, or something of that character, upon the ship. It is clear to my mind that they cannot do it under the writ which they have served in this case, which is confined to necessaries supplied, and at present I am not able to see, nor has counsel for the plaintiffs very clearly suggested to me, how any amendment of the writ can rectify that position. At any rate, such an amendment would have to be made upon this writ, if it can be made, in order to proceed in the proper way in this case, and, if I thought that I were in any way prejudicing the plaintiffs, I should not dispose of this matter finally until I had seen what kind of amendment they could propose; but, in my judgment, it does not prevent them, if they have got any claim, to get at these proceeds by virtue of a lien, charge, or hypothecation or equitable mortgage, making their claim against the fund in court by intervening in the suit by the second mortgagees, which they have already done, and by applying, when these proceeds are paid out, that they should be paid if they have any right to them or a part of them. Therefore I think I must deal with this case as it stands, and to my mind the plaintiffs have wholly failed to make out a case such as they started in this matter, and I am of opinion that their claim must be dismissed, and that, as regards the costs, the plaintiffs must bear their own costs, except so far as those costs have been necessary for the purpose of the sale of the ship, and they must pay the second mortgagees' costs from the time when the second mortgagees appeared.

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

Solicitors for the interveners, *Ince*, *Colt*, and *Ince*.

Tuesday, Jan. 24, 1905.

(Before GORELL BARNES, J.)

THE INVENTOR. (a)

Limitation of liability—Title of suit—Description of plaintiffs—Life claims—Bail in lieu of payment into court.

Where the owners of a vessel seek to limit their liability in respect of a collision under the provisions of the Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 503, 504, *it is not sufficient to describe the plaintiffs on the writ as "The owners of the ship or vessel." The action is one for personal relief, and the names of the owners of the vessel at the time of the collision should be set out on the face of the writ.*

Where the owners of the vessel at fault institute a suit for the purpose of limiting their liability in respect of a collision which has caused loss of life, and in respect of which loss of life the claims made do not amount to the total limit of the owners' statutory liability, the court may grant a decree on the plaintiffs giving bail for an amount to be fixed by the court and an undertaking to give bail if required for the balance of their statutory liability instead of requiring them to pay into court the total amount of their statutory liability in respect of the life claims.

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

LIMITATION SUIT.

On the 9th Sept. 1904 a collision occurred between the steamship *Inventor* and the steamship *Goolistan* off the coast of Portugal. As the result of the collision the *Goolistan* sank, and her mate and six other members of her crew were drowned.

In the damage suit brought by the owners of the *Goolistan* against the owners of the *Inventor* to recover their damage, the *Inventor* was on the 28th Nov. 1904 found alone to blame for the collision.

On the 6th Dec. 1904 the Charente Steamship Company Limited, the owners of the sixty-four shares in the *Inventor*, instituted proceedings to limit their liability in respect of the collision under the provisions of sects. 503 and 504 of the Merchant Shipping Act 1894.

On the writ in that action the plaintiffs were described as "The owners of the steamship *Inventor*," and the writ was headed:

Between the owners of the steamship *Inventor*, plaintiffs, and the owners of the steamship *Goolistan*, the survivors of her crew, and the owners of her cargo, the legal personal representatives of those of her crew who lost their lives, and all and every other person and persons whomsoever claiming or being entitled to claim compensation in respect of loss of life or property, or of personal injury, or of damage to property occasioned by the collision between the steamship *Inventor* and the steamship *Goolistan*, defendants.

The gross tonnage of the *Inventor*, less crew space, was 2220·07 tons. The amount of the plaintiffs' statutory liability in respect of property claims at 8*l.* a ton was 17,760*l.* 11*s.* 2*d.*, and in respect of life claims at 7*l.* a ton was 15,540*l.* 9*s.* 9*d.*

The case came before the court on motion for judgment.

A. D. Bateson appeared on behalf of the plaintiffs.—The plaintiffs seek to limit their liability in respect of this collision. In respect of the property claims they are ready to pay into court the sum of 17,760*l.* 11*s.* 2*d.* and 266*l.* 13*s.*, being interest at 4 per cent. from the date of the collision. With regard to the life claims, only one for 750*l.* has been made by the relations of the mate. It is submitted that the court may make a decree limiting the liability of the plaintiffs without requiring them to pay into court the further sum of 15,540*l.* 9*s.* 9*d.* to meet any further claims which may be made in respect of any injury to or loss of life. The plaintiffs are ready to give bail for 3000*l.* in respect of the life claims, and to give an undertaking to put in bail for any further sum up to 15,540*l.* 9*s.* 9*d.*, which is the limit of their statutory liability with regard to life claims.

H. C. S. Dumas for the owners of the *Goolistan*.

L. Noad for the owners of certain cargo laden on the *Goolistan*.

GORELL BARNES, J.—The decree may go on the plaintiffs paying into court in respect of the property claims the sum of 17,760*l.* 11*s.* 2*d.* and interest from the date of the collision, and, in

respect of the life claims, on giving bail in 3000*l.* and an undertaking to give bail for a further sum not exceeding 15,540*l.* 9*s.* 9*d.* With regard to the title of this action, I have, I think, before this drawn attention to the fact that it is not proper in these limitation suits to merely describe the plaintiffs as the owners of the ship. The right given to owners of vessels to limit their liability in respect of damage caused by collision is a statutory right to personal relief given to the owners individually, and so the names of the owners should be stated on the writ.

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

Solicitors for the defendants the owners of the *Goolistan, Botterell* and *Roche.*

Solicitors for the defendants the owners of cargo on the *Goolistan, Pritchard* and *Sons* for *A. M. Jackson* and *Co.*, Hull.

Jan. 27, 31, *and Feb.* 1, 1905.

(Before GORELL BARNES, J.)

THE ORAVIA. (*a*)

Collision — Fog — Moderate speed — Fog signal forward of the beam—Duty of vessel hearing it to stop—Ascertained position—Right of vessel to proceed—Regulations for Preventing Collisions at Sea 1897, *art.* 16.

The steamship O., *while on a voyage from Liverpool to Monte Video, was off Lobos Island, River Plate, proceeding at ten knots on a course of W. ½ N. The weather was fine with passing banks of fog, and shortly after entering the fog the* O. *came into collision with the* N., *a steamship which had been heard on the starboard bow of the* O. *after that vessel had entered the fog. The* N. *was on a course of E. by S. magnetic, and, having first seen the* O. *on the port bow about three miles off in a position to pass all clear port to port, watched her broaden on the port bow, and saw her hidden by the fog which came on. Shortly afterwards those on the* N. *heard a short blast sounded on the whistle of the* O. *The* N. *answered it with a short blast, her helm was ported, and, as the fog was beginning to envelop the* N., *her engines were put to slow, and, on further signals being heard from the* O., *were put full speed astern, and shortly afterwards the collision occurred.*

Held, that the O. *was to blame for not going at a moderate speed in the fog; and that the* N. *was not to blame for not stopping her engines on hearing the whistle of the* O., *as under the circumstances the position of the* O. *was ascertained.*

ACTION of damage.

The plaintiffs were the owners of the Italian steamship *Nereus.*

The defendants and counter-claimants were the Pacific Steam Navigation Company, the owners of the steamship *Oravia.*

The collision which gave rise to this action occurred early in the afternoon of the 9th Oct. 1904 off Lobos Island, at the entrance to the River Plate.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The case made by the plaintiffs was that the *Nereus,* a screw steamship of 4056 tons gross register, manned by a crew of twenty-seven hands all told, was about 1.55 p.m. on the 9th Oct. off Lobos Island, on a voyage from La Plata to St. Vincent with a cargo of maize. The weather was fine and clear, the wind easterly light, and a current was setting about north-north-west at about one to one and a half knots.

The *Nereus,* steering E. by S. magnetic, was making about eight knots an hour, and a good look-out was being kept on board her.

In these circumstances, those on board her saw about three miles off, and about a point on the port bow, a steamship which proved to be the *Oravia.*

The *Nereus* was kept on her course, and the *Oravia,* which was apparently on an opposite course, was approaching in a direction to pass the *Nereus* all clear port side to port side.

Some time after the *Oravia* was sighted, and when that vessel had broadened on the port bow of the *Nereus,* she was suddenly hidden from view by fog which was apparently coming down the coast.

Shortly afterwards what appeared to be one short blast was heard to be sounded on the whistle of the *Oravia,* and the whistle of the *Nereus* was sounded one short blast in reply, her helm was ported a little to give the *Oravia* a wider berth, and her engines were put to slow as the fog was beginning to envelop the *Nereus.*

Almost immediately afterwards the *Oravia* sounded two short blasts on her whistle, and thereupon the helm of the *Nereus* was put hard-a port, her engines were stopped, and her whistle was sounded a short blast. This signal was almost instantly repeated in answer to a second two-short-blast signal from the *Oravia,* and at the same time the engines of the *Nereus* were put full speed astern, and her whistle was sounded three short blasts.

The *Oravia* then suddenly came in sight having great speed upon her, and acting apparently under a starboard helm, and with her stem she shortly afterwards struck the port side of the *Nereus* in the way of the forward part of the fore rigging, cutting right into her, causing her such damage that she began to make water rapidly. Three short blasts were heard from the *Oravia* just before the collision actually occurred.

After the collision those in charge of the *Nereus* endeavoured to get their vessel into port, but the fog became and remained so dense, and the vessel made water so rapidly, that she had to be beached to prevent her foundering in deep water.

The *Nereus* was subsequently salved, and taken to Monte Video.

Those on the *Nereus* charged those on the *Oravia* with not sounding their whistle for the fog; with proceeding at an immoderate speed; with improperly starboarding; with attempting to cross ahead of the *Nereus;* and with failing to slacken her speed or stop or reverse her engines.

The case made by the defendants was that shortly before 2.23 p.m. on the 9th Oct. 1904 the *Oravia,* a twin-screw steamship of 5321 tons gross and 3318 tons net register, manned by a crew of 145 hands all told, was, whilst bound from Liverpool to Monte Video with passengers and general cargo, to the southward and eastward of Lobos Island, at the entrance to the River Plate.

The weather was fine and clear, but with passing banks of fog coming off the land on the starboard bow with the light north-westerly wind.

The *Oravia* was on a course of W. ½ N. magnetic, and, with engines working at reduced full speed, was making about ten knots. Her whistle was being kept duly sounded for fog at regular intervals, and a good look-out was being kept on board of her. In these circumstances the fog signal of the *Nereus* was heard sounding in a bank of fog broad on the starboard bow.

The starboard engine of the *Oravia* was at once stopped, and the port engine was stopped and put full speed astern, the helm was put hard-a-starboard, and two short blasts were sounded on the whistle in reply. Very shortly afterwards the *Nereus* came in sight out of the fog bank from three to four hundred yards off, and bearing about three points on the starboard bow.

The starboard engine of the *Oravia* was at once put full speed astern, and the two-short-blast signal was repeated.

The *Nereus*, however, came on at a high rate of speed, swinging rapidly under a port helm, and sounding a short blast on her whistle, and with her port side in the way of the fore rigging struck the *Oravia* a heavy blow on the stem and starboard bow, doing considerable damage.

Immediately before the collision the *Oravia* sounded three short blasts on her whistle, to which the *Nereus* replied with three short blasts.

The defendants alleged that the *Nereus* might have been safely taken into port, that she need not have been beached, and that the expenses incurred in salving her need not have been incurred.

Those on the *Oravia* charged those on the *Nereus* with not sounding their whistle for the fog; with proceeding at an immoderate speed; with neglecting to stop their engines on first hearing the fog signal of the *Oravia* forward of their beam; with improperly porting; and with neglecting to stop and reverse her engines.

Art. 16 of the Regulations for Preventing Collisions at Sea is as follows:

> 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.

Laing, K.C. and *D. Stephens* for the plaintiffs.

Aspinall, K.C. and *C. Dunlop* for the defendants.

During the progress of the case the following cases were mentioned:

The Milanese, 45 L. T. Rep. 151; 4 Asp. Mar. Law Cas. 218, 438;
The N. Strong, 67 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 194; (1892) P. 105;
The Bernard Hall, 86 L. T. Rep. 658; 9 Asp. Mar. Law Cas. 300.

GORELL BARNES, J.—The collision in this case took place between the *Nereus* and the *Oravia* on the 9th Oct. 1904 in the early afternoon; there is a difference in the time given by the one side and the other, but that is probably due to the ships' times not being the same. The collision took place off the coast of Uruguay, near Lobos Island, which is off the entrance to the estuary of the River Plate. The *Nereus* is an Italian steamship of 4056 tons gross register, and was manned by a crew of twenty-seven hands. She was on a voyage from La Plata to St. Vincent for orders with a cargo of maize. The *Oravia* is a twin-screw steamship of 5321 tons gross register, belonging to the Pacific Steam Navigation Company, and was bound from Liverpool, *viâ* Rio Janeiro, to Monte Video, with passengers and a general cargo, manned by a crew of 125 hands all told. The case is one of considerable magnitude, partly because of the damage done immediately by the collision, and partly because the *Nereus* was so much injured that an attempt had to be made to beach her, and unfortunately, in making for a spot to beach her, she touched on the Monarch Rock in Maldonado Bay and sustained further injuries, and I gather the damage is extensive. The damage to the *Oravia* is also considerable. The plaintiffs' case is that the weather before the occurrence, and up to shortly before it, was fine; that the *Nereus* was steering E. by S. magnetic, making about eight knots an hour; and that they saw the *Oravia* on the port bow at a distance of about three miles before she was lost sight of in the fog that came on. There is a very remarkable difference in the plaintiffs' case and that made by the defendants, who say that no vessel was in sight before the fog came down. The plaintiffs' say that in that locality the only courses which the ships could practically be on were nearly opposite ones, because there was nowhere else to go from, or come to, except the River Plate. So that, seeing this vessel on their port bow, if both vessels kept their course they would pass all right. The evidence shows that they must have been nearly right, and the locality shows that they would be keeping on an E. by S. course, the other vessel possibly being not quite on a directly opposite course—the defendants say they were on a W. ½ N. course. The plaintiffs say that the *Oravia* broadened on the port bow of the *Nereus*, while still visible, and that she was then hidden from view by the fog which came down from the coast, and that when this short blast, or what was taken for it, was heard, the helm of the *Nereus* was ported a little and her engines were put to slow, as the fog was beginning to come towards them too. The *Oravia* then sounded two short blasts on her whistle, the helm of the *Nereus* was put hard-a-port, her engines stopped, her whistle sounded a short blast, and the two-short-blast signal from the other ship was repeated immediately, and the engines of the *Nereus* were put full speed astern, and her whistle sounded two short blasts; but the *Oravia* came into sight, swinging round under a starboard helm, and struck her a blow, which I think is agreed at somewhere about a six or seven-point blow leading forward. The complaint made against the *Oravia* is that she improperly starboarded into the *Nereus*.

The *Oravia's* case is that while proceeding on this W. ½ N. magnetic course, with her engines working at reduced full speed, making ten knots—though I think there is some confusion as to that, because the reduction of steam does not seem in the evidence quite in accord with that in the log—and sounding her whistle for fog, she heard the

fog whistle of the *Nereus* on her starboard bow that the starboard engine of the *Oravia* was stopped, that the port engine was stopped and put full speed astern, and the helm hard-a-starboarded, and two short blasts sounded on her whistle. In fact, action was taken at once for a vessel not seen, but heard, or supposed to be heard, on the starboard bow, and never seen before the fog settled down. It is said that shortly afterwards the *Nereus* came in sight out of the fog bank three or four hundred yards off, and bearing three to four points on the starboard bow, and that then the starboard engine of the *Oravia* was put full speed astern and the two short-blast signals repeated. But the collision happened with the *Nereus* swinging under port helm and sounding her short blast, the *Oravia* also giving three short blasts when she had got both engines going astern. The blow was, as I have said, a six or seven-point blow, the stem of the *Oravia* hitting the port side of the *Nereus* in the way of the fore rigging, or somewhere about it. The defendants' case substantially is that their vessel was acting properly for a ship on their starboard side, and that they acted because they heard a fog signal, and that the *Nereus* ported into them. The remarkable feature in the case is that the plaintiffs say they saw the *Oravia* on the port bow when, if neither vessel had acted at all, they would have gone clear, whereas the defendants' witnesses say they never saw the *Nereus* at all until she appeared out of the fog close to them, and that then she was porting hard towards them. It does not require more than a statement of the case to show that, whatever view one takes of the important points of conflict between the parties, the *Oravia* is clearly to blame. Counsel for the defendants was practically driven into the unpleasant position of having to admit that, when it was pointed out that, on the evidence of the master of the *Oravia*, that vessel was going at ten knots at least—it may have been a little more—in a fog, which was so thick that he could not see more than three or four hundred yards, and the case of the *Oravia* is hopeless for that reason. At that time the vessel was going ten knots an hour, without any deduction of speed specifically for it, and at what is called a reduced speed for an earlier time. To say that this is a moderate speed is really hopeless, and one must say that, notwithstanding the long experience and high character of the master of the defendants' ship. I am afraid this part of the case is simply an example of taking the risk of going too fast in the expectation that there is nothing in the way, and that, if there is anything, their whistles will be heard in time to stop and reduce speed.

But that does not dispose of this case because the question arises whether the plaintiffs are to blame for porting or not stopping, slowing speed and not reversing in time. That depends, and so also does the blame on the defendants' ship, mainly upon the view one takes as to the original positions of the ships. With the assistance of the Elder Brethren I have considered this matter with great care, and, upon the whole, I have come to the conclusion that the plaintiffs' version of the position of the ships is the correct one. It is deposed to positively that the *Oravia* was in fact seen, and that no other vessel was seen prior to the fog coming down—that she was seen somewhat on the port bow; and I think that fits in with the manœuvres of the ships afterwards, because it is quite clear that the *Oravia* hard-a-starboarded and reversed the port engine when this other vessel was first heard, and it was not until the vessel was seen that both engines were put astern. Although it is said that at the time of the collision the head of the *Oravia* was west-south-west, I think that is a mistake. It is much more probable that, if that evidence is correct at all, that was the heading of the vessel when the *Nereus* was seen, and when the *Oravia* was swinging under the hard-a-starboard helm, and that from then up to the time of the collision she continued to swing on; and I think it more than probable, and it is the fact, that the reason why the witnesses for the defendants say that the other vessel was on their starboard hand is that they had acted for a vessel in a fog before they saw her, and that by the time they did see her she had got on their starboard bow by their own motion. No one could tell in that fog, unless they were looking at the compass, whether the ship was altering, or how much she was altering. I believe that is the reason why the impression had been produced with regard to the earlier period, and altered to, that the vessel was on the starboard hand to begin with. That leaves the plaintiffs, in my view, originally in the position practically which they contend for—namely, that the vessels were port to port. Then the only question is whether there is any blame on the part of those on board the plaintiffs' ship for acting in the way they did. What was done, according to the master, was this: He went on to the bridge after being called by the mate, who told him that there was a steamer coming on the port bow, and he could then see about a mile. The *Nereus* was not yet in the fog, and he did nothing. Then, when the chief officer indicated the direction of the *Oravia*—that is to say, the direction in which he thought she was from having seen her before—he says he heard a blast on the port bow, a short blast, and put the engines slow. It was not a regular blast of the length of a fog signal. He understood she was porting. He thought it was two or three points on the port bow, but he could not see her then. He gave the order a little to port and one short blast on the whistle, and ordered the engines to slow. The *Oravia* gave two short blasts, and he stopped, giving one short blast on his whistle and hard-a-porting his helm, and immediately afterwards there was a two-blast signal in reply. He replied with a one-blast signal, and went full speed astern, there being barely time to try to stop before the full speed astern, it being practically one order. I think the engineer's and other evidence is practically to the effect that slow, stop, and full speed astern were all so near that there was little or no more time than was necessary to carry out the one order as it followed the other. In that state of things I think it is exceedingly difficult to see what blame can be put upon the plaintiffs. I think, therefore, that the conclusion of fact to come to is—and this is the view which the Elder Brethren take—that, taking the plaintiffs' evidence to be correct, nothing wrong was done on board their ship. There was no danger at all at first; they had indications beforehand to show that this other ship was in

such a position that they were not in a sense obliged strictly to stop at once. They knew where she was; they knew where they might expect her, having regard to the locality, and when they heard any signalling from her they took instant action.

The only other matter to dispose of is the question of the damage which occurred afterwards. That is a matter upon which the advice of the Elder Brethren is of great importance and great assistance to me. I think it is clearly proved that there is no fault to be found with the plaintiffs' vessel for not attempting to proceed to Monte Video. I think it was reasonable, and the Elder Brethren do also, for them to attempt to get into Maldonada Bay. The circumstances were critical, and I think they were acting rightly in trying to get the vessel into a place of safety. Unfortunately, owing to the state of the weather, they got on to the northern shoal or bank of the Monarch Rock, not on the rock itself, not its pinnacle, because her depth was too great. That was an unfortunate accident, due to the thick fog, which happened at a time when they were trying their best to get into safety, and when soundings in a direction at right angles to that in which they were originally proceeding were of very little assistance in discovering the exact position of the rock. Upon the whole, I am satisfied that no case of negligence has been made out against the plaintiffs justifying them in being deprived of a claim for the damage which was consequent upon this collision. The decision of the court, therefore, must be that the *Oravia* is alone to blame for this collision, and that her owners are liable for the consequences of it.

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

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

Thursday, Feb. 23, 1905.

(Before BARGRAVE DEANE, J.)

THE GLENGARIFF. (*a*)

Collision—Queenstown Harbour—Narrow channel—Meaning of "fairway"—Regulations for Preventing Collisions at Sea 1897, *art.* 25.

Queenstown Harbour is a narrow channel within the meaning of art. 25 *of the Regulations for Preventing Collisions at Sea, and, although vessels need not necessarily navigate in the buoyed part of the channel, they should on entering or leaving the harbour keep to their starboard side of the middle of the buoyed part of the channel.*

ACTION of damage by collision.

The plaintiffs were the Lough Fisher Steam Shipping Company Limited, owners of the *Lough Fisher.*

The defendants and counter-claimants were the City of Cork Steam Packet Company Limited, the owners of the *Glengariff.*

The collision between the two vessels occurred about 7.40 p.m. on the 30th June 1904 in Queenstown Harbour to the southward and eastward of the Bar Rock Buoy. The wind at the time was west-south-west a strong breeze, the weather was fine and clear, and the tide was ebb of the force of about two knots an hour.

The case made by the plaintiffs was that the *Lough Fisher,* a screw steamship of 418 tons gross and 168 tons net register, manned by a crew of eleven hands all told, was, whilst on a voyage from Ellesmere Port to Queenstown with a cargo of coal, proceeding up Queenstown Harbour. The *Lough Fisher* was proceeding about N.N.E. magnetic up the entrance channel, to the westward of the buoyed fairway, making about eight knots, and a good look-out was being kept on board of her. In these circumstances those on the *Lough Fisher* saw the *Glengariff* about two miles off broad on the port bow. The *Glengariff* was carefully watched, and as the two vessels approached the Bar Rock Buoy the *Lough Fisher's* helm was ported a little, and one short blast was sounded on her whistle. The *Glengariff,* however, appeared to take no notice, so the helm of the *Lough Fisher* was ported a little more, and her engines were slowed, but almost immediately afterwards reversed full speed, her helm being put hard-a-port, and three short blasts sounded on her whistle; but the *Glengariff,* instead of keeping clear of the *Lough Fisher* as she could and ought to have done, came on, and with her starboard bow struck the port side of the stem of the *Lough Fisher,* doing her considerable damage.

The plaintiffs charged those on the *Glengariff* with failing to keep out of the way of the *Lough Fisher;* with attempting to cross ahead of her; with neglecting to slacken their speed or stop or reverse; and with not keeping to the starboard side of the channel.

The case made by the defendants was that the *Glengariff,* a steel screw steamship of 1285 tons gross and 487 tons net register, manned by a crew of thirty-one hands all told, was proceeding through Queenstown Harbour in the course of her voyage from Cork to Liverpool with general cargo, cattle, and thirty passengers. The *Glengariff* was heading straight down the roads, keeping on the southern side of the fairway, and was making about twelve knots. A good look-out was being kept on board her. In these circumstances those on the *Glengariff* observed at a distance of rather over two miles and broad on the starboard bow the *Lough Fisher* coming up the harbour. The *Glengariff* was kept on her course, heading to pass immediately to the southward of the Bar Rock Buoy, but when the *Lough Fisher,* which was coming up to the westward of the fairway and on the wrong side of the channel, sounded one short blast on her whistle and appeared to be acting under port helm as if intending to cross the bows of the *Glengariff* and caused danger of collision, the engines of the *Glengariff* were immediately stopped and reversed full speed astern, three short blasts were sounded on her whistle, and her helm was put hard-a-port; but, notwithstanding these manœuvres, the *Lough Fisher* came on, still acting under port helm and at high speed, and with her stem struck the starboard bow of the *Glengariff,* doing her considerable damage. Just before the collision the *Lough Fisher* sounded three short blasts on her whistle.

The defendants charged the plaintiffs with not keeping on the starboard side of the channel; with failing to pass port to port; and with not

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

slackening speed or stopping and reversing their engines.

Art. 25 of the Regulations for Preventing Collisions at Sea is as follows:

In narrow channels every steam vessel 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 vessel.

The following by-laws of the Cork Harbour Commissioners, made the 22nd March 1899 in pursuance of the Cork Harbour Acts 1820 to 1883 and sanctioned by the Board of Trade on the 8th April 1899, were also referred to:

4. The fairway commences at Roche's Point, and is bounded on the east side to Carlisle Fort by the shore, and on the west by the Harbour Rock and Turbot Bank Buoys.

5. From Carlisle Fort to the Bar Rock Buoy the fairway is bounded on the east by the red buoys marking the shoals on the eastern side of the harbour, and on the west by an imaginary line from the flagstaff at Camden Fort to sixty fathoms S.E. by E. of No. 7 black buoy; from thence to No. 8 Government buoy, coloured black, and from No. 8 buoy to the Bar Rock Buoy.

55. Any regulations for preventing collisions at sea for the time being in force, under the provisions of the Merchant Shipping Acts, shall be deemed to apply to the port . . . provided that where any inconsistency arises between the general regulations and the said by-laws, the provisions of the by-laws shall prevail.

Aspinall, K.C. and *A. D. Bateson* for the plaintiffs the owners of the *Lough Fisher*.—Rule 55 of the Cork Rules imports the collision regulations into the local rules, though, if there is any inconsistency between the two sets of rules, the local rules are to prevail. Rules 4 and 5 define the fairway, but it is defined for the purpose of preventing vessels anchoring in that part of the harbour. The collision did not occur in the fairway, and the narrow channel rule does not decide the rights of the parties. The *Glengariff* was not in the buoyed channel. There is a considerable stretch of navigable water to the left of the buoys on the port side of the channel, and there is no reason why it should not be used. The *Glengariff* had the *Lough Fisher* on her starboard side, and so she ought to have stopped:

The Ashton, 92 L. T. Rep. 811; (1905) P. 21.

The master of the *Glengariff* expected the *Lough Fisher* to starboard, but, as she never broadened on his bow, he knew she was not doing so, and, if it had been night, he admits that the position of the vessels was such that he would have stopped. He should have done that as it was. He only reversed at a very late time. Those on the *Lough Fisher* are not to blame for porting; under art. 21 they were bound to do something to avoid collision, and they only ported when they found that the *Glengariff* could not avoid them by her own action alone. It is suggested that there is a practice for vessels entering this harbour under circumstances such as these to starboard, but, even if that is so, the practice cannot override the regulations.

Laing, K.C. and *H. C. S. Dumas* for the defendants, the owners of the *Glengariff*.—Art. 19, the crossing rule, does not govern this case. The Cork Rules define the fairway, but it is possible that a fairway may exist in a narrow channel, and this is a narrow channel, and art. 25 governs this case. The buoys which the *Lough Fisher* had on her starboard hand were not starboard hand buoys such as were spoken to in *The Gustafsberg* (92 L. T. Rep. 630; 10 Asp. Mar. Law Cas. 61; (1905) P. 10). The *Lough Fisher* was on the wrong side of the fairway, and would have had to starboard to get into Cork. She ported when she saw the *Glengariff* to get to the north of the Bar Rock Buoy; that was reckless navigation, as it threw her across the course of the *Glengariff*. The crossing rule does not apply in cases where the known course of a steamship will take her clear of another:

The Velocity, 21 L. T. Rep. 686; L. Rep. 3 P. C. 44;
The Pekin, 77 L. T. Rep. 443; 8 Asp. Mar. Law Cas. 367; (1897) A. C. 532.

The case of *The Ashton* (*ubi sup.*) is distinguishable from this case. In that case one vessel was in a narrow channel, the other was not; here both vessels are in the same channel. The collision was caused by the *Lough Fisher* being on the wrong side of the channel, and then porting at too late a time to try and get back to her proper side.

Aspinall, K.C. in reply.—The whole of the harbour cannot be termed a narrow channel. In the case of *The Ashton* (*ubi sup.*) it was laid down that if the ship whose duty it was to give way could not pass astern she should stop. The *Glengariff* is to blame for not stopping. Those on the *Glengariff* say they were expecting the *Lough Fisher* to starboard, and yet say that the vessels were in a narrow channel, which presupposes that they were to pass port to port. Even if art. 25 does apply, art. 19 applies also:

The Leverington, 55 L. T. Rep. 386; 6 Asp. Mar. Law Cas. 7; 11 P. Div. 117.

BARGRAVE DEANE, J.—This is an action for damages caused by a collision between the *Lough Fisher*, a steamship of 418 tons gross and 168 tons net register, and the *Glengariff*, a steel screw steamship of 1285 tons gross and 487 tons net register. One vessel is a great deal larger and more powerful than the other. The collision was brought about by one vessel crossing the bows of the other, and the damage done shows that both had way on them at the time of the collision. It is true that the master of the *Glengariff* says that he was stopped, and, when I asked him the question, he said he was going astern through the water; but the mate, who was called, agreed that he was stopped in the water, which would mean that he still had about two knots over the ground with the tide. That would be fast enough to cause the undoubted damage, which consists in the stem of the *Lough Fisher* being drawn over to starboard. The damage actually done was done by the starboard bow of the *Glengariff* near the hawse-pipe, the patent anchor in the hawse-pipe being driven right through the bow of the *Glengariff*, and there is no doubt that was the hard substance which caused the damage which was done to the stem and bow of the *Lough Fisher*. This case has given me a good deal of anxiety, because it involves a very large and important question. The entrance to Cork Harbour is in one sense a very narrow entrance—that is to say, it is very narrow to the southward, where there seems to be only a few hundred

yards where vessels must come in, and then there is a fairway which has been marked by buoys by the local authorities. It leads a little to the eastward of north until you come up further, and then it leads more to the westward, but to the westward of that long stretch of fairway there are several hundred yards—I think four to five hundred yards—of navigable water. The question is, What is the effect of the various rules on a condition of things like that? There is art. 25, which says that "In narrow channels every steam vessel 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 vessel." What is a fairway? A fairway is practically defined by this article to be mid-channel. There is no rule which says that people shall keep in the fairway; the rule says that they shall keep to the starboard side of that fairway or mid-channel—that is to say, in narrow channels. What is a narrow channel? I do not think it has ever been laid down what is a narrow channel. There have been cases in which certain places have been held to be narrow channels, and in which definite decisions have been given on definite facts; but this is the first case, as far as I know, in which the question whether Queenstown Harbour is a narrow channel has been raised. We have discussed it at considerable length with every possible effort to arrive at a definite conclusion, and the Elder Brethren are very strongly of opinion that this is a narrow channel, and that the channel extends from one side of the whole of this navigable channel to the other, and that art. 25 requires steam vessels passing up and down to keep to the starboard side of the fairway. If that is right—and I so hold, and I realise that it is a very serious consideration, because it is a very important piece of water—it is the duty of every steam vessel entering to pass up on the starboard side of that mid-fairway, and of every steam vessel coming down to keep to the starboard side of that mid-fairway. The result is that I find the *Lough Fisher* is to blame. She was away to the port side of that fairway, and right over on the port side of that navigable narrow channel, and for that she is to blame. I have not the smallest doubt that the intention of the *Lough Fisher* was, by hugging that port side of the narrow channel, to cheat the tide, which was ebb, and, when she got up to the light on the port hand, to hug round the shore under starboard helm, and so get up the harbour; but, when she got abreast of that light, she saw ahead and on her port bow a steamer, which was coming down on the starboard side of the fairway. The vessel, which was the *Glengariff*, was, according to the rule I have just laid down, in her proper water; she was on her starboard side of that fairway, not necessarily in the fairway, but on her starboard side of the centre of that fairway coming down. The *Lough Fisher*, when she found herself with her port bow open to the starboard side of the *Glengariff*, did not accept the position under art. 19 and keep her course. She ported, which she had absolutely no right to do. If she was intending—it is not suggested she was—to get into her right water by crossing the bows of the other vessel, so as to get on to the starboard side of the channel, then she had no right to put the *Glengariff* in that position. The *Glengariff* assumed, according to the evidence of her master, that the *Lough Fisher* was going to starboard and carry on the course, which she had been adopting, of hugging the shore and passing away to the westward. The only doubt we have is whether the master of the *Glengariff* is altogether free from blame for not stopping his engines sooner. We do not think that he stopped his engines, in the ordinary course of the word, as soon as he ought to have done, but we think that he is absolved, because we think he was put into a false position by the action of the *Lough Fisher*; and that he is absolved by reason of his assuming, as he was entitled to assume, that that vessel, having got out of her proper water, was intending, as she evidently did intend, to starboard her helm and go to port. It was not until he found that she was porting, so as to cross his bows, that he stopped, and we think that he did it then as early as he was justified in doing it in the circumstances. The result is we find the *Lough Fisher* alone to blame.

Solicitors for the plaintiffs, *Pritchard* and *Sons*.
Solicitors for the defendants, *Thomas Cooper* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Wednesday, March 8, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE CHALLENGE AND DUC D'AUMALE. (*a*)

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

Collision—Tug and tow—Fog—Duty of tug to stop on hearing a fog signal forward of her beam—Article 16 *of the Regulations for Preventing Collisions at Sea* 1897.

The tug C. *was towing the barque* Duc d'A. *in a dense fog in the English Channel, near the Royal Sovereign Lightship, on a course of W.S.W., when the fog signal of the steamship* C., *which was on a course of E.* ½ *N., was heard on the starboard bows of the tug and tow. The tug did not stop her engines on hearing the first fog signal, but on hearing a second fog signal and seeing the loom of the steamship* C. *she stopped them. The steamship* C. *stopped her engines on first hearing the fog signal of the tug and tow.*

Held, that as the tug could have stopped her engines on first hearing the fog signal of the steamship without encountering difficulty with her tow she was to blame for not doing so, and that the tug and tow were to blame for not stopping in accordance with art. 16 *of the collision regulations.*

The judgment of Gorell Barnes, J. affirmed.

APPEAL by the defendants, La Compagnie Maritime Française, the owners of the barque *Duc d'Aumale*, and the Elliott Steam-tug Company Limited, the owners of the tug *Challenge*, from a decision of Gorell Barnes, J. in an action of damage by collision, by which they were held

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

liable for the damage sustained by the plaintiffs' steamship *Camrose* in a collision which occurred between the *Camrose* and the *Duc d'Aumale* on the 22nd June 1902.

The case is reported 89 L. T. Rep. 481; 9 Asp. Mar. Law Cas. 497; (1904) P. 41.

The collision occurred about 7.45 a.m. on the 22nd June 1902 in the English Channel, between the Royal Sovereign Lightship and Dungeness, the weather at the time being a dense fog.

The *Camrose* was a steamship of 2565 tons gross register, and at the time of the collision was on a voyage from Ibrail to Antwerp with a cargo of grain.

The *Duc d'Aumale* was a four-masted French barque of 2297 tons gross register, and was on a voyage from London to San Francisco, *viâ* Cherbourg, with a part cargo on board, and she was in tow of the steam tug *Challenge*, of 137 tons gross register.

Shortly before the collision the *Camrose* was proceeding on a course E. ½ N. magnetic, making two to two and a half knots, with engines working dead slow, with her whistle being sounded a prolonged blast for the fog, when those in charge of her heard about two points on their port bow and some way off the fog signal of a vessel towing another. The engines of the *Camrose* were stopped, and her whistle was sounded in reply. Shortly afterwards the helm was ordered to be ported, but before the order could be effectively carried out, the whistle of the tug was again heard apparently more ahead, and at the same time the tug came into sight between one and two ships' lengths off. The engines of the *Camrose* were at once put full speed astern, and and as the *Duc d'Aumale* came into sight between one and two ships' lengths off, and about a point on the port bow of the *Camrose*, the helm was starboarded; but the collision occurred, the starboard bow of the *Camrose* striking the starboard side amidships of the *Duc d'Aumale*.

The owners of the tug *Challenge* alleged that, with about eighty fathoms of rope between the *Challenge* and her tow, she was heading about W.S.W. magnetic, making about two knots through the water, and duly sounding her whistle, when those on board her saw the loom of the *Camrose* two or three points on their starboard bow, and about two lengths away, and they stopped their engines. They alleged that no signal was heard from the *Camrose* before she came in sight, but at the trial the learned judge came to the conclusion that the whistle of the *Camrose* was heard twice before the tug's engines were stopped.

The owners of the barque *Duc d'Aumale* alleged that their vessel was going at about two knots, "the minimum speed compatible with keeping her under control," and that when the whistle of the *Camrose* was heard on the starboard bow of the *Duc d'Aumale*, the *Duc d'Aumale* was kept on her course, the tug continued to sound the proper fog signal in accordance with the regulations, that soon afterwards the whistle of the *Camrose* was again heard, and shortly afterwards she came in sight two to three points on the starboard bow of the *Duc d'Aumale*, about quarter of a mile off and approaching her at a high rate of speed.

On the hearing in the court below the plaintiffs charged the defendants with not stopping when the whistle of the *Camrose* was first heard, with not keeping out of the way of the *Camrose*, with attempting to cross ahead of her, and with neglecting to slacken their speed or stop or reverse.

The defendants in the court below charged the plaintiffs with proceeding at too high a rate of speed and with not stopping and reversing when the whistle of the *Challenge* was first heard, and the owners of the *Duc d'Aumale* further charged the plaintiffs with improperly failing to stop their engines and navigate with caution after hearing, apparently forward of their beam, the fog signal of a vessel unable to manœuvre as required by the collision regulations.

The learned judge (Gorell Barnes, J.) in the court below found that, up to shortly before the collision, both plaintiffs and defendants were proceeding at a moderate speed, and, distinguishing the case of *The Merthyr* (79 L. T. Rep. 676; 8 Asp. Mar. Law Cas. 475), found for the plaintiffs on the ground that the *Camrose* was not to blame for only reversing her engines on hearing the second signal from the tug, while the tug and tow were to blame, because, distinguishing the case of *The Lord Bangor* (73 L. T. Rep. 414; 8 Asp. Mar. Law Cas. 217; (1896) P. 28), the tug might have stopped her engines on first hearing the whistle of the *Camrose*, without encountering any difficulty with her tow.

From that decision both defendants appealed.

The collision regulations which were referred to during the hearing of the appeal were arts. 15 and 16.

Art. 15. All signals prescribed by this article for vessels underway shall be given:—1. By "steam vessels" on the whistle or siren. . . . In fog, mist, falling snow, or heavy rainstorms, whether by day or night, the signals described in this article shall be used as follows, viz: . . . (*c*) A vessel when towing, . . . or unable to manœuvre as required by these rules shall, instead of the signals prescribed in subdivisions (*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.

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 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.

Carver, K.C. and *Lewis Noad* for the appellants, the owners of the *Duc d'Aumale*.—The *Camrose* should have reversed on first hearing the whistle of the *Challenge*, and should not have been content with only stopping her engines.

The Merthyr (*ubi sup.*).

Art. 16 does not apply to a tug engaged in towing a vessel:

The Lord Bangor (*ubi sup.*).

Aspinall, K.C. and *L. Batten* for the appellants, the owners of the tug *Challenge*.—The tug is not to blame for not stopping her engines on hearing the fog signal of the *Camrose*, for by doing so she would endanger herself and her tow. Art. 15 prescribes the fog signal to be used by a vessel towing another; that was properly sounded by those on the tug and heard by those on the *Camrose*. On approaching a tug and tow in such a fog a high standard of care is required, and

those on the *Camrose* should have reversed their engines on first hearing the tug's fog signal.

Laing, K.C. and *Balloch* for the respondents, the owners of the *Camrose*, were not called on.

Collins, M.R.—The circumstances of the case are these, the plaintiffs' steamship *Camrose* was proceeding up the English Channel in an almost exactly contrary direction to the defendants' ship the *Duc d'Aumale*, which, in tow of a tug called the *Challenge*, was proceeding down channel. The weather was thick with fog, and the *Camrose* hearing a fog-signal on her port bow stopped, and it is alleged ported her helm. Then when the tug and tow came into sight she reversed and admittedly starboarded. It is said she ought to have reversed before, and that her not doing so brought about the collision. The rule applicable to the case is this: "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." So that there is clearly no obligation imposed on her by the rule to reverse. She did stop, and the learned judge has found and he had the concurrence of the Elder Brethren, that, as far as the circumstances of the case admitted, the *Camrose* navigated with caution. As to the porting and starboarding by the *Camrose* which the appellants' counsel say were wrong, it is to be observed that, although they admittedly took place, the learned judge came to the conclusion that it had no practical effect upon the collision. The starboarding followed so closely upon the porting that, even if either or both of them were wrong, they had no effect upon bringing about the collision, because at the time the helm alteration took place the collision was practically inevitable. That was a question of fact for the learned judge on the evidence. There was a theory put forward on the part of the appellants that the entries in the log showed that interpolations had been made, and that there was a great discrepancy. That raised a perfectly clear question of fact for the learned judge, who had the witnesses before him, and had also carefully examined these documents, and he came to the conclusion, in which I entirely concur, that there is no reason to suppose that the additions and alterations made in the entries in the log in any way nullified the evidence given that the movements of the helm had really any appreciable effect upon the direction of the vessels. Now, if that is so, it cuts away one main ground of the appeal—I agree with the learned judge's view on that part of the case. Now, as to the alleged omission on the part of those on the *Camrose* in not reversing their engines on first hearing the fog signal of the tug, as I have already said, the rule does not prescribe that they should. The evidence was that the first signal heard led the master of the *Camrose* to suppose that the aproaching vessel, which he knew by the signal to be a tug with a tow, was on his port side. That he knew, but he did not know in what direction they were coming, whether they were crossing him or whether they were meeting him on the port side. His impression was that they were meeting him on his port side. If he was right in his surmise that they were approaching him from an opposite direction on his port side, his view was that to have reversed would have had the effect of bringing his stern across the course of the vessel meeting him on his port side. There is no doubt, and counsel for the tug *Challenge* admits, that the tendency of reversing a right-handed screw would be to throw the bow to starboard and the stern to port. At all events, it would have been taking a course which, as he was in ignorance of the whereabouts of and the course of the vessel approaching him, he thought in the circumstances was dangerous. Therefore to insist upon his affirmatively taking a course which might be a wrong course, when the conditions were wholly unknown to him, except that there is a vessel in the neighbourhood the position of which he is ignorant of, is, I think, demanding something of him which under the circumstances he was not bound to do, and which was a course which might reasonably appear to him to be imprudent. What he did was to stop and navigate with caution, and it was only until a very short time later on that when these two vessels loomed through the fog, and he saw that the tug was on his starboard hand and the tow on his port hand, that he reversed his engines and did all he could to avoid a collision, although unsuccessfully. The learned judge held that the conduct of the tug in not stopping her engines was wrong, and on that ground, the plaintiffs having done nothing wrong and the defendant having done something wrong, he found in favour of the plaintiffs, the owners of the *Camrose*.

With regard to the question whether the learned judge was right or not in holding that the tug had done wrong, we have had an argument addressed to us by both counsel for the tow and for the tug. They have contended that a tug with a tow is put in a totally different position from a steam vessel, so as to be relieved from the obligation imposed on a vessel under the latter part of art. 16, which I have already read. They have contended that, having regard to the special relation between the tug and tow, the tug could not be called upon to stop her engines, because it would involve the possibility of the tow running up to her, with the probable consequence that the rope would foul the screw of the tug, and other complications might arise. However, the learned judge, with the advice of the Elder Brethren who were assisting him, came to the conclusion which he formulated in his judgment on that part of the case as follows: "The Elder Brethren advise me that, in this case, the tug could have stopped without encountering any difficulty with regard to her tow, sufficiently to let the way run off the tow—that the circumstances which I have described admitted of this being done, and in the position of the vessels it would have been proper seamanship to do so." We have taken the opinion of our skilled assessors on that point, and they have given an opinion which substantially accords with that of the Elder Brethren below, upon which the learned judge acted. Therefore, upon all these grounds, it seems to me that the learned judge was perfectly right, and that the appeal fails.

Mathew, L.J.—I am of the same opinion. The question turns on art. 16 which is applicable

to both vessels, the *Camrose* on the one hand and the tug *Challenge* on the other. The *Camrose* complied with the conditions of that article; the tug did not. The excuse that was offered for the tug was that she could not, and that, when a tug was towing a vessel, she was not bound to stop and could not stop, and that it was not proper seamanship to do so. The nautical assessors in the court below and here concur in saying that the rule might have been complied with by the tug, and therefore it follows that the judgment must be affirmed.

COZENS-HARDY, LJ.—I agree.

Solicitors for the appellants (defendants) owners of the *Duc d'Aumale*, *William A. Crump* and *Son*.

Solicitors for the appellants (defendants) owners of the *Challenge*, *Williamson*, *Hill*, and *Co.*, for *R.* and *R. F. Kidd*, North Shields.

Solicitors for the respondents (plaintiffs) owners of the *Camrose*, *Thomas Cooper* and *Co.*

Wednesday, March 8, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE TOSCANA. (*a*).

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

Salvage—Appeal—Reduction of award—Apportionment of reduced award—Costs of the appeal.

The steamship B. *fell in with the disabled steamship* T. *in the North Atlantic, and towed her* 195 *miles to the roadstead at Las Palmas.*

The owners, master, and crew of the B. *instituted proceedings against the owners of the* T., *her cargo and freight, to recover salvage, and were awarded the sum of* 5100*l.*

The owners of the T. *and of her cargo appealed, on the ground that the award was excessive, and the Court of Appeal reduced the award to* 3000*l.*, *and directed that that sum should be apportioned between the owners, master, and crew of the* B. *in the same proportions as the original award had been.*

The appellants asked for the costs of the appeal.

Held, that, as the rule laid down in The Gipsy Queen (72 *L. T. Rep.* 454; 7 *Asp. Mar. Law Cas.* 586; (1895) *P.* 176) *had been relaxed, the ordinary rule in the Court of Appeal that a successful appellant should receive his costs of the appeal would be followed, and that, as the appellants had succeeded in largely reducing the salvage award made against them, they were entitled to the costs of the appeal.*

APPEAL from a decision of the late Sir F. H. Jeune (President) dated the 14th April 1904.

The *Toscana* was a screw steamship of 4252 tons gross and 2748 tons net register, owned by the Italia Societa di Navigazione a Vapore, manned by a crew of eighty-four hands all told, and, at the time the services were rendered to her by the *Bonny*, was on a voyage from Genoa to Buenos Ayres with general cargo, and had on board thirteen saloon and 1160 emigrant passengers.

The *Bonny* was a mail screw steamship of 2702 tons gross and 1713 tons net register, fitted with engines of 24-horse power nominal, working up to 1200 indicated, owned by Elder, Dempster, and Co, manned by a crew of thirty-nine hands all told, and, at the time the services were rendered by her, was running in the British and African Steam Navigation Company's line on a voyage from Liverpool to Sierra Leone with mails and general cargo, and had on board four passengers.

The *Toscana* was in about latitude 25.22 N. and longitude 16 W. when, on the 11th Dec. 1903, about 7 p.m., her propeller shaft broke. She made some water, but this leak was stopped when her stern tube was caulked and cemented. During the night of the 11th Dec. the *Toscana* drifted about twenty-six miles to the southward and westward. Early on the morning of the 12th Dec. the steamship *Bonny* fell in with the *Toscana* and took her in tow, and the vessels arrived at the roadstead at Las Palmas at 8 a.m. on the 14th Dec., the *Toscana* having been towed 195 miles in fifty-two hours in fine weather, the *Bonny* having been delayed seventy-three hours by rendering the services, and her owners having incurred expenses amounting to about 13*l.*

The value of the *Toscana* was 50,000*l.*, of her cargo 36,000*l.*, and of her freight 1437*l.*, in all 87,437*l.*; the value of the *Bonny* was 28,000*l.*, of her cargo 40,688*l.*, no freight was at risk, in all 68,688*l*

The case was heard before Sir F. H. Jeune, the late President, assisted by two of the Elder Brethren of the Trinity House, and the learned judge awarded the plaintiffs 5100*l.* and costs, his award being based upon the high values at risk in each case, on the large number of passengers on board the *Toscana*, and on the fact that she was completely disabled.

The award was apportioned as follows: To the owners of the *Bonny* 3900*l.*, to the master 400*l.*, and to the crew 800*l.* according to their ratings, but the non-navigating portion of the crew—the surgeon, purser, stewards, baker, butcher, and cooks—were to receive salvage as though rated at one half their actual rating: (*The Spree*, 69 L. T. Rep. 628; 7 Asp. Mar. Law Cas. 397; (1893) P. 147; *The Minneapolis*, 86 L. T. Rep. 263; 9 Asp. Mar. Law Cas. 270; (1902) P. 30).

The defendants appealed.

Pickford, K.C., *Laing*, K.C., and *Arthur Pritchard* for the appellants, the owners of the *Toscana* and her cargo and freight.—The award is too great, and is so great that it is unjust. The values, no doubt, are large, but the services were simple in character, and there was a complete absence of serious risk to life or property. The weather was fine, and there was every probability that the *Toscana* would fall in with assistance. The court will diminish an award if it is of opinion that it is so large as to be unjust:

The Accomac, 66 L. T. Rep. 335; 7 Asp. Mar. Law Cas. 153; (1891) P. 349.

Aspinall, K.C. and *A. D. Bateson* for the respondents, the owners, master, and crew of the *Bonny*.

The court, having consulted with the assessors, reduced the award to 3000*l.*, on the grounds that, although the values were large, the risk to both vessels was small; there was no serious loss by delay to the owners of the salving vessel; and no probability that the provisions on the salved vessel would have run short. The court directed the 3000*l.* to be apportioned among the owners, master,

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

and crew of the *Bonny* in the same proportions as the 5100*l.* had been apportioned.

Pickford, K.C. asked for the costs of the appeal.

Aspinall, K.C. for the respondents.—An appellant, even though he succeeds in reducing an award, is not entitled to costs:

The Gipsy Queen, 72 L. T. Rep. 454; 7 Asp. Mar. Law Cas. 586; (1895) P. 176.

Pickford, K.C.—It has been held by a divisional court sitting in Admiralty that where an appellant succeeds in considerably reducing an award the costs of the appeal will be allowed:

The Prince Llewellyn, 89 L. T. Rep. 489; 9 Asp. Mar. Law Cas. 505; (1904) P. 83.

That case followed *The Kilmaho*, 16 Times L. Rep. 155.

COLLINS, M.R.—We think we are entitled to follow the ordinary rule that prevails in this court, for the rule which was laid down in the Privy Council when exercising jurisdiction in Admiralty cases and which was followed in *The Gipsy Queen* (*ubi sup.*) seems to have been relaxed in this court in *The Kilmaho* (*ubi sup.*), and in the Divisional Court sitting in Admiralty in *The Prince Llewellyn* (*ubi sup.*). So, as the appellants have in this case succeeded in reducing the award by a very substantial amount, we are of opinion they should have the costs of the appeal, the costs of the action in the court below remaining as they are.

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

Solicitors for the respondents, *Stokes* and *Stokes*, for *Bateson*, *Warr*, and *Wimshurst*, Liverpool.

March 8, 9, 10, *and* 14, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE LONDON. (*a*)

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

Collision action—Plaintiff ship alone to blame—Appeal by plaintiff admitting liability—Judgment of both to blame—Practice as to costs.

In a collision action brought by the owners of the A. *against the owners of the* L., *the Admiralty Court found the owners of the* A. *alone to blame. The owners of the* A. *appealed, admitting that their vessel was to blame, and alleging that the* L. *was also to blame.*

The Court of Appeal held that both the A. *and the* L. *were to blame for the collision, and, following* The Ceto (62 *L. T. Rep.* 1; 6 *Asp. Mar. Law Cas.* 479; 14 *App. Cas.* 670), *gave the successful appellants the costs of the appeal.*

APPEAL by the plaintiffs, the owners of the *Anson*, from a decision of Sir F. H. Jeune, President, holding their vessel alone to blame for a collision with the *London*, belonging to the defendants, who counter-claimed for the damage to the *London*.

The case is reported in the court below (*The London*, 91 L. T. Rep. 327; 10 Asp. Mar. Law Cas. 12; (1904) P. 355) on the proper signals to be made by a trawler when fishing off the coast of Europe lying north of Cape Finisterre; the case on appeal is only reported on the question of the costs of the appeal.

On the 5th June 1904 the *Anson*, a steam trawler of 154 tons gross register, was trawling about eighty-five miles E. ½ S. of the Spurn, when she collided with the *London*, a steamship of 1475 tons gross register. Shortly after the collision the *Anson* sank. The weather at the time of the collision was foggy, and the chief charge against the *Anson* was that she was not sounding proper fog signals as prescribed by art. 10 (*g*) of the Collision Regulations 1884, which is in force as art. 9 of the Collision Regulations 1897. The chief charges against the *London* were that she was proceeding at an excessive speed in the fog; that she had no proper look-out; and that she had neglected to stop her engines and then navigate with caution on hearing the fog signal of a vessel forward of her beam, the position of which was not ascertained.

On the 26th July 1904 the case came before the President (Sir F. H. Jeune), assisted by two of the Elder Brethren of the Trinity House, when the *Anson* was held to blame for not sounding proper fog signals, and the charges against the *London* were held to have failed. A decree was therefore drawn up pronouncing the plaintiffs alone to blame, and condemning them in the damage proceeded for by the defendants and in the costs of the action.

March 8 *and* 9.—The plaintiffs, the owners of the *Anson*, appealed against the judgment in so far as it held that the *London* was not to blame. They admitted the *Anson* was to blame.

Aspinall, K.C. and *Lauriston Batten* for the appellants, the owners of the *Anson*.

Robson, K.C. and *Balloch* for the respondents, the owners of the *London*.

March 10.—The court, assisted by nautical assessors, allowed the appeal, finding the *London* to blame mainly on the ground that her speed was excessive.

On the question of costs:

Aspinall, K.C. on behalf of the owners of the *Anson*.—The plaintiffs having succeeded on the only point on which they appealed are entitled to their costs. The rule in such cases as this has not been uniform. In *The Hector* (48 L. T. Rep. 890; 5 Asp. Mar. Law Cas. 101; 8 P. Div. 218) Brett, L.J. said that the court would, unless the case was exceptional, follow the rule observed by the Privy Council in Admiralty appeals of giving no costs where both vessels were found to be to blame. That rule, however, has been broken in *The Batavier* (62 L. T. Rep. 406; 6 Asp. Mar. Law Cas. 500; 15 P. Div. 37). The defendants' vessel was held alone to blame in the Admiralty Court. The Court of Appeal reversed that decision, holding that the collision was the result of inevitable accident; and Lord Esher, M.R. said: "It is time that it should be laid down once for all that in every case, unless there are special circumstances to take it out of the general rule, the party who is successful obtains his costs." In *The General Gordon* (63 L. T. Rep. 117; 6 Asp. Mar. Law Cas. 533) Butt, J. gave the plaintiffs, who admitted that their vessel was to blame, their costs of the action.

Balloch (*Robson*, K.C. with him).—The practice as to the costs in cases such as this is settled; the

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Court of Appeal follows the practice of the Privy Council, and where a collision occurs between two ships, through the fault of both, the owners of the ships are not entitled to the costs of any litigation arising out of the collision:

The Hector (*ubi sup.*);
The Beryl, 51 L. T. Rep. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137;
The Arratoon Apcar, 62 L. T. Rep. 331; 6 Asp. Mar. Law Cas. 491; 15 App. Cas. 37.

Aspinall, K.C. in reply.—The practice which is alleged cannot be said to be settled:

Williams and Bruce's Admiralty Practice, 3rd edit. (1902), p. 550.

[COLLINS, M.R.—We shall consult the other members of the court before giving our decision as it is desirable to establish a uniform practice.]

March 14.—COLLINS, M.R.—Counsel for the appellants, with the assent of counsel for the respondents, have called our attention to the case of *The Ceto* (*ubi sup.*), which was not referred to during the argument, but which seems to decide the point. In that case the President, Sir James Hannen, held that one of the vessels, the *Lebanon*, was alone to blame for the collision which occurred between the *Lebanon* and the *Ceto*. The owners of the *Lebanon* appealed, but admitted that their vessel was to blame, and the only question on the appeal was whether the *Ceto* was also to blame. That is exactly the position in the present case. In that case the Court of Appeal affirmed the judgment of the President. In the House of Lords there was a difference of opinion on the merits of the case; but the judgments appealed from were reversed, and it was declared that both the *Lebanon* and the *Ceto* were in fault, and that the respondents were to pay the appellants their costs in the Court of Appeal and in the House of Lords. The facts in that case and in this are exactly similar, and the appellants are entitled to the costs of the appeal, and there will be no order as to costs in the court below.

Solicitors for the appellants (plaintiffs), *Pritchard* and *Sons*, for *Andrew M. Jackson* and *Co.*, Hull.

Solicitors for the respondents (defendants), *Thomas Cooper* and *Co.*

Wednesday, March 15, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

PAGE v. DARLING AND GASELEE; THE MILLWALL. (a)

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

Collision between tow and vessel at anchor—Negligence of tug—Damage to cargo in tow—Action by cargo owners against tug owners and tow owners—Judgment for cargo owners against tug owners—Action against tow owners dismissed—Indemnity of tug owners by tow owners—Appeal by tug owners—Appeal withdrawn—Right of tow owners to appeal from judgment in favour of cargo owners against the tug owners—Order XVI., rr. 52, 53, 55.

The barge M. *in tow of the tug* B. *was brought into collision with a sailing barge* H. H., *which was at anchor. The collision was caused by the negligence of the servants of the tug owners. The cargo on the barge* M. *was damaged. The owners of the cargo on the* M. *brought an action against the owners of the tug B. and the owners of the barge M. jointly and severally in tort, and also alternatively against the owners of the barge* M. *for breach of contract in not carrying and delivering the cargo safely. The claim of the cargo owners against the barge owners was dismissed with costs, but the cargo owners recovered judgment against the owners of the tug* B. *in tort with costs, and the tug owners were also ordered to pay to the cargo owners the costs of the cargo owners' unsuccessful action against the barge owners. The owners of the tug towed the barge under a contract which entitled them to be indemnified by the barge owners against the damages and costs which the owners of the tug had paid in respect of the collision.*

The owners of the tug appealed against the judgment obtained against them by the owners of the cargo, but afterwards withdrew the appeal. The owners of the barge, who had to indemnify the owners of the tug against the damages and costs to be paid by the tug owners, also appealed against the judgment obtained by the cargo owners against the tug.

Held, that the barge owners had no right to appeal against a decision in favour of the cargo owners against the tug owners, as they were not parties to that judgment, and they could not rely on the third-party procedure under the Judicature Act as no order had been made within the meaning of Order XVI., r. 53, *giving directions as to the mode in or the extent to which they were to be bound, or made liable, by the judgment against the tug owners.*

APPEAL by defendants, the owners of the barge *Millwall*, from the judgment of the President (Sir Francis Jeune), reported 91 L. T. Rep. 695; 10 Asp. Mar. Law Cas. 15.

Charles Page and Co., owners of certain sulphate of ammonia, instructed Darling Brothers, the owners of the barge *Millwall*, to convey the sulphate of ammonia to a ship loading in the Thames.

As the ship was sailing shortly, Charles Page and Co. told Darling Brothers to employ a tug to tow the *Millwall* to the ship, and Darling Brothers ordered Gaselee and Sons, the owners of the tug *Bee*, to tow the *Millwall* with the sulphate of ammonia on board to the ship. In the course of the towage the *Millwall* was brought into collision with the sailing barge *Hughes Hallett*, which was at anchor, and the cargo on the *Millwall* was damaged.

The owners of the cargo brought an action against the tug owners and the barge owners to recover the damage sustained by the cargo. They framed their action against the tug and barge owners jointly and severally in tort, and alternatively against the barge owners for breach of contract to carry and deliver the cargo safely.

Before the trial of the action the tug owners served a third-party notice on the barge owners, claiming to be indemnified by them against any sum which Charles Page and Co., the plaintiffs, might recover in the action against the tug owners for damages and costs and against the costs the

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

tug owners might incur in defending the action, and against the costs of and incidental to the third-party notice and the necessary proceedings consequent thereon, on the ground that the towage of the *Millwall* by the *Bee* had been undertaken on the terms that the tug owners should "not be answerable for any loss or damage which might happen to, or be occasioned by, any barge, or its cargo, while in tow, however such loss or damage might arise," and that the barge owners had undertaken to hold them harmless and indemnify them "from any such loss or damage, and against the faults or defaults of their servants or any claim therefor by whomsoever made."

Gaselee and Sons, the tug owners, on the 11th July 1904 applied to the court for directions as to the course to be pursued with regard to the third party, and the President made an order that a statement of claim should be dispensed with, and that the defence by the third party should be delivered within seven days.

Darling Brothers, the third party, delivered a defence to the claim under the third-party notice, and the action by the cargo owners against the tug and barge owners came on for hearing on the 27th, 28th, and 29th July.

On the 29th July the President (Sir Francis Jeune) held that the defendants Gaselee and Sons were responsible for the damage done to the cargo, and judgment was given in favour of the plaintiffs for the amount claimed against Gaselee and Sons, the tug owners, with costs. The claim of the cargo owners against the barge owners was dismissed with costs, but the learned judge ordered that the taxed costs recovered by the barge owners from the cargo owners were to be added to the costs recoverable by the cargo owners against the tug owners.

The question of the indemnity of the tug owners, Gaselee and Sons, by the barge owners, Darling Brothers, was then argued, and on the 30th July the President gave judgment in favour of Gaselee and Sons, the tug owners, and directed the barge owners to pay to the tug owners the amount of the damages and costs paid by the tug owners to the cargo owners, together with the costs paid by the tug owners to the barge owners.

The tug owners, Gaselee and Sons, on the 12th Aug. 1904 served the cargo owners, Charles Page and Co., with a notice of appeal against the judgment of the President (Sir Francis Jeune), dated the 29th July, by which he held them responsible for the damage done to the cargo, but on the 12th Oct. 1904 they withdrew their appeal.

The barge owners, Darling Brothers, also appealed against so much of the judgment of the President, dated the 29th July, as found in favour of the cargo owners, Charles Page and Co., against Gaselee and Sons.

The appeal by Darling Brothers came before the court on the 15th March 1905.

The rules of Order XVI. which were referred to on the hearing of the appeal were rules 52, 53, and 55, and are as follows:

Rule 52. If a third party appears pursuant to the third-party notice, the defendant giving the notice may apply to the court or a judge for directions, and the court or judge, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the action, as the court or judge may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.

Rule 53. The court or a judge upon the hearing of the application mentioned in rule 52, may, if it shall appear desirable to do so, give the third party liberty to defend the action, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the court or judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the judgment in the action.

Rule 55. Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendants, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action.

Scrutton, K.C. and *A. D. Bateson* on behalf of the respondents (plaintiffs) Charles Page and Co., took a preliminary objection that Darling Brothers were not entitled to appeal against the judgment obtained by the cargo owners against the tug owners. The notice of motion served by the barge owners on the cargo owners stated that they are going to appeal from so much of the judgment of the President "delivered on the 29th July as pronounced in favour of the plaintiffs' claim against Gaselee and Sons, the owners of the *Bee*, in respect of the plaintiffs' claim for damage occasioned to the cargo on board the barge *Millwall* whilst in tow of the *Bee*," but the barge owners are not parties to the judgment obtained by the cargo owners against the tug owners, and therefore cannot appeal from it. The tug owners might have appealed from it, but they gave notice of appeal and then withdrew it. The only way in which the barge owners could appeal against this judgment would be for them to be subrogated to the right of the tug owners. They can only be subrogated to the rights of the tug owners if they paid the amounts which the tug owners had been held liable to pay, and, as they have not done that, they can have no right to appeal by subrogation. Even assuming they were subrogated to the rights of the tug owners, they could only have the same rights as the tug owners, who have withdrawn their appeal. The barge owners cannot rely on the third-party procedure, for no order has been made under Order XVI., r. 53, as to the mode in and extent to which the barge owners are to be bound or made liable by the judgment against the tug owners in favour of the cargo owners. *West of England Fire Insurance Company* v. *Isaacs* (75 L. T. Rep. 564; (1897) 1 Q. B. 226) was referred to.

Carver, K.C., *Laing*, K.C., and *Balloch* for the appellants (defendants) Darling Brothers, the owners of the barge *Millwall*.—After the tug owners served the third-party notice on the owners of the barge, there was a summons for directions, and the barge owners were ordered to deliver a defence as against the tug owners. Under Order XVI., r. 55, where a defendant

claims against a co-defendant under a notice, the same procedure is to be adopted for the determination of such questions between the defendants as if the defendant on whom the notice was served had been a third party. The result of the summons for directions was that the barge owners fought the action, and are therefore entitled to appeal:

Eden v. *Weardale Iron and Coal Company*, 56 L. T. Rep. 464; 35 Ch. Div. 287.

The result of the third-party procedure is to make the judgment obtained by the cargo owners against the tug owners binding on the barge owners. The barge owners are therefore entitled to appeal as representing the tug owners. They are also entitled to appeal on their own behalf against the judgment, to show that the liability imposed on the tug owners by the judgment was wrongly imposed, for, if they succeed in doing that, no liability would arise against the barge owners under their contract with the tug owners. After an appeal is set down for hearing, a person interested in but not a party to the cause has been permitted to prosecute an appeal:

Attorney-General v. *Marquis of Ailesbury*, 54 L. T. Rep. 923; 16 Q. B. Div. 408, at p. 412.

Scrutton, K.C. in reply.—The barge owners are quite clearly trying to appeal, in their own right, against a judgment obtained against the tug owners, and they are not entitled to do that. The only persons entitled to appeal are persons standing in the shoes of the tug owners, and the tug owners cannot appeal now for they have withdrawn it. This application is in the teeth of rule 55 of Order XVI., which expressly safeguards the rights of the plaintiff against any defendant in the action.

Collins, M.R.—This is a preliminary objection taken by Charles Page and Co. to an appeal in this case being heard by this court so far as it affects them. Charles Page and Co. were the owners of a certain cargo of sulphate of ammonia which was in a barge called the *Millwall*, owned by Darling Brothers, and the barge was being towed by a tug belonging to Gaselee and Sons. While the barge was being towed to a steamship in the Thames which was going to carry the sulphate of ammonia, a collision occurred between the *Millwall* and another barge which was at anchor. The collision injured the sulphate of ammonia. Page and Co. brought an action against the owners of the tug, joining the owners of the *Millwall*, claiming from both, or, in the alternative, from either of them, damages for the injury to the cargo in the *Millwall*. At the trial the learned judge held that the tug was liable, and that the barge was not to blame. He therefore gave judgment for the plaintiffs against the tug owners and for the owners of the barge against the plaintiffs. He followed that up by holding that the plaintiffs were entitled to recover from the tug owners, not only the costs of their action against the tug owners, but also the costs payable by the plaintiffs to the barge owners. The owners of the tug gave notice of appeal against that judgment, but that appeal was afterwards abandoned, so, as matters stand, there is no appeal by Gaselee and Sons, the tug owners, against the judgment obtained against them by Charles Page and Co., the owners of the sulphate of ammonia. It appears that after the matter had been disposed of between the plaintiffs, Charles Page and Co., and the tug owners, Gaselee and Sons, an application was entertained by the late learned President in the absence of the plaintiffs, who were not concerned with it, in respect of a contract of indemnity which was alleged to have been entered into by Darling Brothers, the barge owners, with Gaselee and Sons, the tug owners, and he held that the barge owners were bound to indemnify the tug owners in respect of the damages recovered by Charles Page and Co. for the injury done to the sulphate of ammonia. Darling Brothers, the owners of the barge, now seek to appeal, and question the correctness of the decision of the court below as between Gaselee and Sons, the tug owners, and Charles Page and Co, the owners of the sulphate of ammonia. The plaintiffs, Charles Page and Co., say that the barge owners are not in a position to make such an appeal. It is an appeal as to a decision between the plaintiffs and the owners of the tug; and the plaintiffs say, therefore, that the owners of the barge cannot question a decision between the plaintiffs and the tug owners by way of appeal unless they were either themselves parties to that decision, or are subrogated to the rights of one of the parties. Obviously they are not parties to the decision, and they are not subrogated to the right of appeal, because, if they come in, or claim to come in, by subrogation, they can only take the rights possessed by those whose position they take, and, inasmuch as the tug owners have lost their right of appeal by abandoning it, it is impossible for anyone else by subrogation to acquire their right of appeal.

Counsel for the appellants say they do not rest their case on subrogation, but on the machinery of the third-party procedure under the Judicature Act; but, when what has taken place in this case is examined, it seems to me that there has been no decision which will put the barge owners into the shoes of the tug owners for the purpose of questioning the decision of the court below as between the plaintiffs, the owners of the cargo on the barge, and the tug owners. There would, I think, have been power under the Judicature Act had the court been invited to do it; but there is no order, and the court was not invited to substitute the owners of the barge for the tug owners in an appeal against the decision of the court as between the owners of the cargo on the barge and the owners of the tug. Order XVI., r. 53, is the rule which deals with the matter, and which really determines this case. It is in these terms: [The learned judge then read rules 53 and 52, and proceeded:] Now, there was no permission asked for, and no order made determining that the third party in this case was fully bound by the action, and therefore there is nothing binding the barge owners with regard to the result of the judgment between the owners of the cargo on the barge, the plaintiffs, and the tug owners. There is no provision made by that or any other order whereby the owners of the barge have been substituted as defendants, giving them all the rights in the conduct of the trial, with the right to appeal in their own name. In point of fact, counsel for the barge owners is not able to point to any order made under the powers of the Judicature Act giving them any special rights, and therefore, if they have any rights at all, they only have them under subrogation. That to which

they are subrogated is nothing, because the persons to whom they are subrogated have abandoned the right of appeal. Therefore, in my opinion, Darling Brothers, the barge owners, are not in a position in this appeal to question the decision pronounced by the President as between the owners of the cargo on the barge and the tug owners.

MATHEW, L.J.—I am of the same opinion, for the reasons given by the Master of the Rolls.

COZENS-HARDY, L.J.—I am also of the same opinion. I think rule 53 of Order XVI. is sufficient to enable us to decide this case, for the mere bringing in of a third party does not, apart from some subsequent order, make the judgment in the original action binding upon him. I think that conclusion is fortified by the language of rule 55, which provides that: "Where a defendant claims to be entitled to contribution or indemnity against any other defendant to the action, a notice may be issued and the same procedure shall be adopted, for the determination of such questions between the defendants, as would be issued and taken against such other defendant, if such last-mentioned defendant were a third party; but nothing herein contained shall prejudice the rights of the plaintiff against any defendant in the action." One of the rights of the plaintiffs in this case as against the tug owners is that the plaintiffs, the owners of the cargo, have got a judgment against the tug owners, against which an appeal has not been brought; and it seems to me that the present application really goes in the teeth of those words at the end of rule 55. This is an application which is to the prejudice of the plaintiffs, but no order has been made enabling the third party to defend the action brought by the plaintiffs against the tug owners. There was a *lis* as between the plaintiffs and the owners of the barge, in which the plaintiffs were unsuccessful; there was another *lis* between the plaintiffs and the tug owners, in which the plaintiffs have been successful; and we are asked by persons who are or may be, as between themselves and the tug owners, affected by the judgment in the latter case to say that, in the absence of any order, they ought to have a right of appeal, although there is nothing in the Judicature Act of 1873 or the rules which confers that right on them. It seems to me that the limits to which the right of appeal extends in the exceptional cases dealt with in Order XVI. are shown in the judgment of Cotton, L.J. in *Re Youngs* (53 L. T. Rep. 682; 30 Ch. Div. 421), where he says that "there is no power to give to a person who could not be made a party to the action leave to appeal against the judgment." If the owners of the *Millwall* had obtained an order allowing them to defend the action against the tug owners, then they might possibly have appealed against the judgment. They cannot do that now.

Solicitors for the appellants (defendants), Darling Brothers, *Keene, Marsland, Bryden,* and *Besant.*

Solicitors for the respondents (plaintiffs), Charles Page and Co., *James Ballantyne.*

March 17 *and* 18, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

GASELEE *v.* DARLING; THE MILLWALL. (*a*)

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

Collision between tow and vessel at anchor—Negligence of tug—Damage to cargo in tow—Action by cargo owners against tug and tow owners—Costs—Contract between tug and tow—Indemnity of tug owners by tow owners.

A barge M., *in tow of the tug* B., *came into collision with a barge,* H. H., *at anchor. The collision was caused by the negligence of the tug. The cargo on the barge* M. *was damaged. The cargo owners brought an action for tort against both the barge and tug owners for the damage, and also brought their action against the barge owners alternatively for breach of contract to carry and deliver the cargo safely. In that action the claim of the cargo owners against the owners of the barge was dismissed with costs, but the owners of the cargo recovered against the owners of the tug in tort with costs, and the tug owners were also ordered to pay to the cargo owners the costs of the cargo owners' unsuccesssful action against the barge owners.*

The tug owners had contracted to tow the barge on the following terms: "They will not be answerable for any loss or damage which may happen to any barge or its cargo while in tow, however such loss or damage may arise and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults or defaults of their servants, or any claim therefor by whomsoever made. And the customers of the said Gaselee and Sons undertake and agree to bear, satisfy, and indemnify them accordingly." The tug owners claimed to be indemnified by the barge owners against the damages and costs paid to the cargo owners and against the costs which the barge owners had recovered against the cargo owners and which the cargo owners had recovered from the tug owners.

Held (affirming the judgment of the court below), that there was no privity of contract between the cargo owners and the tug owners, and that the barge owners not only could not bring an action against the tug owners for any loss or damage which might happen to any barge or its cargo while in tow of the tug, but that the contract between the barge and tug owners assumed that a liability might be thrown on the tug owners, and that the barge owners had undertaken to indemnify the tug owners against it, so that the barge owners were liable for the damages recovered by the cargo owners from the tug owners, and the costs reasonably incurred by the tug owners in defending the action, including the costs which the cargo owners had to pay to the barge owners and which the cargo owners afterwards recovered from the tug owners.

Judgment of the President (Sir Francis Jeune) affirmed.

(*a*) Reported by J. F. C. DARBY, Esq., Barrister-at-Law.

Appeal by the defendants, Darling Brothers, the owners of the barge *Millwall*, from a decision of the President (Sir Francis Jeune), reported in 91 L. T. Rep. 695; 10 Asp. Mar. Law Cas. 15), holding that they were liable to indemnify their co-defendants, Gaselee and Sons, the owners of the tug *Bee*, in respect of the damages and costs paid by Gaselee and Sons to the owners of certain cargo laden on the barge *Millwall*, and in respect of costs which the cargo owners had paid to the owners of the barge and which the cargo owners had recovered from the tug owners.

Charles Page and Co., the owners of some sulphate of ammonia, having to send it to a ship loading in the Thames, employed the barge *Millwall*, owned by Darling Brothers, to convey it to the ship.

As the ship was about to sail, Page and Co. told Darling Brothers to employ a tug to tow the *Millwall* with the sulphate of ammonia on board to the ship.

Darling Brothers ordered Gaselee and Sons to send a tug to tow the barge *Millwall* to the ship.

The *Bee*, a tug owned by Gaselee and Sons, took the *Millwall* in tow, and during the towage the *Millwall* was, through the negligence of the tug *Bee*, brought into collision with a barge at anchor called the *Hughes Hallett*, in consequence of which the cargo on the *Millwall* was damaged.

The owners of the cargo on the *Millwall* brought an action against the barge owners and the tug owners to recover the damage sustained by the cargo. They framed their action against the barge owners and tug owners jointly and severally in tort, and alternatively against the barge owners for breach of contract to carry and deliver safely.

Before the action came on for trial, the tug owners served a third-party notice on the barge owners, claiming to be indemnified by them against any sum which the cargo owners, Page and Co., might recover in the action against Gaselee and Sons, the tug owners, for damages and costs and against the costs the tug owners might incur in defending the action, and against the costs of and incidental to the third-party notice and the necessary proceedings consequent thereon, upon the ground that the barge *Millwall* had been towed by the tug *Bee* on the tug owners' usual terms, which were as follows:

> Gaselee and Sons hereby give notice that they will not be answerable for any loss or damage which may happen to any barge or its cargo while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged upon the terms that they are to be held harmless and indemnified from any such loss or damage, and against the faults and defaults of their servants, or any claim therefor by whomsoever made. And the customers of the said Gaselee and Sons undertake and agree to bear, satisfy, and indemnify them accordingly.

The tug owners afterwards applied to the court for directions as to the course to be pursued with regard to the third party, and the barge owners were ordered to deliver a defence to the claim by the tug owners.

The barge owners, in their defence to the claim of indemnity by the tug owners, denied that they had employed the tug on the terms set forth in the third-party notice, or that the alleged terms entitled the tug owners to the relief claimed, and, alternatively, alleged that, if the tug was employed on the terms alleged, it was employed at the request of Page and Co., the cargo owners, who were at all times material aware of the tug owners' terms of towage.

On the hearing of the action by the cargo owners against the barge and tug owners, which was before the court on the 27th, 28th, and 29th July 1904, the President (Sir Francis Jeune) held that the damage to the cargo was occasioned by the negligence of the crew of the tug, and judgment was given for the amount claimed with costs against the tug owners. The claim of the cargo owners against the barge owners was dismissed with costs; but the learned judge, following the cases of *The River Lagan* (58 L T. Rep. 773; 6 Asp. Mar. Law Cas. 281), *The Mystery* (86 L. T. Rep. 359; 9 Asp. Mar. Law Cas. 281), and *Sanderson* v. *Blyth Theatre Company* (89 L. T. Rep. 159), ordered that the taxed costs paid by the cargo owners to the barge owners were to be added to the costs to be recovered by the cargo owners from the tug owners.

During the trial of the action, evidence was given showing that the barge owners frequently employed tugs owned by Gaselee and Sons to tow their barges, and received a discount from the tug owners on the amount paid for the hire of the tugs; but that they did not allow this discount to the cargo owners when debiting them with the hire of the tug. Upon that evidence the learned judge held that the barge owners had entered into the contract with the tug owners as principals and not as agents for the cargo owners, and, on the construction of the indemnity clause contained in the contract, held that the barge owners were liable to indemnify the tug owners in respect of the damages and costs paid by the tug owners to the cargo owners, including the costs which the cargo owners had paid the barge owners and which the cargo owners had afterwards recovered from the tug owners.

The barge owners appealed.

Carver, K.C., *Laing*, K.C., and *R. H. Balloch* for the appellants (defendants), Darling Brothers. —The barge owners, Darling Brothers, were acting as agents for the cargo owners when they engaged the tug. In the usual course of business Darling Brothers would have lightered the cargo to the ship without employing a tug at all, and that would have been done on the terms that they were not to be held liable for negligence. The tug was employed on the express order of the cargo owners for their benefit, so they are bound by the conditions under which the tug was employed, and, the contract being between the owners of the tug and the cargo owners, the cargo owners took the risks and liability arising from the contract of towage. The fact that Darling Brothers charged the cargo owners the full towage rate while they themselves got a discount for cash does not make them any the less agents of the cargo owners. If the cargo owners are principals and bound by the towage contract, they cannot claim against the tug owners, and the tug owners cannot claim an indemnity from the barge owners, for there can be no right to an indemnity unless there is a liability on the tug owners. Even if the barge owners,

Darling Brothers, entered into the towage contract as principals and not as agents for the cargo owners, the claim of the tug owners for an indemnity cannot be sustained, for the cargo owners instructed Darling Brothers to employ a tug, and so they impliedly authorised them to get a tug on the usual terms; the usual terms on which tugs are employed are that the tug owners are not to be liable for negligence, so, as the cargo owners are bound by the contract made by the barge owners, the cargo owners could not recover from the tug owners:

Delaurier v. *Wylie*, 17 Ct. of Sess. Cas. 4th series, 167.

The only question is whether the terms of the contract entered into by the barge owners with the tug owners are reasonable; if they are, the cargo owners are bound by them:

Hall v. *North-Eastern Railway*, 33 L. T. Rep. 306; L. Rep. 10 Q. B. 437.

The same principle is illustrated in the cases where a bailor's rights are subject to the rights of a third party who has entered into a contract with the bailee with regard to the subject of the bailment:

Singer Manufacturing Company v. *London and South-Western Railway Company*, 70 L. T. Rep. 172; (1894) 1 Q. B. 833, at p. 837;
Keene v. *Thomas*, (1905) 1 K. B. 136.

The tug owners can only recover against the barge owners under the indemnity by showing that the tug owners are liable to the cargo owners; if there is no such liability, the tug owners can recover nothing from the barge owners. Assuming the tug owners are liable to the cargo owners, the barge owners under their contract of indemnity with the tug owners are not liable for the costs of the tug owners incurred in defending the action. The words in the contract are "loss or damage"; that does not include the costs incurred in fighting a claim for loss or damage:

Xenos v. *Fox*, L. Rep. 4 C. P. 665.

The rule in *Hammond* v. *Bussey* (20 Q. B. Div. 79) does not apply to cases of tort.

J. A. Hamilton, K.C. and *Bailhache* for the respondents (plaintiffs under third-party notice) Gaselee and Sons.—The case turns wholly on the construction of the indemnity clause upon which the tug owners, Gaselee and Sons, agreed with the barge owners that the tug should be employed. The question whether there is privity of contract between the owners of the tug and the owners of the cargo is one of fact, and the President, upon the evidence, was right in finding that there was no privity of contract between the cargo owners and the tug owners, and that the tug owners contracted with the barge owners only. The contract must be construed as a whole, and clearly means that the cargo is to be carried at the risk of the barge owners and not at the risk of the tug owners, and that, if the tug owners become in any way liable for loss or damage during the towage, the barge owners will indemnify them. The clause is no defence to claims by third persons, for, unless there is privity of contract, the clause has no application; but between the barge owners and the tug owners the effect is that the barge owners take the risk attaching to the carriage of the cargo, and they, in their turn, can refuse to take the risk and throw it back on the owners of the cargo. As to the costs incurred by the tug owners in defending the action brought by the cargo owners, the barge owners are bound to indemnify the tug owners against them, for, so long as they are properly incurred, they are as much damage as money paid by the tug owners to minimise damage to the cargo by drying or sorting it would be. The principle was decided in *Hammond* v. *Bussey* (*ubi sup.*), in which it was held that costs incurred by plaintiffs in reasonably defending another action were recoverable under the rule in *Hadley* v. *Baxendale* (9 Ex. 341). Here the tug owners acted reasonably. They gave the barge owners notice of the claim by the third-party notice, and the barge owners might have defended the action brought against the tug, or warned the tug owners not to defend the action, for, if they did defend, it would be at their own risk.

Carver, K.C. in reply.—The cargo owners have clothed the barge owners with authority to take the cargo to a person who they know will not be liable for damage caused by negligence; they cannot be in a better position by making the barge owners engage the tug than they would have been if they had engaged the tug themselves.

COLLINS, M.R.—This is an appeal from the order of the late President (Sir Francis Jeune) in an action tried before him. The action was brought by Page and Co., the owners of a cargo of sulphate of ammonia, which had been placed in a barge belonging to Darling Brothers, one of the defendants, for the purpose of being delivered to a ship lying in the Thames, and carried in that ship to its destination. As there was a doubt, having regard to the time at the disposal of the parties, whether the barge could reach the ship in time, some discussion took place between the plaintiffs, Page and Co., the owners of the cargo, and Darling Brothers, the owners of the barge. A conversation took place over the telephone, with the result that the owners of the barge pointed out that the barge might possibly take so much time as to make it uncertain whether she would reach the ship to which the ammonia had to be delivered in time. It was therefore suggested, and the suggestion was approved by the plaintiffs, Page and Co., that a tug should be engaged. Accordingly a tug was engaged by the barge owners, Darling Brothers, and the tug and barge were proceeding up the river to the ship on which the ammonia was to be loaded when a collision occurred between the defendants' barge, the *Millwall*, and another barge at anchor in the river, which resulted in considerable damage being done to the ammonia in the barge belonging to the defendants, Darling Brothers. The consequence was that Page and Co. brought an action against both the barge owners, Darling Brothers, and Gaselee and Sons, the owners of the tug, and in those proceedings Gaselee and Sons, the owners of the tug, issued a third-party notice to their co-defendants. That third-party notice led to discussion, and an order was made by the judge dealing with the rights of the parties in view of that notice. When the case was tried, the learned judge came to the conclusion that Darling Brothers, the owners of the barge, were free from blame, and as between them and Page and Co., the plaintiffs, the learned judge ordered that the

plaintiffs should pay them their costs; but he came to the conclusion that the tug had been guilty of negligence, and that the whole disaster was due to the tug's negligence, with the result that he gave the plaintiffs judgment against Gaselee and Sons, the owners of the tug, with costs; and at the instance of the plaintiffs, Page and Co., inasmuch as the plaintiffs had been put to the trouble and expense of suing these two defendants through not knowing which of them was to blame, the learned judge made an order that the tug owners—the tug being the real source of the mischief—should pay to the plaintiffs the costs which the plaintiffs, on the judge's order, had to pay to the barge owners. The plaintiffs, Page and Co., were satisfied with that order, and appear to have passed from the scene. But after they left the court a discussion arose between the owners of the barge and the owners of the tug. It was brought to the notice of the President that the contract of towage had been made upon the terms of a written agreement between Darling Brothers, the owners of the barge, and Gaselee and Sons, the owners of the tug; and it was contended by the tug owners that the effect of that agreement was to shift the responsibility for the damage from the tug on to the barge. The learned President took that view, with the result that the barge owners, who had been freed from blame in the first instance, and had been given the right to recover their costs from the plaintiffs, found that, although they had been held free from blame, they were to bear the whole liability. The tug owners appealed from the judgment against them in favour of the plaintiffs, but after a time abandoned the appeal. The barge owners also appealed, and sought to discuss the rightness of that decision; and, although the tug owners abandoned the appeal, the barge owners endeavoured to go on with it as though they stood in the shoes of the tug owners, for they had an interest in setting aside the original decision. This court has already decided that point against the barge owners by holding that they had no right as a third party to substitute themselves for the tug owners.

Counsel for the barge owners now endeavour to impugn that judgment, which the barge owners certainly cannot appeal against. Although it may be that that judgment does not bind them as an estoppel in these proceedings, still the barge owners are endeavouring to impugn an order made on the basis of a judgment which they cannot appeal against. It is said that, even assuming that they cannot appeal from it, the judgment is not binding upon them so as to debar them from saying that the decision was wrong and that the tug owners were never, in point of fact, liable to the plaintiffs. That is the first point that is made. I am not deciding that it is open to them to impugn that judgment, but I will assume that it is open to them to do so. That being so, the point made is that when one comes to look at the provisions of the agreement made between the barge owners and the tug owners, they have, rightly construed, the effect of relieving the tug owners, from all liability, not only to the barge owners, but to the plaintiffs also; and that, if the tug owners were never liable to the plaintiffs, all the superstructure built up on their liability falls to the ground. That turns upon the construction of the document itself. It is as follows: "Gaselee and Sons, tug owners, hereby give notice that they will not be answerable for any loss or damage which may happen to, or be occasioned by, any barge or vessel, or its cargo, while in tow, however such loss or damage may arise, and from whosesoever fault or default such loss or damage may arise, and the services of their tugs must be understood and agreed to be engaged or accepted upon the terms that they are to be held harmless, and indemnified from any such loss or damage, and against the faults or defaults of their servants, or any claim therefor by whomsoever made. And the customers of the said Gaselee and Sons undertake and agree to bear, satisfy, and indemnify them accordingly." The first point taken by counsel for the barge owners upon that document is that the circumstances under which it came into existence show that it established privity, and was intended to establish privity, between the cargo owners and the tug owners. Upon that part of the matter, which is a question of fact, as to the circumstances under which the engagement of the tug was made, the learned President has come to the conclusion that privity was not established. He holds that Darling Brothers made this contract directly with the tug owners, no doubt with the sanction of the cargo owners, the plaintiffs, but not so as to create privity of contract between the cargo owners and the tug owners. It is not necessary for me to restate the evidence. I see no reason for differing from the conclusion arrived at by the learned judge as to the arrangement between the parties. Therefore I start with that finding, that this document was not intended to create, and did not create, privity between the owners of the cargo and the tug owners. Of course, if privity were created, that would be a point in favour of the contention put forward by the barge owners. There would be, upon the contract between the parties, complete immunity given to the tug owners. On the other hypothesis that privity is not established. The barge owners nevertheless contend that the true effect of this document was that the cargo was carried at the owner's risk. It seems to me that the answer to that argument is in the construction of this document. This document, when it comes to be construed, does not amount to a contract to tow at owners' risk. On the contrary, it is a document which presupposes a liability to someone, created by the fault of the tug, and secures an indemnity against the consequences of that fault. In other words, taking it all together, it is a contract of indemnity which presupposes something against which it is necessary to be indemnified. The barge owners say that that part stands alone and is separated from the rest of the contract, and is merely a declaration of repudiation of liability. I think the answer is that it does not stand alone, that the document must be read as a whole, and that the words "such loss or damage" refer to the loss or damage previously mentioned. It seems to me, therefore, that the first point attempted to be made on behalf of the barge owners—namely, that there was no liability on the tug owners to the cargo owners—fails, and that this appeal must be considered on the ground of their second argument.

Assuming, they say, liability has been established against them to indemnify the tug, that

liability must be limited only to loss or damage, and therefore the tug owners cannot recover the costs of the proceedings which the President ordered them to pay. Now, that raises the question whether, having regard to the circumstances of the case, the third-party order, and all the other facts, it can be said that the tug owners, in defending this action, acted otherwise than reasonably — whether, having given the barge owners, who would ultimately be liable for anything the tug owners had to pay, full notice of the claim and full opportunity of intervening and paying the loss, and of ascertaining, if the liability existed, the full extent of that liability, it is nevertheless competent for the barge owners to throw the whole burden of litigation upon the tug owners. It seems to me that the case falls within the principle laid down long ago in the case of *Broom* v. *Hall* (7 C. B. N. S. 503). The headnote to that case is as follows: "A., a broker, contracted with B. for the purchase (on behalf of C.) of certain goods. C. refusing to accept the goods, B. sued A. for breach of contract. C. had notice of the proceedings, but repudiated his liability, and A. defended the action unsuccessfully. In an action by A. against C. for the damages and costs paid and incurred by him in the first action, C. paid into court enough to cover the damages only, and it was left to the jury to say whether A., in defending the former action, had pursued the course which a reasonable and prudent man would have done in his own case. The jury having found for the plaintiffs: Held, that A. was entitled to recover the costs." There is no doubt that after that decision there were one or two cases in which it does not seem to have been given full effect to, as in *Baxendale* v. *London, Chatham, and Dover Railway Company* (32 L. T. Rep. 330; L. Rep. 10 Ex. 35); but all those cases were considered in the case of *Hammond* v. *Bussey* (*ubi sup.*), which referred to it, and, it seems to me, returned to the principle laid down in *Broom* v. *Hall* (*ubi sup.*)—namely, that costs reasonably incurred in defending an action in which there was a liability over to a third person in respect of the damages were properly recoverable against that other person as well as the damages. In this case the learned judge himself arrived at the conclusion, under all the circumstances, that the defendant tug owners, who had the right of indemnity over, acted reasonably in defending the action, and it seems to me that the evidence is strongly in favour of that view, because the object of the third-party proceedings is to give an opportunity to the third party, if he is so minded, to prevent the catastrophe of an adverse decision which would have the effect of ultimately saddling him with liability. It seems to me that, having regard to all the circumstances of the case, the tug owners did all they were bound to do as reasonable men in order to ascertain whether liability did exist, and to limit the extent of it as far as possible. Therefore it seems to me that Darling Brothers, the barge owners, are bound to make good those costs. Counsel for Darling Brothers contended that the terms of the document itself excluded that liability. The terms of the document itself do not expressly provide for the costs of litigation, for I think "loss or damage" refers to the results of the collision; but that is not really conclusive. It is by reason of the fact that there is a contract of indemnity which will have the effect of rendering a third party liable that the question arises whether or not the party primarily liable is acting reasonably in resisting the original liability, and that the third party becomes liable to the costs of investigating something which he had it in his power to admit; and where he has notice enabling him to take steps, if so minded, to avoid the costs. It is not a contract arising under the terms of the indemnity, but it is a contract beginning after the contract of indemnity is proved to exist, and arises out of the conduct of the parties in view of the fact that the contract of indemnity does exist. Therefore it is no answer to this case to say that the terms of the document itself do not specifically embrace the obligation to be liable for the costs of the litigation as well as the original loss. The result is that I think the appeal of the barge owners fails, and that the order of the learned judge below must stand.

MATHEW, L.J.—I am of the same opinion. It seems to me there is no question that the learned judge was entitled to add the costs which the barge owners were entitled to recover from the plaintiffs, the cargo owners, to the costs which the plaintiffs were entitled to recover from the tug owners. That order, however, did not have the effect that a person of ordinary mind would expect. There was this contract of indemnity, which cast upon the barge owners the costs of which they were held entitled to be relieved by the learned judge.

COZENS-HARDY, L.J.—I agree with the view of the Master of the Rolls that on the facts here there is no privity of contract between the plaintiffs, the cargo owners, and the tug owners, and that the contract with the conditions of towage are conditions between the tug owners and the barge owners alone. The only point upon which I desire to add a word is as to whether, the costs not being mentioned in the indemnity, the tug owners are entitled to claim the costs of the litigation in which the liability has been established. This is only one of many classes of cases in which the question of the costs of the indemnity arises. It has been well settled, I think, that in cases of this sort the costs of the litigation are invariably given to the person who is entitled to the indemnity. I refer to the cases in which two trustees are held liable for breach of trust, and as between them one is primarily liable. In those circumstances it is well established that the trustee who is primarily liable is not only bound to indemnify his co-trustee against the amount which he has to pay to the estate, but is also liable for the costs of his co-trustee. Lord Cranworth decided that in the case of *Lockhart* v. *Reilly* (25 L. J. 697, Ch.), and the principle was recently applied by Warrington, J. in the case of *Re Linsley; Cattley* v. *West* (1904) 2 Ch. 785), where it was held that a solicitor trustee, to whom the management of the trust had been left as the acting trustee, is liable to indemnify his co-trustee against the costs of an action caused by his negligent conduct of the trust business, even where no actual loss has been thereby occasioned to the trust estate. I think that is exactly the principle upon which the learned judge in the court below and the Master of the Rolls have proceeded with reference to this case. That is no new principle.

Solicitors for the appellants (third parties), Darling Brothers, *Keene, Marsland, Bryden*, and *Besant*.

Solicitors for the respondents (claimants), Gaselee and Sons, *J. A.* and *H. E. Farnfield*.

March 11, 14, *and May* 4, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE HARVEST HOME. (*a*)

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

Collision—Tug and tow—Damage done by third vessel to pilot boat lashed to tow—Independent duty of tug and pilot boat to avoid collision—Right of owners of pilot boat to recover against negligent tug when tow in fault—Right of third vessel to recover damage against tug owners and owners of pilot boat—Joint tortfeasors—Costs.

A pilot cutter was made fast to a sailing ship which was being towed by two tugs. A collision occurred between the cutter and a schooner, causing damage to both. The cutter sued the tugs and the schooner. The schooner counter-claimed against the cutter and the tugs. The tugs were held solely to blame.

On appeal by the tugs it was held that, though the cutter was lashed alongside the tow, those in charge of her were not absolved from keeping a look-out, and were negligent in not slipping their tow rope and so avoiding the collision.

Held, further, that there was no contribution between the tugs and the cutter in respect of the judgment obtained by the schooner against the tugs, and that the tugs and cutter must pay their own costs in the court below and of the appeal.

APPEAL by the defendants, the owners of the tugs *Clarissa* and *Nora*, from a decision of Sir F. H. Jeune, President, holding them alone to blame for a collision which occurred between the pilot cutter *Emily* and the schooner *Harvest Home*.

The pilot cutter at the time of the collision was lashed to the side of the *Moy*, which was in tow of the *Nora* and *Clarissa*. As the result of the collision the *Emily* was sunk and the *Harvest Home* sustained injury.

The case is reported in the court below (*The Harvest Home*, 92 L. T. Rep. 173; 10 Asp. Mar. Law Cas. 18; (1904) P. 409) on the independent duty of tugs towing a vessel to take steps to avoid collision; on the question whether a pilot cutter lashed to a vessel in tow is so identified with the tow as to prevent the owners of the pilot cutter from recovering damage from the owners of the tugs, caused by the negligence of the tugs towing the vessel, when the vessel herself is precluded from recovering such damage from the tug owners; and on the right of a tug to recover towage remuneration when prevented by negligence from recovering salvage.

On the hearing of the appeal the owners of the tugs admitted that the tugs had been negligent in attempting to cross ahead of the *Harvest Home*, but alleged that the owners of the *Emily*, the pilot cutter, were also to blame for the collision for not keeping a proper look-out.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

About 11.10 p.m. on the 14th March 1904 the sailing ship *Moy* was being towed down the Bristol Channel by the tugs *Clarissa* and *Nora*. The *Moy* was in charge of a pilot, and the *Emily*, the pilot cutter, was lashed to the starboard bow of the *Moy*, and was being towed down channel with her in order that the pilot might be taken off the *Moy*.

The tugs and the *Moy* and *Emily* were on a course of about west, making about five knots. In these circumstances those on the *Emily* alleged that they saw about one to two points on their starboard bow, and about three miles off, a low white light which they took to be the stern light of the *Harvest Home*.

The white light gradually broadened on the starboard bow of the *Emily*, which continued to be towed on a westerly course and was overtaking the *Harvest Home*, but, when the *Emily* was in a position to pass all clear of the *Harvest Home* and to the southward of her, the *Harvest Home* suddenly opened her red light and stood to the southward on the port tack. Fenders were at once put between the *Moy* and the *Emily*, and the rope by which the *Emily* was fastened to the *Moy* was ordered to be slipped, but, before this could be done, the *Harvest Home* struck the *Emily*, causing her to founder immediately.

The owners of the *Harvest Home* alleged that their vessel was on a course of S.E. to E.S.E., and, as the wind was calm with occasional light northerly airs, she was making little or no headway. In these circumstances the masthead and green lights of the two tugs, and afterwards the green light of the sailing ship *Moy*, which was in tow of the tugs, were seen about a quarter of a mile distant and two to three points on the port bow of the *Harvest Home*.

The *Emily*, which was exhibiting no light, was not visible to those on the *Harvest Home* until just before the collision.

The *Harvest Home* remained heading in the same direction, but the tugs with the *Moy* and the *Emily* in tow came on without taking any steps to keep clear of the *Harvest Home*, with the result that the stem and starboard bow of the *Emily* struck the stem and port bow of the *Harvest Home*, and the starboard side of the *Moy* also struck the bowsprit and forward part of the *Harvest Home*.

The tug owners in the main adopted the case made by the *Emily*, but they also alleged that those on the *Emily* were negligent in not slipping the rope by which they were made fast to the *Moy*.

In the court below the President (Sir F. H Jeune) accepted the story told by the *Harvest Home*, and held that the tugs had been guilty of negligence in not keeping clear of the *Harvest Home*, and that those on the *Harvest Home* had not been guilty of negligence; that those on the *Emily* had not been guilty of negligence; and that, even if those on the *Moy* had been negligent, the *Emily* was not so identified with the *Moy* as to prevent the owners of the *Emily* from suing the owners of the tugs.

The owners of the *Emily* therefore obtained judgment against the tug owners with costs for the amount of their damage, and their claim against the *Harvest Home* was dismissed with costs. The owners of the *Harvest Home* also obtained judgmen against the tug owners with

costs for the amount of their damage, and their counter-claim against the owners of the *Emily* was dismissed.

The tug owners appealed against the judgment in so far as it held that those on the *Emily* were not negligent, and were entitled to recover their damage from the tug owners.

March 11 *and* 14.—*Aspinall*, K.C. and *Bailhache* for the appellants (defendants), the owners of the steam-tugs *Clarissa* and *Nora*.—The facts found by the President show that the *Emily* was guilty of negligence which contributed to the collision, and she is therefore not entitled to succeed in her action against the tugs. The fact that she was lashed to the *Moy* does not relieve her from her obligation to keep a good look-out, and there is nothing in *The Bernina* (58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257; 13 App. Cas. 1) to support such a view. On the President's own finding of fact it is clear that the *Emily* was negligent in not keeping a good look-out and in not having a man in a position to slip the tow rope.

Robson, K.C. and *D. Stephens* for the respondents (plaintiffs), the owners of the pilot boat *Emily*.—There was no duty on those on the *Emily* to have someone ready to slip the rope until danger of collision arose, and when the danger became apparent the rope could not have been slipped in time to avoid the collision. It was the negligent action of the tugs that placed the *Emily* in this position of danger, and they ought not to have attempted to cross ahead of the *Harvest Home*, and, as their wrong manœuvre placed the *Emily* in a position of danger, the court will not hold her to blame, even if she has not been manœuvred with perfect skill:

The Bywell Castle, 41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207; 4 P. Div. 19.

The tugs must be held to blame, for they have broken a collision regulation (art. 22), and, by sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), where a collision regulation is infringed, the ship infringing it shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary:

The Duke of Buccleuch, 65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) A. C. 310.

No necessity can be alleged for the departure by the tugs from the observance of art. 22.

Aspinall, K.C. in reply.—Even admitting that the tugs are to blame for infringing the collision regulations, the *Emily* is also to blame for not keeping a proper look-out.

Art. 22 of the Regulations for Preventing Collisions at Sea is as follows:

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.

Sect. 419, sub-sect. 4, of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) is as follows:

Sect. 419 (4). Where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

COLLINS, M.R.—This is an appeal from the decision of Sir Francis Jeune in a case of collision. One of the plaintiffs is a pilot, and his boat, the *Emily*, was in attendance on him while he was engaged in piloting a ship called the *Moy* down the Bristol Channel. The *Moy* was in charge of two tugs. It was necessary for the pilot to go ashore when the *Moy* reached a certain point where his duties ceased, and therefore his boat was lashed to the *Moy*, and was being towed on her starboard side. A collision occurred between the *Moy*, with this pilot boat attached to her, and a ship called the *Harvest Home*, and these proceedings were initiated by an action brought by the owners of the pilot boat against the owners of the *Harvest Home*, whom they charged with negligently running into the pilot boat and sinking her. In the alternative they claimed that the collision was brought about by the negligence of the two tug boats, the *Nora* and *Clarissa*, which were towing the *Moy*, and sought to recover the damage sustained by the pilot boat from the tug owners. In the result the President rejected the case made by the *Emily* as to the conduct of the *Harvest Home*, and he acquitted the *Harvest Home* of any negligence contributing to the accident. The plaintiffs say they saw the stern light of the *Harvest Home* about three miles off on the starboard bow, which would make the *Harvest Home* be going in the same direction as the *Moy*, and that then the *Harvest Home* executed a most extraordinary manœuvre, which had the effect of opening her red light, and which involves a complete change of course, and then ran into the pilot boat. The President rejected that story, and came to the conclusion, on the evidence, that the *Harvest Home* was really in point of fact coming up Channel, and that, to persons who were really keeping a proper look out, her port light would have been visible quite as early as the supposed white stern light was said to have been visible; in fact, visible in plenty of time to enable them to take precautions which would make the collision impossible. He has found, therefore, that the *Harvest Home* was not to blame, but that the alternative case that the tugs were to blame was true, and he has held that the owners of the tugs were liable for the damage caused by the collision.

The owners of the tugs now appeal. They contend, or did contend, that upon the facts, rightly understood, the tugs were free from blame; that they had so manœuvred as in point of fact not to come within the range of the *Harvest Home*; and that they had not violated any rule which put upon them liability for this collision, which they had not in point of fact brought about. It has been pointed out, however, that the tugs did violate a rule in fact, and cannot escape statutory liability, inasmuch as a collision with the tow has actually taken place. Therefore that part of the appeal which involves the question whether the tugs are to blame, wholly or in part, for the collision has been disposed of. Counsel for the appellants did not feel able successfully to contend against that point, and therefore the only question is whether both parties are to blame. That brings us to the real point in the case—namely, whether the persons on the pilot cutter

ought by reasonable care to have avoided the collision. As I have said, the pilot cutter was lashed to the *Moy*, and was taking the benefit of the tow, for the common purpose of both the pilot boat and the *Moy*. The pilot had to be there, and he had to have a boat, and it was an arrangement convenient to both parties. Therefore I do not treat it as purely a gratuitous tow. It seems to me, however, that the persons who accepted the tow in that way did not become emancipated from the duty of keeping a good look-out—a duty which they would have to perform if they were the only vessel towed, and had not been lashed to the vessel which was being in fact towed. Therefore, if they have failed to take reasonable care, they must take the consequences. It seems to me that when we take the facts as found by the President, which are not now in dispute, this case comes down to a very small point. The President, rejecting the story put forward by the plaintiffs, has found that the tug boats ought to have seen, and did see, if they had only taken proper pains to ascertain what they were looking at, the side light of the *Harvest Home* in plenty of time to avoid the collision, and he attributes negligence to them in not keeping a good look-out. He says: "She"—that is, the *Harvest Home*—"was lying there becalmed, and the wind sprang up, and she naturally moved on. I do not see any reason why she should not do so in those circumstances. If the other vessels had seen her at the distance they might have done, they should have kept out of her way, and they undoubtedly did not do so. They were to all intents and purposes all steamers, having perfect facility for keeping out of the way of the schooner. I think one could go further. If they were coming down Channel and had seen, as I think they ought to have seen, the red light of this vessel at a considerable distance, then it was their duty to keep out of her way, and the fact that they did not see that light, but saw a white light, shows, I think, that there was some bad look-out on their part' and that they were completely under a mistake." That finding in terms embraces the whole flotilla, not excluding this pilot boat, the *Emily*. Even if it be limited to the two tugs, it seems to me that what could have been seen on one vessel could have been seen on the other, and seen in reasonable time to enable an attempt to be made to prevent a collision taking place. At the trial it was suggested, and evidence was given on the point, that it would have been a reasonable and proper thing for the pilot boat to have slipped the rope which attached her to the *Moy*. Now, it is really common ground, on the evidence, that it would have been a reasonable course to take, and the only reason why it was not taken that is suggested by the witnesses for the pilot boat is that they did not become aware of the danger in time to admit of their doing that which they all admit would have been a prudent thing to have done. There is a consensus of opinion on the part of the witnesses from the pilot boat that if they had only known of the danger a little earlier they might have avoided the collision by letting go. So the whole point comes to be at what time ought they to have seen this red light. We have put two questions to our assessors. The first is this: "Accepting the relative courses, as found by the learned President, of the *Harvest Home* and the flotilla, ought those in charge of the *Emily* to have seen the red light of the *Harvest Home* in time to have slipped their rope, if they had thought fit to do so?" The answer we have received is: "There would have been time to have slipped the rope." The second question is as follows: "Would it have been a reasonable step for them to have taken?" The answer is: "It would have been reasonable to have slipped the rope." Those answers amount to a clear finding that the *Emily* is also to blame, and therefore to that extent this appeal succeeds. In arriving at that conclusion, I do not think we are differing greatly from the view at which the learned President arrived. He seems to have accepted the other view with hesitation and reluctance. It is upon his own finding that I am mainly basing my judgment in this case—his own finding as to the time in which persons on the flotilla ought to have seen, and in fact, in his judgment, did see, the light of the *Harvest Home*. The learned President seems, however, when he came to this point as to the time at which the rope might have been slipped, to have ignored the considerable distance at which the lights of the *Harvest Home* should have been seen and the time which must have elapsed before the emergency became critical, and it was too late to slip the rope.

Mathew and Cozens-Hardy, L.JJ. concurred.

May 4.—Bailhache for the appellants (defendants), owners of the tugs *Clarissa* and *Nora*, applied to the court as to the form of the order to be drawn up on the judgment of the Court of Appeal.—In the court below, the tug owners were held solely to blame for the collision between the *Harvest Home* and the *Emily*, and the claim of the *Emily* against the *Harvest Home* was dismissed, and the counter-claim of the *Harvest Home* against the *Emily* was also dismissed. The claims of the *Harvest Home* and of the *Emily* against the tugs succeeded. The *Harvest Home* did not appeal against the judgment dismissing her counter-claim against the *Emily*. The tug owners did not appeal from the judgment against them in favour of the *Harvest Home*, but appealed against it in so far as it condemned them to pay to the owners of the *Emily* the damage sustained by the pilot cutter. In that appeal the tug owners have partly succeeded, for the *Emily* has now been held to blame for the collision as well as the tugs. The result is that the *Emily* is only entitled to recover a moiety of her loss from the tug owners, and it is submitted that the tug owners are entitled to a contribution from the owners of the *Emily* in respect of the damage done to the *Harvest Home*, and to the costs of the appeal.

D. Stephens for the respondents (plaintiffs), the owners of the *Emily*.—The judgment of this court is that the tugs and pilot cutter are both to blame for this collision. There was no counter-claim by the tugs against the *Emily* for the tugs sustained no damage. The tugs and the pilot cutter are joint tortfeasors, and there can be no contribution between them. The judgment of the court below with regard to the damage done to the *Harvest Home* is unaffected by the decision of this court; there was no appeal by the tugs or the *Harvest Home* with regard to it. Under the

judgment of this court the tug owners are liable for a moiety of the damage sustained by the pilot cutter, and neither party is entitled to any costs here or below:

The Morgenry, 81 L. T. Rep. 417; 8 Asp. Mar. Law Cas. 591; (1900) P. 1.

COLLINS, M.R.—As between the tug owners and the owners of the pilot cutter no question of contribution with regard to the damage recovered by the owners of the *Harvest Home* from the tug owners arises. The judgment of the court below between the *Harvest Home* and the *Emily* and the *Harvest Home* and the tugs has not been disturbed. The owners of the tugs are liable for a moiety of the damage done to the *Emily*, and there will be no costs here or below.

Solicitors for the appellants (defendants), owners of the tugs *Clarissa* and *Nora*, *Stokes* and *Stokes*, for *Lloyd* and *Pratt*, Cardiff.

Solicitors for the respondents (plaintiffs), owners of the *Emily*, *Holman*, *Birdwood*, and *Co.*, for *James Inskip* and *Co.*, Bristol.

Monday, June 26, 1905.

(Before COLLINS, M.R. and ROMER, L.J.)

BORTHWICK *v.* ELDERSLIE STEAMSHIP COMPANY. (*a*)

ORIGINAL APPLICATION.

Practice—Carriage of goods—Judgment—Interest—Action dismissed at trial—Judgment for plaintiff in Court of Appeal—Damages to be ascertained—Date from which interest runs—Ante dating judgment—Order XLI., r. 3—*Order LVIII., r.* 4.

The plaintiff sued the defendants to recover unliquidated damages for breach of contract. At the trial judgment was given for the defendants; but the Court of Appeal ordered judgment to be entered for the plaintiff for a sum to be ascertained. When the amount had been ascertained the plaintiff asked that judgment should be entered for him for that amount with interest from the date of the trial.

Held, that the plaintiff was entitled to interest only from the date when the judgment of the Court of Appeal was pronounced, and that the court ought not to order its judgment to be antedated in the absence of good ground for so doing.

APPLICATION of the plaintiff for directions as to the amount for which judgment should be entered for the plaintiff in the action.

The plaintiff, the indorsee of a bill of lading of a cargo of frozen meat, brought this action to recover damages from the defendants for breach of warranty of seaworthiness of the vessel whereby the meat was damaged.

The action was tried before Walton, J., without a jury. The learned judge found that the damage to the meat arose from the condition of the vessel at the commencement of the voyage, which rendered her unfit for the carriage of meat, and that, if proper care, skill, and attention had been given to the cleansing of the vessel before she commenced the voyage, the damage to the meat would not have happened; he held, however, that upon the construction of certain clauses in the bill of lading the defendants were exempt from liability, and he gave judgment in favour of the defendants on the 9th March 1903

The plaintiff appealed, and the Court of Appeal, on the 25th Jan. 1904, reversed the judgment of Walton, J., and ordered judgment to be entered for the plaintiff for damages to be assessed by a referee: (9 Asp. Mar. Law Cas. 513; 90 L. T. Rep. 187; (1904) 1 K. B. 319).

The judgment of the Court of Appeal, as drawn up, was as follows: "It is ordered that the plaintiff's appeal be allowed; that the abovementioned judgment of the Honourable Mr. Justice Walton of the 9th March 1903 be wholly set aside, and that instead thereof judgment be entered in the action for the plaintiff against the defendants on all issues for such sum as damages as may be assessed by a referee to be agreed upon by the parties, with costs of action and of this appeal. And it is further ordered that the costs of the said reference be in the discretion of the referee so to be agreed upon. Liberty to apply."

The defendants appealed to the House of Lords, where the judgment of the Court of Appeal was affirmed on the 16th Feb. 1905: (10 Asp. Mar. Law Cas. 24; 92 L. T. Rep. 274; (1905) A. C. 93).

It was agreed between the parties that, pending the appeal to the House of Lords, the assessment of damages should stand over.

After the decision of the House of Lords the parties agreed, on the 16th May 1905, that the amount of the damages to be paid by the defendants should be 3750*l.* "with interest."

The defendants paid the 3750*l.* on the 23rd May 1905, and offered to pay interest from the 16th May to the 23rd May 1905. The plaintiff claimed interest from the 9th March 1903, the date of the judgment of Walton, J.

The plaintiff then made this application to the Court of Appeal for an order that judgment should be entered for the plaintiff for 3,750*l.* with interest thereon at the rate of 4 per cent. from the 9th March 1903.

The Rules of the Supreme Court provide:

Order XLI., r. 3. Where any judgment is pronounced by the court or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the court or judge shall otherwise order, and the judgment shall take effect from that date: provided that by special leave of the court or a judge a judgment may be antedated or postdated.

Order LVIII., r. 1. All appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way, and no petition, case, or other formal proceeding other than such notice of motion shall be necessary.

Order LVIII., r. 4. The Court of Appeal shall have all the powers and duties as to amendment and otherwise of the High Court, together with full discretionary power to receive further evidence upon questions of fact, such evidence to be either by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner. Such further evidence may be given without special leave upon interlocutory applications, or in any case as to matters which have occurred after the date of the decision from which the appeal is brought. Upon appeals from a judgment after trial or hearing of any cause or matter upon the merits, such further evidence (save as to matters subsequent as aforesaid) shall be admitted on special grounds only, and not without

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

special leave of the court. The Court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require.

J. A. Hamilton, K.C. and *Maurice Hill* for the plaintiff.—The judgment for the plaintiff ought to carry interest from the date upon which it ought to have been pronounced—that is, from the date of the wrong judgment given by Walton, J., which was reversed in this court. By Order LVIII., r. 4, the Court of Appeal has power "to give any judgment and make any order which ought to have been made"; and in this case the Court of Appeal gave the judgment which Walton, J. ought to have given. If it is necessary to do so in order to give the plaintiff interest from the time when judgment ought to have been given in his favour, the court has power, under Order XLI., r. 3, to order their judgment to be antedated to the date of the judgment of Walton, J. The plaintiff has been wrongfully kept out of his money since that date, and he is entitled, therefore, to receive interest from that date.

Carver, K.C. and *D. C. Leck* for the defendants.—The plaintiff cannot be entitled to any interest except from the date of the judgment of the Court of Appeal. Until that judgment was pronounced the right of the plaintiff to recover any sum at all was not ascertained. Interest is payable only from the date of the judgment when the liability was ascertained—that is, in this case the judgment of the Court of Appeal:

Re London Wharfing Company, 53 L. T. Rep. 112;

Boswell v. *Coaks*, 57 L. T. Rep. 742.

The plaintiff has not been wrongfully kept out of his money at all, for until the judgment of this court the right of the plaintiff to recover any sum of money was not established. Therefore the plaintiff is not entitled to ask for interest from an earlier date, or to have the judgment antedated, upon that ground:

Caledonian Railway Company v. *Carmichael*, L. Rep. 2 H. L. Sc. 56;

Richard v. *Great Western Railway Company*, 91 L. T. Rep. 724; (1905) 1 K. B. 68.

Maurice Hill in reply.—In *Caledonian Railway Company* v. *Carmichael* (*ubi sup.*) the delay in payment was not the fault of the debtor, but of the creditor himself.

Collins, M.R.—This is an application by the plaintiff with reference to the way in which judgment ought to be entered in this case. The plaintiff, on appeal to the Court of Appeal, whose decision was affirmed by the House of Lords, recovered judgment against the defendants for a sum for damages to be assessed by a referee. The plaintiff, then, obtained judgment for that sum by reason of the decision of the Court of Appeal. The learned judge at the trial gave judgment in favour of the defendants, but, on appeal to this court, that judgment was reversed and judgment entered for the plaintiff. The defendants appealed, and the House of Lords affirmed the judgment of this court. The result was that there was a long delay between the date of the trial and the time when it was finally ascertained what sum for damages was payable by the defendants to the plaintiff. That sum has now been ascertained by agreement between the parties, and the plaintiff says that he is entitled to interest, not merely from the time when it was ascertained that he was entitled to recover a sum of money as damages by the judgment of the Court of Appeal, but that he is entitled to interest from the date of the trial, because if his rights had been properly understood in the court below he would have been entitled then to an inquiry as to the damages payable to him, and judgment would have been given in his favour as at the date of the trial, and that judgment would have carried interest from that date. He had, however, to come to the Court of Appeal to establish his right to recover any damages; and, if that is analogous to a judgment of a court of first instance, all that the plaintiff would get would be, under Order XLI., r. 3, where judgment is pronounced in court for an amount to be ascertained by a referee or otherwise, a judgment dated as of the day it was pronounced, upon which the amount when ascertained would be afterwards entered; and he would be entitled to interest on the sum so ascertained as from the date of the judgment. The plaintiff claims more than that, and asks that the judgment shall be antedated as if it had been given at the original trial, and that he shall get interest from that date. He bases that claim upon the provisions of Order XLI., r. 3, which provides that: "Where any judgment is pronounced by the judge or a judge in court, the entry of the judgment shall be dated as of the day on which such judgment is pronounced, unless the court or a judge shall otherwise order, and the judgment shall take effect from that date: provided that, by special leave of the court or a judge, a judgment may be antedated or post-dated." Now, no doubt an appeal to the Court of Appeal is a rehearing by rule 1 of Order LVIII., and by rule 4 the Court of Appeal has all the powers of a judge of the High Court, and has power to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require. Still, the judgment of the Court of Appeal is a judgment of the date when it is given on appeal, and it would require the powers given by Order XLI., r. 3, to enable that judgment to be antedated, and to enable the plaintiff to get the benefit of it being antedated.

That power ought, I think, to be exercised and that benefit given only when some good cause is shown for so doing. In the present case no such good ground has been shown. The delay was not the fault of either party, but of the law, or of those who had to administer the law. It cannot be said that any unreasonable obstacle was placed by the defendants in the way of ascertaining the rights of the plaintiff, and the defendants, therefore, ought not to be treated as parties in default. Therefore I think that we ought not, in this case, to entertain the application to have the judgment antedated so that the plaintiff may get interest in the interval between the trial and the judgment of the Court of Appeal. If we examine the principle of the decision of the House of Lords in *Caledonian Railway Company* v. *Carmichael* (L. Rep. 2 H. L. Sc. 56), which was followed in this court in *Richard* v. *Great Western Railway Company* (91 L. T. Rep. 724; (1905) 1 K. B. 68), we derive some assistance in consider-

ing the present case. In that case a landowner had a claim under the Lands Clauses Consolidation (Scotland) Act 1845 against a railway company for compensation, the amount of which had to be ascertained in accordance with the Act. The amount was not so ascertained until twelve years after the claim arose, the landowner having taken no steps to have it ascertained. In the House of Lords it was held that where a pecuniary claim has been left by the creditor for years unascertained and unexamined, the debtor having been always ready and willing to meet the demand, the right to interest on the principal sum did not commence until after the debt had been established, and the precise amount settled; and Lord Westbury said that interest can be demanded only in virtue of a contract, or where the principal money has been wrongfully withheld. I think that the principle of that case helps us in dealing with the present case. In that case there was a long delay, and a consequent loss of money as interest. The principle, however, is that unless there is an ascertained sum which a party is liable to pay there is no liability to pay interest until the amount of the principal is ascertained. The House of Lords considered in that case the fact that the persons liable to pay compensation were always ready and willing to pay; but the case need not be put as high as that. As Lord Westbury said, there must be a wrongful withholding of the money. Therefore, when the withholding of payment continues only during the necessary process of ascertaining the liability, that withholding is not wrongful so as to make us exercise the special power of antedating the judgment so as to put the party into the same position as if the liability had been ascertained earlier. That case is a clear authority that the fact that the claim existed long before but was not ascertained is not of itself sufficient to entitle the creditor to interest. I am of opinion, therefore, that the principle of that case helps us in considering whether we should antedate the judgment so as to give interest from an earlier date. In the circumstances of this case I think that we ought not to do so. Nothing that I have said in this case must be taken to apply to the case of a fixed sum, the amount of which has not to be ascertained, which was either due or was not due, but the liability to pay which has to be ascertained. In the present case the amount could not be ascertained without inquiry. I desire to express no opinion with respect to a case where the sum claimed is an ascertained amount.

Romer, L.J.—I am of the same opinion. It should be borne in mind that when a case comes before the Court of Appeal the hearing of the appeal is a rehearing of the case. That is forcibly shown by the case of *Quilter* v. *Mapleson* (9 Q. B. Div. 672). When a plaintiff has at the trial failed in his action, so that by the action of the learned judge at the trial his action has been dismissed, and he then appeals successfully to the Court of Appeal so that the judgment of the judge at the trial is reversed, and the plaintiff is held to be entitled to relief, it cannot properly be said that the judgment of the Court of Appeal is to be regarded as if for all purposes it was the judgment of the learned judge in the court below. The reversal of the judgment of the court below and the new judgment of the Court of Appeal must be regarded as a judgment pronounced upon the day when the Court of Appeal pronounces its judgment, subject, however, to the right of the Court of Appeal to antedate the judgment under Order XLI., r. 3. The Court of Appeal has many powers to remedy any injustice which may be done to a plaintiff, who successfully appeals, by reason of his having failed to succeed in the court below, for instance, the power to antedate its judgment. I think, however, that the power to antedate a judgment ought to be exercised with great caution. Now, in the present case, the claim of the plaintiff was for unliquidated damages, and by the judgment of the Court of Appeal the plaintiff was held entitled to recover damages to be assessed, contrary to the opinion of the court below. That judgment of the Court of Appeal must *primâ facie* be regarded as given on the day on which it was pronounced. In the present case I think that that judgment certainly ought not to be antedated; nor do I think that in the circumstances of the present case the plaintiff can successfully ask the Court of Appeal to exercise its powers to order the judgment to be antedated. I can see no sufficient ground for ordering the judgment to be antedated in such a case as this. In many cases, no doubt, the damage is continuing damage, and then the judgment of the Court of Appeal would give the plaintiff damages up to the date of the judgment of the Court of Appeal. In the present case, for the reasons which have been given by the Master of the Rolls, I think that this is not a case in which the reasons for antedating a judgment should lead the Court of Appeal to order the judgment to be antedated. By agreement between the parties the amount of the damages was agreed at 3750*l.* "with interest," but nothing was said as to the date from which interest was to run. As a matter of construction, I think that the interest should run from the date of the judgment of the Court of Appeal. Therefore, both as a matter of construction and upon principle, I think that no interest ought to be allowed to the plaintiff except as from the date when judgment was pronounced in the Court of Appeal.

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

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

July 24, 25, *and Aug.* 7, 1905.

(Before Collins, M.R. and Mathew, L.J.)

Temperley Steam Shipping Company *v.* Smyth and Co. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Bill of lading — Charterer the holder of bill of lading—Cesser clause—Arbitration clause in charter-party — Action for demurrage by shipowners against charterers—Stay of proceedings.

By a clause in a charter-party it was provided that delay in loading arising from certain specified causes should not be counted as part of the lay days, and that any dispute arising under that clause "in the loading" of the vessel should

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

be settled by arbitration in the Argentine Republic. The charter-party contained the usual cesser clause.

A cargo was shipped by the charterers, at a port in the Argentine Republic, under a bill of lading which incorporated all the terms and exceptions of the charter-party and gave the shipowners an absolute lien on the cargo for freight, demurrage, and all other charges.

There was delay in loading, which the charterers alleged, but the shipowners denied, arose from the causes specified in the charter-party. At the port of discharge the shipowners claimed a lien on the cargo for demurrage at the port of loading, and they brought this action against the charterers, who were the holders of the bill of lading, for a declaration that they were entitled to the lien. The charterers applied for a stay of proceedings, in order that the dispute might be referred to arbitration under the clause in the charter-party.

Held (*allowing the appeal*), *that the arbitration clause was binding between the parties, that the dispute came within that clause, and that the charterers were entitled to a stay of proceedings.*

Runciman and Co. *v.* Smyth and Co. (20 *Times L. Rep.* 625) *overruled.*

Appeal of the defendants from an order of Channell, J., at chambers, refusing to stay proceedings in the action under sect. 4 of the Arbitration Act 1889.

The plaintiffs, the owners of the steamship *Woodbridge*, brought this action claiming a declaration that they were entitled to a lien on cargo carried by the *Woodbridge* for the sum of 661*l*., and payment to them of that sum which had been deposited in a bank in the joint names of the parties.

On the 7th Jan. 1905 a charter-party was made at Buenos Ayres between the agents of the plaintiffs and one F. M. Nicholson, whereby it was agreed that the *Woodbridge* should proceed to Bahia Blanca and there load a full cargo of wheat, and therewith proceed to a port in the United Kingdom.

F. M. Nicholson was, in fact, agent for Smyth and Co., the defendants.

By clause 23 of the charter-party it was provided as follows:

Cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted (if the ship be not sooner dispatched), and time for loading shall commence to count twelve hours after written notice has been given by the master, brokers, or agents, on working days between 9 a.m. and 6 p.m., to the charterers or their agents that the vessel is in readiness to receive cargo . . . and all time over and above such laying days shall be paid for by charterers, or their agents, to the ship at the rate of 4*d*. per gross register ton per day.

Clause 31 provided:

The master to sign bills of lading as presented at any rate of freight that the charterers or their agents may require, but any difference in amount between the bill of lading freight and the total gross chartered freight, as above, shall be settled at port of loading before the steamer sails; . . . Charterers' liability to cease upon shipment of cargo (provided such cargo be worth the bill of lading freight, dead freight, and demurrage at port of shipment). Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever.

Clause 39, which was contained in a slip attached to the charter-party, provided:

If the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores, lightermen, tug boat men, cart men, railway *employés*, or other labour connected with the working, loading, or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay days (unless any cargo be actually loaded by the steamer during such time), but lay days to be extended equivalent to the time lost owing to such cause or causes; and if the cargo cannot be discharged by reason of a strike or lock-out of any class of workmen essential to the discharge of the cargo, the days for discharging shall not count during the continuance of such strike or lock-out. A strike of the charterers' or receivers' men only shall not exonerate charterers or receivers from any demurrage for which they may be liable under this charter, if by the use of reasonable diligence they could have obtained other suitable labour, at rates current before the strike, and in case of any delay by reason of the forementioned causes no claims for damages shall be made by charterers or receivers of the cargo, or by the owners of the ship, or by any other party under this charter. Any time lost by the steamer through any of the above causes to be reckoned as days for loading solely for the purpose of settling the dispatch money account. Should any dispute arise under this clause in the loading of the steamer, same to be settled in the Argentine Republic by a committee consisting of two arbitrators, one to be nominated by each party to the contract, and should they be unable to agree, the decision of an umpire approved by the two arbitrators shall be final.

The steamer proceeded to Bahia Blanca, and there loaded a cargo of wheat. The loading occupied a longer time than the lay days allowed by the charter-party, and the master claimed a sum of 661*l*. for demurrage. The charterers denied liability for the delay upon the ground that it arose from some of the causes specified in clause 39 of the charter-party, and requested that this dispute should be settled by arbitration under the provisions of clause 39. The master refused to proceed to arbitration, and the steamsr sailed for the United Kingdom.

The cargo of wheat was shipped under a bill of lading which stated that the cargo was shipped by Nicholson on board the steamer to be delivered to Smyth and Co. or their assigns:

They paying freight for the said goods, against delivery, in cash without deduction, the rate of freight to be in accordance with charter-party or freight contract effected at Buenos Ayres, dated the 7th Jan. 1905, all the terms and exceptions contained in which charter-party or freight contract are herewith incorporated and form part hereof.

It was also provided by the bill of lading that

The owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of freight and demurrage and all other charges whatsoever.

The steamer arrived at Manchester, which was her port of discharge, and the plaintiffs claimed a lien on the cargo for 661*l*. for demurrage at Bahia Blanca.

By agreement between the plaintiffs and defendants, the defendants, in order to release the cargo, paid the sum of 661*l*. into a bank to a joint account.

The defendants were the holders of the bill of lading.

The plaintiffs then brought this action to obtain a declaration that they were entitled to a lien on the cargo for the sum of 661*l.* for demurrage, and payment to them of the 661*l.* deposited in the bank.

The defendants then applied, under sect. 4 of the Arbitration Act 1889, that all proceedings in the action should be stayed, in order that the dispute might be determined by arbitration in accordance with the provisions of clause 39 of the charter-party.

Channell, J. at chambers refused to make an order staying all proceedings in the action, upon the ground that the dispute did not arise "in the loading of the steamer" within the meaning of clause 39 of the charter-party.

The defendants appealed.

Pickford, K.C., and *Leslie Scott* for the appellants.—The learned judge was wrong in holding that this dispute did not arise "in the loading," within the meaning of clause 39. This dispute did arise in the loading of the vessel, because the dispute was whether the delay in loading arose from any of the causes specified in clause 39. The provision for arbitration contained in the charter-party is binding between the plaintiffs and the defendants; that provision is incorporated in the bill of lading by the express provisions of the bill of lading. Further, as between the charterers and the shipowners, the contract is contained in the charter-party, and the bill of lading is merely a receipt for the goods:

Rodocanachi v. *Milburn*, 6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67;
Sewell v. *Burdick*, 5 Asp. Mar. Law Cas. 386; 52 L. T. Rep. 445; 10 App. Cas. 74;
Capper v. *Wallace*, 4 Asp. Mar. Law Cas. 223; 42 L. T. Rep. 130; 5 Q. B. Div. 163.

Where the charterer is also the holder of the bill of lading, the cesser clause does not operate to cancel the contract contained in the charter-party. The cesser clause only operates in that way when another contract is brought into existence and substituted for the original contract:

Gullischen v. *Stewart*, 5 Asp. Mar. Law Cas. 130, 200; 50 L. T. Rep. 47; 13 Q. B. Div. 317;
Hansen v. *Harrold Brothers*, 7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612;
Clink v. *Radford*, 7 Asp. Mar. Law Cas. 10; 64 L. T. Rep. 491; (1891) 1 Q. B. 625.

In the present case the bill of lading incorporated all the terms of the charter-party, and no other contract was substituted for the provision as to arbitration contained in clause 39 of the charter-party. All the provisions of the charter-party must be read with the bill of lading, unless inconsistent with the bill of lading:

Hamilton and Co. v. *Mackie and Sons*, 5 Times L. Rep. 677.

In this case, the charterers being the holders of the bill of lading, the arbitration clause is not inconsistent with the bill of lading.

J. A. Hamilton, K.C. and *A. Adair Roche* for the respondents.—The learned judge rightly held that this dispute did not come within the terms of the provision as to arbitration in clause 39. The arbitration clause in the charter-party is not operative between the parties; the contract contained in the charter-party is superseded by the bill of lading, and the arbitration clause, being inconsistent with the bill of lading, is not incorporated in it. This was so decided in a similar case in *Runciman and Co.* v. *Smyth and Co.* (20 Times L. Rep. 625), and that case was rightly decided. The effect of the cesser clause in the charter-party is that the bill of lading becomes the contract between the shipowners and the holders of the bill of lading as soon as the cargo has been shipped:

Gullischen v. *Stewart* (*ubi sup.*).

A bill of lading is the contract between the parties when the charterer is the holder, just as much as when another person is the holder. A bill of lading is not a mere receipt for the goods when given to the charterer:

Turner v. *Haji Goolam Mahomed Azam*, 9 Asp. Mar. Law Cas. 588; 91 L. T. Rep. 216; (1904) A. C. 826.

As a matter of discretion the proceedings in this action ought not to be stayed, for the balance of convenience is against sending this case to arbitration at Bahia Blanca. The evidence of the master and crew of the vessel, who will be necessary witnesses, will not be available there. The matter in dispute raises difficult questions of law which ought not to be referred to the decision of arbitrators at Bahia Blanca.

Pickford, K.C. in reply.—It is the fault of the shipowners that the dispute was not at once determined when the master and crew were at Bahia Blanca. No questions of law will arise for the decision of the arbitrators.

Cur. adv. vult.

Aug. 7. — Collins, M.R. read the following judgment:—This is an appeal from Channell, J., who refused to stay proceedings with a view to a reference under sect. 4 of the Arbitration Act 1889. The plaintiffs are the owners of the steamship *Woodbridge*, and have brought this action for a declaration that they are entitled to a lien to the amount of 661*l.* on a cargo carried in the said steamship from Bahia Blanca to Manchester under a charter-party. The defendants, who are the charterers and also holders of the bill of lading, dispute the plaintiffs' right to the amount claimed, but have paid it into a bank in the joint names of the parties so as to release the cargo. The lien claimed is for demurrage at the port of loading. The defendants contend that the question whether any such demurrage is payable or not depends on clause 39 of the charter-party, which provides that should any dispute arise under that clause in the loading of the steamship it shall be settled by arbitration, and they accordingly apply under sect. 4 of the Arbitration Act to have the dispute referred to arbitration as provided by the clause. The plaintiffs contend that, as a matter of construction, the clause does not cover the dispute in this case, and Channell, J. has accepted that view. They also contend that, having regard to the cesser clause in the charter-party and to the fact that the defendants, although charterers, are holders of the bill of lading, the arbitration clause, even if applicable to the facts, cannot be invoked. The main argument before us has been on the latter point. The charter-party purports to be made between the plaintiffs and F. M.

Nicholson as charterer. Nicholson was, in fact, the agent for the defendants. The cesser clause (clause 31) is as follows. [His Lordship read the clause.] Clause 23 provides for the rate of loading. [His Lordship read that clause and also clause 39, and continued:] First with regard to the construction of clause 39 itself. I cannot agree with Channell, J. that it relates only to a dispute that must arise for settlement before the loading is complete. It seems to me that it arises "in the loading," within the meaning of the clause, if the loading is claimed by one party and denied by the other to have been delayed by one of the causes named in the clause, and none the less because the extent of the delay cannot be ascertained until the loading has been completed. With regard to the point that it cannot apply by reason of the cesser clause and (or) the fact that the charterers are also the holders of the bill of lading, if the case were free from authority I cannot think that there would be any difficulty. A dispute has arisen between two parties to a contract by which they have agreed that in an event which has happened there shall be an arbitration. Why is the arbitration not to take place? The fact that the liability of the charterers is to cease on shipment of the cargo cannot affect it because the clause is quite independent of whether personal liability subsists or not. It is common ground that a lien subsists if anything is due, and the only question is for what amount. Why is the amount not to be ascertained in the manner provided by the contract? The cesser clause itself cannot bring about this result, and if it can be reached at all it must be because of the bill of lading. But the bill of lading in terms provides that "all the terms and exceptions contained in the charter-party or freight contract are herewith incorporated and form part hereof," and further, "the owner or master of the vessel shall have an absolute lien and charge upon the cargo . . . for the recovery and payment of freight and demurrage and any other charges whatsoever." I can see nothing at all inconsistent in the provision of the charter-party that the amount of demurrage at the port of loading is to be ascertained by arbitration at the port of loading, and the provision in the bill of lading that there is to be a lien for the amount, so as to prevent its operating between the parties to the charter-party, who are also the parties to the bill of lading.

Apart from authority I think this would be clear. It is, however, necessary to examine the authorities, and the respondents can certainly vouch one in their favour, which does not seem to be distinguishable — viz., *Runciman and Co.* v. *Smyth and Co.* (20 Times L. Rep. 625). That case, however, purported to be decided on the authority of *Hamilton and Co.* v. *Mackie and Sons* (5 Times L. Rep. 677). This latter case was an action by the shipowner against the indorsee of the bill of lading who was not the charterer, and was for bill of lading freight. The case is very shortly reported, and I will read the judgment of Lord Esher: "The law on the subject had been laid down several times. Where there was in a bill of lading such a condition as this, 'all other conditions as per charter-party,' it had been decided that the conditions of the charter-party must be read verbatim into the bill of lading as though they were there printed *in extenso*. Then if it was found that any of the conditions of the charter-party on being so read were inconsistent with the bill of lading, they were insensible and must be disregarded. The bill of lading referred to the charter-party, and therefore when the condition was read in, 'all disputes under this charter shall be referred to arbitration,' it was clear that that condition did not refer to disputes under the bill of lading, but to disputes arising under the charter-party. The condition, therefore, was insensible, and had no application to the present dispute which arose under the bill of lading." He treats the dispute in that case as arising exclusively under the bill of lading, and not under the charter-party, and therefore as not covered by the clause which related to disputes under the charter only. Here the dispute arises under the charter-party and is between the parties to it, and, unless as between these parties the bill of lading has annulled this part of the contract of the charter-party, it still subsists and binds the parties. There is no doubt that, where the charterer takes the bill of lading in his own name, the rights and obligations as between him and the shipowner are different from those of persons other than the charterer who has become the holder of a bill of lading purporting to incorporate the charter-party, though the precise extent of the difference is not quite clear. In *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100; 56 L. T. Rep. 594; 18 Q. B. Div. 67, 75), decided in 1886, Lord Esher, M.R. says: "In my opinion, even so, unless there be an express provision in the documents to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods"; and he adopts fully what was said by Lord Bramwell in *Sewell* v. *Burdick* (5 Asp. Mar. Law Cas. 386; 52 L. T. Rep. 445; 10 App. Cas. 105). On the other hand, in *Gullischen* v. *Stewart* (5 Asp. Mar. Law Cas. 200; 50 L. T. Rep. 47; 13 Q. B. Div. 317), decided in 1884, in the Court of Appeal, consisting of Lord Coleridge, C.J., Sir Baliol Brett, M.R., and Bowen, L.J., it was held that a charterer who was also the bill of lading holder could not set up the cesser clause in the charter as an answer to a claim for demurrage at the port of discharge. The broad distinction between the position of a charterer, who ships and takes a bill of lading, and an ordinary holder of a bill of lading is, I think, that in the former case there is the underlying contract of the charter-party which remains until it is cancelled, and taking a bill of lading does not cancel it in whole or in part unless it can be inferred from the inconsistency of the terms of the two documents that it was intended to do so. On the other hand, in the case of the holder of the bill of lading who is not the charterer, there is no presumption that he contracts in any terms but those of the bill of lading, and if the bill of lading purports to import the charter-party, the presumption is that it incorporates only those clauses which relate to the conditions to be performed by the receiver of the goods: (*Russell* v. *Niemann*, 10 L. T. Rep. 786; 17 C. B. N. S. 163). With all deference to the learned judges who decided it, I think *Runciman and Co.* v. *Smyth and Co.* (*sup.*) is not supported by the

authority relied upon, and is not in accordance with principle. If the clause is operative, as I think it is, between the parties, I think the fact that the ship sailed away from Bahia Blanca without performing its conditions, though pressed to do so, debars the owner from relying upon the inconvenience of conducting the reference in the Argentine now. I am of opinion, therefore, that the appeal should be allowed.

MATHEW, L.J.—I am of the same opinion, and only desire to add a few words. I think that the disposal of the matter should be submitted to the arbitrator, and that it is necessary for him to decide the dispute in question. When there is a question entirely on English law, it is better, perhaps, to bring the case into the Commercial Court here; but it is clear from the facts of this case that there is no such question to be raised before the arbitrators. It would, I think, be most undesirable to submit to the tribunal in Bahia the difficult questions as to under what circumstances the bill of lading would supersede the charter-party, and what terms of the charter-party are incorporated in the bill of lading. But, as I have said, it is not to raise a question of law that this case has to be submitted to the arbitrators. The case appears to be a clear one. There is no question as to the construction of the charter-party. It contains the ordinary cesser clause, substituting a lien for demurrage for the contract by the charterers in the charter-party. The charter-party contains clause 39, which has been read. This clause is contained in the slip annexed to the charter-party, and no doubt was inserted with knowledge of the condition of things at the port of loading. The vessel arrived at the port of loading and was detained there, and the dispute at once arose as to whether the detention was due to the fault of the charterers or was due to any of the causes specified in clause 39 of the charter-party. That was a dispute which could have been expeditiously dealt with at the port of loading; but the master absolutely refused to proceed to arbitration there. The master, without having the question decided at once, brought the cargo home. When the vessel arrived in England, the shipowners at once said that they claimed a lien for demurrage, and that it had nothing to do with the terms of the charter-party. The very sensible course was then adopted of depositing the amount in dispute in their joint names pending the settlement of the question. It was clearly intimated to the shipowners that, if they brought an action, it would be brought subject to the right to ask for an arbitration. The shipowners issued their writ and commenced proceedings in the Commercial Court here, and an application was immediately made to stay the proceedings. We have to see whether that application ought to be granted, and I have come to the conclusion that it should be. I pass by the discussions on the points of law that have arisen. There was another observation made on the part of the shipowners—namely, as to the inconvenience of sending this case back to Bahia Blanca. It was said that the captain might not be there, and that the crew were probably dispersed all over the world. In my view, I do not think it is at all necessary to have the captain, or those who were on the ship, to give evidence at all. I do not think they are at all material witnesses. But the shipowners cannot complain of any inconvenience occasioned in that respect, because it was entirely their own fault that the dispute was not at once disposed of under clause 39 at Bahia Blanca. Indeed, on the balance of convenience, if the case proceeded in the Commercial Court, it would be necessary for the charterers to bring their witnesses here, or to have a commission, which would be an ordinary mode of procedure in such a case as this. It would be possible to have a commission, but that must, of course, entail a serious expense, and I decline to impose on the charterers that burden. I therefore agree that the action must be stayed. It is a question of fact which must be settled by arbitration. The question for the arbitrators to dispose of is a pure question of fact, and nothing else.

Appeal allowed.

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

Solicitors for the respondents, *Botterell and Roche.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

May 4 and 5, 1905.

(Before BIGHAM, J.)

SIMPSON STEAMSHIP COMPANY LIMITED *v.* PREMIER UNDERWRITING ASSOCIATION LIMITED. (*a*)

Marine insurance—Policy—Warranty—"Not to proceed east of Singapore"—Intention—Construction.

A time policy contained the following warranty: 'Not to proceed east of Singapore.' A vessel, in reference to which the policy had been taken out, was chartered to carry a cargo of coals to Kiaochau, a place east of Singapore. On the voyage the vessel was totally lost off the coast of Tunis. Held, that the warranty had not been broken and that the loss was recoverable under the policy.

ACTION tried before Bigham, J. sitting without a jury.

Claim under a covering note and a policy of marine insurance, dated the 7th Sept. 1904, for 1000*l.* in respect of the steamship *Scaw Fell*, which was totally lost by stranding off the Tunis coast on the 27th April 1904.

The policy, which was a time policy, ran from the 1st March 1904 to the 1st March 1905, and contained (*inter alia*) the following warranty: "Warranted not to proceed east of Singapore except to Java and Australasia," and provided for cancelling the warranty on the payment of an additional premium.

On the back of the policy was the following condition:

Every member shall, if required, when transmitting his proposal for insurance or as soon as practicable thereafter, deliver to the managers, duly filled up and completed, a slip or form provided by the association for the purpose, wherein he shall state the rate or rates of premium and conditions of all other insurances effected by him on the steamship, and (or) other insurable interest connected therewith insured by the association, or if no other insurance has been effected, such

(*a*) Reported by TREVOR TURTON, Esq., Barrister at-Law.

slip or form shall be filled up accordingly. The managers may require the production of all policies referred to in such slip or form and (or) all covering notes relating thereto. Any member who shall on request neglect, or who shall refuse to deliver such slip or form duly filled up and completed, or produce the policies referred to in such slip or form and (or) covering notes relating thereto, and any member who shall deliver any such slip or form containing any misrepresentation, shall absolutely forfeit all claim which he shall or may have upon the association, unless the managers and directors shall decide otherwise.

The *Scaw Fell* was chartered to carry a cargo of coals to Kiao-chau, a port east of Singapore. The vessel sailed from Cardiff on the 16th April 1904, and on the 27th April 1904 she was totally lost off the coast of Tunis.

J. A. Hamilton, K.C. and *Bailhache* for the plaintiffs.—The loss is covered by the policy, and there has been no breach of the warranty. It is time to give notice that the vessel is going east of Singapore and to have the warranty cancelled and to pay the additional premium required by the policy at any time before the vessel arrives in waters east of Singapore. The fact that the vessel was on a voyage to Kiao-chau does not mean that the moment she lifted her anchor at Cardiff she was proceeding east of Singapore. In *Colledge* v. *Harty* (6 Ex. p. 205; 20 L. J. 146, Ex.) the warranty was not "to sail to any ports in the Belts," and it was held that sailing to meant "towards" and not "at." In *Simon, Israel, and Co.* v. *Sedgwick* (7 Asp. Mar. Law Cas. 219, 245; 67 L. T. Rep. 785; (1893) 1 Q. B. 303) the clause was to "any port in Spain this side of Gibraltar."

Scrutton, K.C. and *Leck* for the defendants.—The warranty has been broken and the policy ceased to attach. When the vessel left Cardiff, she intended to go to and was in fact on a voyage to a place east of Singapore; therefore she was proceeding east of Singapore. The necessary notice had not been given, and the extra premium had not been paid as required by the policy. The plaintiff, accordingly, cannot recover. Further, there was a breach of the condition printed on the back of the policy.

Bigham, J.—This is an action on a time policy to recover for a total loss of a ship called the *Scaw Fell*, and the first question to be determined is whether the policy was in operation at the date of the loss. The policy ran from the 1st March 1904 to the 1st March 1905. On the 16th April 1904 the vessel sailed from Cardiff with a cargo of coals for Kiao-chau, a port well east of Singapore. When off the coast of Tunis, on the 27th April 1904, she was totally lost. The defendants refuse to pay upon the ground that before the loss occurred there had been a breach of a warranty in the policy, the effect of which was to cause the policy to cease to attach. The warranty is in the following words: "Warranted not to proceed east of Singapore except to Java and Australasia." The contention is that the moment the ship lifted her anchor at Cardiff and started on her voyage to Kiao-chau she was "proceeding east of Singapore," and therefore breaking the warranty.

I am clearly of opinion that this contention is wrong. There was at most merely an intention to proceed east of Singapore, and an intention to commit a breach of course does not itself constitute a breach. But it was said that the question is governed by authority, and two cases were referred to. In *Colledge* v. *Harty* (6 Ex. 205; 20 L. J. 146, Ex.) the policy was a time policy, and the warranty was that the ship was not "to sail to any port in the Belts." The ship did sail from Newcastle, bound for the Belts. The court held that the warranty had been broken and that the policy had ceased to attach. In *Simon, Israel, and Co.* v. *Sedgwick* (*ubi sup.*) the policy was a voyage policy on goods from the Mersey to "any port in Spain this side of Gibraltar." The goods left in a ship bound for Cartagena. The court held that a voyage to Cartagena was not one of the voyages covered by the policy. Neither of these cases, in my opinion, affects the question before me. In each of them the vessel sailed on a voyage to which the policy did not apply. In the present case the only prohibition was that the vessel should not navigate waters east of Singapore, and she never did.

The next question is whether there has been a breach of a condition indorsed on the policy. The defendants are a club, and the condition is in the following terms: "Every member shall, if required, when transmitting his proposal for insurance or as soon as practicable thereafter, deliver to the managers, duly filled up and completed, a slip or form provided by the association for the purpose, wherein he shall state the rate or rates of premium and conditions of all other insurances effected by him on the steamship, and (or) other insurable interest connected therewith insured by the association, or if no other insurance has been effected, such slip or form shall be filled up accordingly. The managers may require the production of all policies referred to in such slip or form and (or) all covering notes relating thereto. Any member who shall on request neglect, or who shall refuse to deliver such slip or form, duly filled up and completed, or produce the policies referred to in such slip or form and (or) covering notes relating thereto, and any member who shall deliver any such slip or form containing any misrepresentation, shall absolutely forfeit all claim which he shall or may have upon the association, unless the managers and directors shall decide otherwise." It is said that the plaintiff never delivered the slip or form referred to in this condition, and it is true that he did not do so in relation to this particular policy until after the loss; but as a matter of fact and on the evidence before me I find that the plaintiff never on request either neglected or refused to deliver the slip. He was no doubt asked for the slip more than once, but it happened to be at times when the information required for filling it up was not at hand. Thus some delay arose. It did not, however, occur to anybody until after the loss that there was any neglect on the plaintiff's part in the matter, and I am satisfied that there was not. Moreover, I doubt whether the condition in question applies to the present case. This action is brought upon a renewal policy, and no proposal was ever transmitted within the meaning of the condition by the plaintiff. As the condition stipulates that the slip is to be transmitted with the proposal, and there never was any proposal, I doubt whether the condition applies at all in the present case; but, whether it does or not, I am satisfied that there was no

breach of it. There must be judgment for the plaintiff for the amount claimed.

Solicitors for the plaintiffs, *Smith, Rundell,* and *Dods,* for *Vachell* and *Co.*, Cardiff.

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

Friday, Aug. 4, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

SYMONS (app.) *v.* BAKER (resp.). (*a*)

Pilotage — Admiralty coal vessel — "King's ship"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 591 *and* 741.

The K. *was a coal vessel owned by the Government and entered in the Navy List as employed on harbour service. She was exclusively employed in carrying coal for the navy under the dockyard authorities and the Admiralty. Her master held a Board of Trade certificate, and the crew were engaged under articles of agreement, but neither were in the navy.*

Held, that the K. *was a King's ship, and therefore the master was not liable either under the Merchant Shipping Act* 1894 *nor the Bristol Channel Pilotage Act* 1861 *for pilotage dues in proceedings taken in a court of summary jurisdiction.*

CASE stated on a complaint preferred by the respondent under sect. 591 and the by-laws made pursuant to sects. 582 and 583 of the Merchant Shipping Act 1894 against the appellant to recover four guineas in respect of pilotage.

Upon the hearing of the complaint the following facts were proved or admitted:—

The *Kharki* (net register tonnage 338·24 tons) is a coal vessel owned by His Majesty's Government. She is a collier exclusively engaged in going backwards and forwards to various ports, carrying coal for the navy. She flies the Devonport Dockyard flag, but not the navy flag, and she does not carry guns. She is not registered under the Merchant Shipping Act 1894, but has been surveyed by the Board of Trade in accordance with rule 1 of that Act. She appears in the Navy List under the heading "List of Small Steam Vessels, Tugs, &c., employed on Harbour Service," and is there described "*Kharki*, S. Coal Vessel (steel), 1465 Tons, I.H P. 775 N. D. Devonport."

The appellant holds a Board of Trade certificate as master mariner, and is employed as master of the *Kharki* by the dockyard authorities at Devonport under the Admiralty, and acts on instructions received from the coaling officer at Devonport Dockyard. He is not an officer of the Royal Navy. The crew of the vessel were engaged at the dockyard under articles of agreement. Some of the crew were navy pensioners.

The respondent is a licensed pilot for the port of Cardiff, and, at the request of the appellant (master of the *Kharki*), he piloted the *Kharki* on several occasions.

Pilotage is not compulsory in the port of Cardiff.

The dues charged by the respondent for the pilotage of the *Kharki* are the dues authorised by the by-laws to be charged for vessels of her tonnage.

On the completion of each pilotage service rendered by the respondent the appellant handed him a certificate.

On the 20th May 1904 the respondent sent to the appellant a demand in writing for payment of the dues.

By-law 2 of the "Pilotage Rates, By-laws, and Regulations for the Government of Pilots acting under the Bristol Channel Pilotage Act 1861," made pursuant to sect. 582 of the Merchant Shipping Act 1894 and approved and confirmed by Order in Council dated the 20th May 1903, provides:

Every licensed pilot who may be employed to pilot any ship or vessel to any dock, harbour, or basin in the port of Cardiff, from any point in Penarth Roads or *vice versâ*, shall be paid according to the registered tonnage of such vessel as follows:—If 300 tons and under 400 tons, 1*l.* 1*s.*

Sect. 591 of the Merchant Shipping Act 1894 provides:

(1) The following persons shall be liable to pay pilotage dues for any ship for which the services of a qualified pilot are obtained—namely: (*a*) the owner or master; (*b*) as to pilotage inwards, such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port of her arrival or discharge; (*c*) as to pilotage outwards, such consignees or agents as have paid or made themselves liable to pay any other charge on account of the ship in the port from which she clears out; and those dues may be recovered in the same manner as fines of like amount under this Act, but that recovery shall not take place until a previous demand has been made in writing.

Sect. 681 (2) provides;

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.

Sect. 741 provides:

This Act shall not, except where specially provided, apply to ships belonging to Her Majesty.

By the Bristol Channel Pilotage Act 1861 (24 & 25 Vict. c. ccxxxvi.), s. 35:

It shall be lawful for the board to levy, demand, and receive from the master, or owner, or consignee of every vessel coming into or going out of the port for which such board may have been appointed, and who shall have required and obtained the assistance of a pilot, such reasonable rates for pilotage as may from time to time be provided by the by-laws to be made by such board for such purpose; and such board shall at all times maintain an efficient staff of pilots.

On the part of the appellant it was contended (1) that the *Kharki* was a ship belonging to His Majesty, within the meaning of sect. 741 of the Merchant Shipping Act 1894, and that, inasmuch as the Act neither makes provision for the application of sect. 591 to the King's ships nor confers power on the pilotage authority to fix dues for the pilotage of such ships, the appellant, as master of the *Kharki*, was not liable to pay the pilotage dues claimed, and the magistrate had no jurisdiction to adjudicate upon the claim; (2) that by the common law the Crown is not liable for statutory dues or bound by any statute except where expressly bound therein; (3) that the appellant was not legally responsible for the payment of the said dues, because the services were ordered by him in his capacity as a public officer and an agent for

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

the Crown, and the public revenue could not be reached by means of an action against him. The cases of *Palmer* v. *Hutchinson* (45 L. T. Rep. 180; 6 App. Cas. 619), *McBeath* v. *Haldimand* (1 T. R. 172), *Weymouth Corporation* v. *Nugent* (11 L. T. Rep. 672; 6 B. & S. 22), and *Gidley* v. *Lord Palmerston* (3 Br. & B. 275; 24 R. R. 668) were cited in support of the last-mentioned contention.

On the part of the respondent it was contended (1) that sect. 741 merely places King's ships on a different footing from other ships in that they are not liable to be proceeded against *in rem*, and that the section does not preclude an action from being successfully maintained against the master of a ship belonging to His Majesty in respect of tort or breach of contract; (2) that the *Kharki* was not a ship belonging to His Majesty within the meaning of sect. 741, and that the appellant, as master, was therefore personally liable, under sect. 591, to pay the dues claimed by the respondent. The case of *The Cybele* (3 Asp. Mar. Law Cas. 532; 37 L. T. Rep. 773; 3 P. Div. 8) was referred to.

The magistrate was of the opinion, having regard to the foregoing findings of fact to the terms of the agreement entered into by the crew and to the classification of the vessel in the Navy List, that the *Kharki* did not perform the services of a "King's ship," but was a dockyard vessel or yard craft, used exclusively for commercial purposes by the dockyard authorities at Devonport. He therefore held that she was not a ship belonging to His Majesty within the meaning of sect. 741 of the Merchant Shipping Act 1894 and that the appellant, as her master, was therefore liable under sect. 591 of the Act to pay the dues claimed. He was also of opinion that the immunity enjoyed by such high officers and direct representatives of the Crown as those mentioned in the cases cited on behalf of the appellant from liability on contracts entered into by them in their official capacities as agents of the Crown, could not be extended to the appellant who, being subordinate to the coaling officer at the Devonport Dockyard, could not be regarded as a representative or servant to whom the Crown had delegated its authority.

The *Attorney-General* (Sir R. Finlay, K.C.) and *W. Wills* for the appellant.—The *Kharki* was a King's ship, and so comes within sect. 741 of the Merchant Shipping Act 1894 and is exempt from all the provisions of that statute. The Crown is not mentioned in the Bristol Pilotage Act 1861 and is therefore exempt from that statute. *The Cybele* (37 L. T. Rep. 773; 3 Asp. Mar. Law Cas. 532; 3 P. Div. 8) has no application to this case, for she did not belong to the Admiralty and she did not perform any of the services of a King's ship. They referred to

The Parliament Belge, 42 L. T. Rep. 273; 5 P. Div. 197;

The Cargo ex Woosung, 3 Asp. Mar. Law Cas. 239; 35 L. T. Rep. 8; 1 P. Div. 280.

The master is not personally liable. They referred to

Gidley v. *Lord Palmeston*, 3 B. & B. 275; 24 R. R. 668.

We do not dispute that a King's ship must pay pilotage, but the remedy is a petition of right.

Pickford, K.C., *John Sankey*, and *Herman Cohen* for the respondent.—The question here is whether the *Kharki* belonged to His Majesty within the meaning of sect. 741. In one sense she was a King's ship and belonged to the Government, but so did the vessel in *The Cybele* (*sup.*). The *Kharki* carried no members of the Navy. The appellant is liable under the Bristol Pilotage Act 1861, for the Crown is not excepted from that statute. Under that statute, by sect. 31, pilots must give their services when required. The Crown could take advantage of that, and so it must be liable under sect. 35. They referred to

Palmer v. *Hutchinson*, 45 L. T. Rep. 180; 6 App. Cas. 619.

The *Attorney-General* in reply.

Lord ALVERSTONE, C.J.—The point raised in this case is, to my mind, one of very considerable difficulty, and, though I have arrived at the conclusion that the appeal must be allowed, I feel that there are strong arguments which may be used both ways in connection with the matter. I do not want at all to press too hardly against the view of the learned magistrate with reference to the particular ground that he has given in respect to the use of the ship, but if it did weigh upon his mind that a different rule was to be applied because the particular services which the vessel was being employed in were what he called "commercial purposes," by which I suppose he means carrying coal to feed the King's ships from time to time, which was the only service she was ever employed in, I cannot accede to that view. I think there was nothing commercial about this. I think the facts show, and the learned magistrate does not differ from that, that the *Kharki* was being employed as what may be called a coal tender, and solely as a tender taking coal to the ships of the Navy. Therefore, unless some distinction can be drawn between one of His Majesty's ships performing a more dignified service and one which was performing, as this vessel was, a most useful but less dignified service, I do not understand the distinction of "commercial purposes." Now, the vessel in question is clearly a King's ship—that is to say, she comes within the words of sect. 741 of the Merchant Shipping Act, which are "shall not, except as expressly provided, apply to ships belonging to His Majesty." I think, therefore, we have got to consider whether, in order to justify this conviction, it can be supported on one of two grounds: either that the King's ship is liable to pay pilotage duties under the Bristol Pilotage Act; or, as is contended for by Mr. Pickford, the master of any ship is liable, if he chooses to employ a pilot, to that rate. I have come to the conclusion that the language of the Bristol Pilotage Act is not sufficient to make the King's ship liable to pay the scale of dues contemplated by the by-laws. It seems to me that, whatever may be the rights and duties and obligations of pilots who are summoned to navigate the King's ships, or pilot the King's ships rather, it cannot be said, there being no express language, that there is such necessary implication that the public revenue, by petition of right, could be called upon to pay the scale of pilotage which has been imposed by the by-laws. I therefore think, for the purpose of creating a debt against the Crown in respect of the services

rendered, the Bristol Pilotage Act and the Merchant Shipping Act combined are not binding upon the Crown. Even if I had come to the other conclusion, of course that would have raised another difficulty; but I think it right to say that, because it is the foundation of one part of Mr. Pickford's argument. I have not overlooked the fact that that may appear to deprive the Crown of certain rights. I agree in the view presented by the learned Attorney-General that the two points are not necessarily dependent upon exactly the same considerations. I can imagine the Crown getting the benefit of certain general enactments by way of privilege, although it did not have the obligation which would be created by being liable to certain other provisions.

Then, upon the other point, that the master is liable because he as master has ordered the pilotage. I do not think that can be maintained against the Crown. He is the master of the King's ship; he acts as master on behalf of the Crown; he is an agent in the ordinary sense of the word; and, therefore, unless it was intended by clear implication that the obligation should be a personal obligation upon the master to pay, I think that Mr. Pickford's contention goes too far, and it seems to me that, unless he could make good his major premise—viz., that the Crown ships are liable to pay the amount of dues which are provided by the by-laws, he is not able to make a contract based upon the statutes which would make the master of the ship personally liable. That, it seems to me, would be a direct contradiction in so far as the Merchant Shipping Act, which gives the remedy, is concerned of the provisions exempting the Crown. Further than that, as I have already indicated, I think that the master of the King's ship is there on behalf of His Majesty, and that the only way in which it can be suggested that any right of contract or any obligation is created is in the way indicated by the case *Palmer* v. *Hutchinson* and the other authorities to show that there would be ground for alleging a contract by the State to be enforced by petition of right. I think, therefore, on both grounds, the contention of Mr. Pickford fails, and this appeal must be allowed. The case, as I said, is one of difficulty; it can be taken further, and, if it is thought right to have further consideration of it, it is a case which certainly should be appealed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree. The difficulty I feel is chiefly upon the second point taken by Mr. Pickford—viz., upon the interpretation of the Bristol Pilotage Act, though I do not entertain much doubt that this vessel was a ship belonging to His Majesty. Having regard to the general provisions in the Merchant Shipping Act and the other sections in the Bristol Pilotage Act to which I alluded in the course of the argument, it seems to me that our right course is to say that His Majesty's ships are not included in the enactments of the Bristol Pilotage Act, and could not be included unless there were special mention of them. I think that is the better rule to follow, and for these reasons I agree. *Appeal allowed.*

Solicitors: *The Treasury Solicitor; Stephens, David,* and *Co.*, Cardiff.

Thursday, Aug. 10, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.).

PHILLIPS (app.) *v.* BORN (resp.); THE RAVENSWORTH. (*a*)

Compulsory pilotage—Exemption in favour of "coasting vessel" — Foreign-going articles — Vessel taking cargo at port in United Kingdom to be discharged at another port in United Kingdom—Bristol Wharfage Act 1807 (47 *Geo.* 3, *sess.* 2, *c. xxxiii.*), *s.* 9—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 603, *sub-s.* 2.

A ship sailing under foreign-going articles left Swansea and went to various ports within and without the United Kingdom. She went from Dieppe to Hull in ballast, and at Hull she took in a cargo to be discharged at Bristol, and went from Hull with such cargo to Bristol, where she discharged her cargo, still sailing under the same articles. When on the voyage from Hull to Bristol, the ship was proceeding up the Bristol Channel, and was within the limits of the port of Bristol, within which, by sect. 9 *of the Bristol Wharfage Act* 1807, *pilotage by a Bristol pilot is compulsory for all vessels except "coasting vessels and Irish traders." The master refused to take a compulsory pilot on board, on the ground that the ship during the voyage from Hull to Bristol was a "coasting vessel" within the meaning of the exemption by reason of her having taken in cargo at Hull destined to be discharged at Bristol, both ports being within the United Kingdom.*

Held, that the ship was not a "coasting vessel" at the time in question, and the fact that she took in cargo at Hull, a port in the United Kingdom, which she was going to discharge at Bristol, another port in the United Kingdom, did not make her a "coasting vessel" on the voyage from Hull to Bristol, and that the master was properly convicted, under sect. 603, *sub-sect.* 2, *of the Merchant Shipping Act* 1894, *for having, within a district where pilotage was compulsory, refused to take a pilot on board.*

CASE stated by justices of the peace in and for the city and county of Bristol.

1. At a petty sessions held in the city and county of Bristol on the 21st Dec. 1904, an information and complaint preferred by Edmund William Born (the respondent), under the Merchant Shipping Act 1894, against William Phillips (the appellant) was heard by the justices. It averred that the appellant, on the 19th Dec. 1904, after the respondent, a qualified pilot, had offered to take charge of the steamship *Ravensworth*, of which the appellant was master, did himself pilot such ship to the eastward of the Holms, and within the limits of the port of Bristol, without a pilotage certificate enabling him so to do, contrary to the statute in such case made and provided, whereby the appellant incurred a fine of 5*l.* 11*s.*, being double the amount of pilotage demanded. The hearing was adjourned until the 2nd Jan. 1905, and finally determined by the justices on the 9th Jan. 1905, when they ordered the appellant to pay the sum of 5*l.* 11*s.*, with 4*l.* 4*s.* for costs.

2. The appellant duly applied to the justices

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

to state a case, and entered into a recognisance as required by the statute.

3. By an Act of Parliament, 47 Geo. 3, sess. 2, c. xxxiii., hereinafter referred to as the Bristol Wharfage Act 1807, being an Act providing, amongst other things, for the better regulation of pilots and the pilotage of vessels navigating the Bristol Channel, it was enacted in sect. 9 "that from and after the first day of October next after the passing of this Act, all vessels sailing, navigating, or passing up, down, or upon 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 mayor, burgesses, and commonalty of the said city of Bristol, by warrant under their corporate seal. . . ."

4. By the Pilotage Order Confirmation (No 1) Act 1891 (54 & 55 Vict. c. clx.), an Act for confirming the Bristol Pilotage Order 1891, which was an order for exempting from compulsory pilotage, except within the port of Bristol, vessels bound to and from that port, it was provided (*inter alia*):

Notwithstanding anything contained in the Bristol Wharfage Act 1807, the masters and owners of all vessels sailing, navigating, or passing up or down the Bristol Channel to or from the port of Bristol shall be and they are by this order exempted from all obligation to be conducted, piloted, or navigated by pilots authorised or licensed by the mayor, aldermen, and burgesses of the city of Bristol, except when within the limits of that port [which limits were defined as follows: From the westwardmost part of the Flat and Steep Holms, up the course of the Bristol Channel eastward to Aust in the county of Gloucester, and from the said Holms southward athwart the Channel to Uphill, and from thence along the coast eastward in the counties of Somerset and Gloucester to Aust aforesaid, and also from Holesmouth in Kingroad up the Avon to the city of Bristol, together with the several Pills lying on the said river]. And all existing by-laws, rules, and orders of the mayor, aldermen and burgesses of the city of Bristol relating to pilotage shall be read and have effect in accordance with the provisions of the Bristol Wharfage Act 1807, as amended by this order.

5. By sect. 603 of the Merchant Shipping Act 1894 it is enacted:

If within the district where pilotage is compulsory the master of an unexempted ship, after a qualified pilot has offered to take charge of the said ship or has made a signal for the purpose, pilots his ship himself without holding the necessary certificate, he shall be liable for each offence to a fine of double the amount of the pilotage dues that could be demanded for the conduct of the ship.

6. The appellant was and still is the master of the steamship *Ravensworth*.

7. The respondent was a pilot duly licensed by the Lord Mayor, aldermen, and burgesses of the city and county of Bristol by warrant under their corporate seal, pursuant to sect. 9 of the Bristol Wharfage Act 1807.

8. The articles under which the *Ravensworth* was sailing, dated the 28th Oct. 1904, were in evidence before the justices, and contained provisions usual in agreements with crews of foreign-going ships, as required by sect. 115 of the Merchant Shipping Act 1894. They were signed by the appellant as master, and by the crew of the *Ravensworth*. On the 29th Oct. the vessel left Swansea and proceeded to Newport, from thence to Vigo with a cargo of coal, from thence to Casablanco in ballast, from thence to Irvine (Scotland) with a cargo of beans, from thence to Swansea in ballast, from thence to Dieppe with a cargo of coal, and from thence to Hull in ballast, where she took in a cargo of linseed for John Robinson Limited, of Bristol—still sailing under the same articles.

9. It was proved and admitted that on the 19th Dec. 1904, the *Ravensworth* was proceeding up the Bristol Channel, and, when well within the port of Bristol as defined in par. 4 of this case, the respondent offered his services to the appellant, which were refused.

10. It was proved and admitted that the pilotage dues for carrying the *Ravensworth* into the Bristol Docks would have amounted to the sum of 2*l.* 15*s.* 6*d.*, which sum was duly demanded by the respondent from the appellant, who refused to pay the same.

11. It was admitted that the appellant was not licensed as a pilot in pursuance of sect. 9 of the Bristol Wharfage Act 1807, or otherwise.

12. It was proved and admitted that the *Ravensworth* arrived at the port of Bristol under the foreign-going articles referred to in par. 8 of this case, where she discharged her cargo. The appellant on the 21st Dec. delivered the ship's articles and his official log to the superintendent of the Local Marine Board at Bristol in pursuance of sub-sect. 3 of sect. 118 of the Merchant Shipping Act 1894.

13. It was proved and admitted that the *Ravensworth* entered into fresh foreign-going articles and left the port of Bristol in charge of the appellant as master, who engaged the services of the respondent to pilot the ship out of the limits of the port.

14. It was contended by the appellant that the *Ravensworth* was a "coasting vessel" and not subject to compulsory pilotage, and it was alleged that she was principally engaged in the coasting trade, and that on the day in question when the appellant refused the respondent's services she was actually engaged in a voyage from Hull to Bristol, both ports in the United Kingdom, having on board a coastwise cargo, and in support of this contention the following cases were cited: *Courtney* v. *Cole* (6 Asp. Mar. Law Cas. 169; 57 L. T. Rep. 409; 19 Q. B. Div. 447) and *Owners of the Edenbridge* v. *Green and others*; *The Rutland* (8 Asp. Mar. Law Cas. 168, 270, 497n.; 76 L. T. Rep. 662; (1897) A. C. 333). It was further contended on the part of the appellant that before conveying linseed from Hull to Bristol he was bound to obtain and did obtain a transire or pass for the cargo in compliance with the Customs Consolidation Act 1876.

15. The appellant called witnesses to prove that it was a frequent occurrence for vessels that were sailing under uncompleted or unexpired foreign articles to engage in the coasting trade upon returning to the United Kingdom until such articles expired or were given up, but failed to satisfy the justices that this was an established custom.

16. On behalf of the respondent it was contended that the ship was not a "coasting vessel," inasmuch as she had not been habitually or regularly engaged in the coasting trade, but had been more frequently engaged in foreign voyages

and sailing under foreign articles, and that on the 19th Dec. 1904 she was on an uncompleted foreign voyage sailing under articles containing special provisions with regard to foreign-going ships, and that as such she was, when within the port of Bristol, subject to compulsory pilotage. In support of this contention the following cases were referred to, namely: *The Winestead* (7 Asp. Mar. Law Cas. 547; 72 L. T. Rep. 91; (1895) P. 170) and *The Glanystwyth* (8 Asp. Mar. Law Cas. 513; 80 L. T. Rep. 204; (1899) P. 118).

17. The ship's articles and official log were to be deemed part of this case. So far as the same was a matter of fact the justices found that the voyage on which the *Ravensworth* was employed commenced at Swansea on the 28th Oct. and ended at Bristol on the 21st Dec. 1904. So far as the same was a question of law they respectfully referred to the ship's articles and official log in support of their interpretation that the ship was not a coasting vessel at the time the respondent offered to take charge of her, and was upon an uncompleted foreign voyage.

18. The justices also found as facts that the *Ravensworth* was not principally or habitually and regularly engaged in the coasting trade of the United Kingdom; that she was equipped in every respect for foreign voyages, and that she as frequently engaged in them as in the coasting trade of the United Kingdom.

19. Upon the facts as found and stated the justices held that the *Ravensworth* was on the day in question subject to compulsory pilotage, and they made an order for the payment of 5*l.* 11*s.*, being double the amount of pilotage dues that could be demanded for the conduct of the ship, together with 4*l.* 4*s.* for costs.

The question for the opinion of the court was, whether upon the facts above stated and found the justices came to a correct determination in point of law. If the question should be answered in the affirmative, then the determination of the justices was to stand; if in the negative, the case was to be sent back to the justices, with such directions as the court should be pleased to give.

The Customs Consolidation Act 1876 (39 & 40 Vict. c. 36) provides—as to coasting trade:

> Sect. 140. 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, and no part of the United Kingdom, however situated with regard to any other part, shall be deemed in law, with reference to each other, to be parts beyond the seas. . . .

Bailhache for the appellant.—It is submitted that the vessel was at the time a "coasting vessel" within the meaning of sect. 9 of the Bristol Wharfage Act 1807, and was therefore exempt from compulsory pilotage. The justices were wrong in holding that the voyage until the arrival in Bristol was one voyage, and that the voyage from Hull to Bristol was only part of that one voyage. Between the periods of time mentioned there were several separate voyages:

> *Re an Arbitration between the Owners of the Istok and Drughorn*, 6 Com. Cas. 220.

The question whether the vessel was a coasting vessel or not depends upon whether she made one voyage or several separate voyages, and it is submitted that the voyage from Hull with linseed to Bristol was a separate and complete voyage in itself, and as she took in cargo at Hull to be carried to and discharged at Bristol—both termini of the voyage being within the United Kingdom—she was at the time in question a coasting vessel. There is no definition in the Merchant Shipping Act of what a coasting vessel is, but there is a definition in sect. 140 of the Customs Consolidation Act 1876, and according to that definition a coasting ship is one which is trading from one part of the United Kingdom to another part of the United Kingdom, and the limits of the voyage must both be within the United Kingdom. This ship comes within that definition on the voyage from Hull to Bristol. The justices have largely based their decision on the ship's articles, but they were wrong in supposing that, because the articles did not expire until after the ship's arrival in Bristol, therefore the voyage did not end till then. The articles have no bearing on the question, and, moreover, in this case they include the coasting trade as well as the foreign trade. A vessel which at the time is carrying a cargo which she picks up in one part of the United Kingdom, and which is destined for discharge in another part of the United Kingdom is at that moment of time a coasting vessel, though she may have come from a foreign country. [Lord ALVERSTONE, C.J. referred to the judgment of Dr. Lushington in *The Agricola* (2 Wm. Rob. 10, at pp. 16, 17, as to the meaning of a "coasting vessel," and said that accepting for the purposes of the argument that the voyages were all separate voyages, it still left the question to be considered whether this was a coasting vessel.] *The Agricola* (*ubi sup.*) differs in this: She was homeward bound for Liverpool; she had cargo for London; she went to and discharged that cargo in London, and then, without taking in any cargo in London, she went in ballast from London to Liverpool, completing her voyage. The reason why it was held that she was not a coasting vessel on the voyage from London to Liverpool seems to have been that she had come on a voyage from foreign parts, and was merely completing that voyage when she was going round from London to Liverpool. Dr. Lushington says that "coasting vessel" is to be confined to a trading from one British port to another, and here there was such a trading, whereas in that case the vessel had not taken in cargo in London to be discharged in Liverpool. *The Lloyds*, or *Sea Queen* (1 Mar. Law Cas. O. S. 391; 9 L. T. Rep. 236; Br. & L. 359), is more against the appellant than *The Agricola* (*ubi sup.*), but Dr. Lushington merely follows his judgment in *The Agricola* (*ubi sup.*), and he says that in *The Agricola* he decided that a vessel making a similar voyage without a cargo and in ballast was not a ship employed in the coasting trade, and that he did not see how the fact that the vessel had cargo on board made any difference. It is submitted that it does make all the difference. The *Agricola* had come in from Calcutta, and was completing her voyage to Liverpool, and the *Sea Queen* was going from London to Liverpool, to proceed from that place to foreign parts. The case of *The Winestead* (*ubi sup.*) in which Bruce, J. held that the ship in question was a foreign-going ship, and not a coasting vessel, was rightly decided,

and is in the appellant's favour for this reason, that, when the ship left London she was then beginning the voyage which finally took her abroad. She did not make two voyages, one from London to Cardiff and the other from Cardiff abroad, but she was in fact when she went to London on her foreign voyage. She had then begun her foreign voyage, notwithstanding that she was to put into and pick up cargo at Cardiff. [He also referred to and distinguished upon similar grounds *The Glanystwyth* (*ubi sup.*).] In *The Sutherland* (6 Asp. Mar. Law Cas. 181; 57 L. T. Rep., at p. 632; 12 P. Div., at p. 156) Sir J. Hannen says that "ships employed in the coasting trade of the United Kingdom" obviously means "ships proceeding on a coasting voyage from any one port of the United Kingdom to another." The present case comes within that description and within the definition of "coasting trade," and "coasting ship," given in sect. 140 of the Customs Consolidation Act 1876, unless "coasting trade" is to have a different meaning from that which it has in the Customs Act, and, as pointed out by Bruce, J. in *The Winestead* (*ubi sup.*), the Legislature could hardly have contemplated that "coasting ship" in the Customs Consolidation Act should have a different meaning from the words "ships employed in the coasting trade," used in the Merchant Shipping Act 1854. [He referred to the judgment of Lord Halsbury, L.C. in *Owners of the Edenbridge* v. *Green and others*; *The Rutland* (*ubi sup.*).]

Salter, K.C. and *Inskip*, for the respondent, were not called upon.

Lord ALVERSTONE, C.J.—The point in this case has been put with great persistence by counsel for the appellant, who has endeavoured by the force of his argument to make us differ from a view that has been taken, to my knowledge, for upwards of sixty years, and which is not qualified by any single authority to which he has been able to draw our attention. He was quite entitled to put his argument, but in this case he has not produced the effect of making me think that in this matter I know more than Dr. Lushington. It is really important in these cases to look at the principle of the thing. The words in question here are "except coasting vessels and Irish traders." Now, counsel for the appellant, in his most careful research, did not happen to take us back to the earliest case of all on this matter, which is the case of *Davison* v. *Mekibben* (3 B. & B. 112), decided in the year 1821. In that case the words in question were the same as in the present case—"all coasting vessels and all Irish traders"—and it is important to see what Dallas, C.J. and Burrough, J. thought was the basis of this matter. Burrough, J. says: "There is no reason why a vessel frequenting the Thames, as this vessel did, should employ a pilot, the principle being that foreign vessels should be piloted, but not vessels the crews of which, from frequent navigation, must be supposed to know the river. It is not necessary they should be coasters; it is sufficient if they use the Thames as coasters, and no other certain meaning can be affixed to the words 'as coasters.'" When the matter came before Dr. Lushington, who, one may say, without exception, is the greatest authority that can be cited upon such a question, he laid down exactly the same principle, and he said, in the case of *The Agricola* (*ubi sup.*)—the words there being "employed in the coasting trade," which for this purpose are wider words than "coasting vessels"—that the principle of exemption is this, that the masters of such vessels, from their occupation and experience, are supposed to be familiarly acquainted with the English coasts; and that is the principle upon which vessels engaged in the coasting trade are so exempt. He repeated that in the case of *The Sea Queen* (*ubi sup.*). Counsel for the appellant is perfectly right in saying, from the point of view of authority, that the case of *The Sea Queen* (*ubi sup.*) is more against him on the facts than *The Agricola* (*ubi sup.*), but the principle is exactly the same. The matter came before Sir Gainsford Bruce in the case of *The Winestead* (*ubi sup.*), and before Sir Francis Jeune in the case of *The Glanystwyth* (*ubi sup.*). All of them have recognised the binding authority of *The Agricola* (*ubi sup.*) and *The Sea Queen* (*ubi sup.*), and have followed those cases strictly. Now, the only criticism that can possibly be made upon those cases is this. Counsel for the appellant has pointed out that those were cases which arose in which there were attempts made to bring within what I may call Dr. Lushington's principle vessels which had not got so much in their favour as coasting vessels as the vessel in the present case had, because, as counsel has properly pointed out, in one, if not in both cases, the vessels were vessels which were completing a foreign voyage when they went from one part of the coast to another part of the coast; and if there had been a difference in principle in consequence of this vessel having taken its cargo on board at Hull, I should have agreed with counsel that the matter would have had to be considered further. But I wish to say, not that the facts mentioned in par. 8 of this case are to be kept out of view—namely, that the vessel had gone in the immediately preceding two months from Newport to Vigo, from Vigo to Casablanco, from Casablanco to Irvine, from Irvine to Swansea, from Swansea to Dieppe, and from Dieppe to Hull—those are the preliminary voyages; but that, even accepting for the purposes of the argument that those are all separate voyages, yet that does not make any difference in principle, and the fact that this vessel started from Hull with cargo taken on board there and ended at Bristol, and was thus going between two ports in England, is not a conclusive or sufficient test as to whether or not this vessel was at the time in question a coasting vessel within this compulsory pilotage clause. Now, the articles have been referred to, and counsel for the appellant has argued that the articles have no bearing at all on what constitutes a voyage for this purpose. I quite agree that the articles are not conclusive of this matter at all. I agree that they ought not, perhaps, to be looked at except for the purpose of showing that it was never intended that the vessel should go on a coasting voyage. The articles speak between different people; they speak between the master and the crew, and, although they may in some cases be evidence in fact that the vessel is not engaged in the coasting trade, yet, where the articles contain a clause—as they do in the present case—that the vessel can be engaged in a coasting trade,

even for the whole of the time, they are obviously in no sense evidence to show that she was not a coasting vessel. But when we consider the facts as to what this vessel had been doing, in my opinion the case is one of identically the same class of cases as those to which Dr. Lushington referred. Now, the magistrates have found, so far as it was for them to find, that the *Ravensworth* "was not principally or habitually and regularly engaged in the coasting trade of the United Kingdom," and, so far as it was for them, they have found that she was not a coasting vessel. In my judgment they have only applied the principle laid down by Dr. Lushington. It may be, and in many cases it is, a question of degree. I am clearly of opinion that a vessel is not a coasting vessel simply because she happens to have on board of her a cargo which she has taken on board at one place in the United Kingdom, and which she is going to discharge in another place in the United Kingdom, whether it is a full cargo or not. I am therefore of opinion that the magistrates' decision was clearly right, and that this appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree.

Appeal dismissed. Conviction affirmed.

Solicitors for the appellant, *Downing, Handcock, Middleton*, and *Lewis*, for *Downing* and *Handcock*, Cardiff.

Solicitors for the respondent, *Whites* and *Co.*, for *James Inskip* and *Co.*, Bristol.

HOUSE OF LORDS.

May 22, 23, 25, 26, *and Aug.* 4, 1905.

(Before the LORD CHANCELLOR (Halsbury), Lords DAVEY, JAMES OF HEREFORD, and ROBERTSON.)

ARDAN STEAMSHIP COMPANY *v.* WEIR AND CO. (*a*)

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

Charter-party—Liability of charterer to provide cargo—Custom of port—Delay.

The charterer is under an obligation to furnish the stipulated cargo, and is liable for delay caused by the cargo not being ready, in the absence of some qualification of the obligation.

A ship was under charter "to proceed to such loading berth as the freighters may name" at M., and there "load in the usual and customary manner a full and complete cargo of coals as ordered by the charterers, which they bind themselves to ship." The charterers had ordered coals from a particular colliery which was not able to provide a cargo at the time of the arrival of the ship, and she was therefore unable to obtain a loading berth for some time. If the cargo had been ready she could have got a loading berth at once.

Held (reversing the judgment of the court below), that the charterers were liable for the delay so occasioned.

Little *v.* Stevenson (8 *Asp. Mar. Law Cas.* 162; 74 *L. T. Rep.* 529; (1896) *A. C.* 108) *distinguished.*

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

APPEAL from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Kinross), Lords Adam, M'Laren, and Kinnear, who had reversed a judgment of the Lord Ordinary (Lord Pearson). The case is reported 41 Sc. L. Rep. 230.

The appellants claimed damages for the detention of their steamship *Ardandearg* at Newcastle, New South Wales, by the respondents.

By charter-party made between Clark and Service, shipowners and brokers, Glasgow, the agents for the appellants, and on their behalf, and the respondents, dated the 30th May 1900, the *Ardandearg* was chartered by the latter to "proceed to such loading berth as freighters may name at Newcastle, New South Wales, and after being in loading berth as ordered" to "load in the usual and customary manner a full and complete cargo of Australian coals as ordered by charterers, which they bind themselves to ship (except in the event of riot, commotion by keelmen, strike or lock-out of shippers' pitmen, or any hands striking work, frosts or floods, or any other accidents or causes beyond the control of the charterers, which may delay her loading)." Under this charter-party, the appellants submitted that the obligation of the charterers was to supply the specified cargo and to load it within a reasonable time after the vessel was ready to load and a loading berth had become available, subject only to the specified exceptions.

The *Ardandearg* in due course arrived at Newcastle, New South Wales, on or about the 14th July 1900, and was then ready to load her cargo in terms of the charter-party. If the respondents had provided cargo on or about that date the *Ardandearg* would at once have got a loading berth. In point of fact, there was no cargo ready for the *Ardandearg*, and none was given her until the 13th Aug. 1900. Even then there was not sufficient cargo, and the ship had, after getting her berth, to be moved twice from under the crane owing to want of cargo. Her loading was only completed by the 23rd Aug. Had there been cargo ready when the *Ardandearg* arrived she could have been loaded within three days. Had there been enough cargo available to carry on the loading continuously after the *Ardandearg* got a berth she could in like manner have been loaded within three days. A reasonable time for loading such a vessel as the *Ardandearg* with a coal cargo would, the appellants contended, not have exceeded eight or ten days. In these circumstances the appellants at the trial claimed that the respondents had committed a breach of contract by failing to provide cargo, and so had caused the ship to be detained (1) in getting to a loading berth, and (2) in loading, and were at least liable to them in the loss and damage they had sustained in respect of the detention of the *Ardandearg* from the 23rd July to the 23rd Aug. 1900—that is, for thirty-one days.

The Lord Ordinary upheld this view, and gave decree for 1612*l.* as the amount of pursuers' loss and damage. The First Division of the Court of Session reversed this judgment and assoilzied the respondents.

Carver, K.C., *Bailhache*, and *J. Clarke* (of the Scotch Bar) appeared for the appellants, and argued that there was an obligation on the charterer to have a cargo ready on the arrival of

the ship, unless he was prevented by causes coming within the exceptions, which was not contended in this case, and the delay was at his risk. See

Grant v. *Coverdale*, 5 Asp. Mar. Law Cas. 74, 353; 51 L. T. Rep. 472; 9 App. Cas. 470;
Kay v. *Field*, 4 Asp. Mar. Law Cas. 526, 588; 47 L. T. Rep. 423; 10 Q. B. Div. 241;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599;
Gardiner v. *Macfarlane*, 1893, 20 R. 414;
Re Richardson and Samuel, 8 Asp. Mar. Law Cas. 330; 77 L. T. Rep. 479; (1898) 1 Q. B. 261.

The court below were influenced by the view taken by Vaughan Williams, L J. in *Jones* v. *Green* (9 Asp. Mar. Law Cas. 600; 90 L. T. Rep. 768; (1904) 2 K. B. 275), which is distinguishable on the facts. See also

Harrison v. *Dresman*, 23 L. J. 210, Ex.;
Little v. *Stevenson*, 8 Asp. Mar. Law Cas. 162; 74 L. T. Rep. 529; (1896) A. C. 108;
Hudson v. *Ede*, 3 Mar. Law Cas. O. S. 114; 18 L. T. Rep. 764; L. Rep. 3 Q B. 412;
Tharsis Sulphur and Copper Company v. *Morell*, 7 Asp. Mar. Law Cas. 106; 65 L. T. Rep. 659; (1891) 2 Q. B. 647;
Dobell v. *Green*, 9 Asp. Mar. Law Cas. 53; 82 L. T. Rep. 314; (1900) 1 Q. B. 526.

The colliery selected by the charterers was not a reasonable one. Its output was very small. There is no foundation for implying an agreement by the shipowner to take the risk of delay. [The LORD CHANCELLOR.—He might be supposed to have undertaken to load according to the custom of the port.] A cargo ought to have been ready within a reasonable time.

Ure, K.C. (of the Scotch Bar) and *Scrutton*, K C., for the respondents, contended that the words of the charter-party, "such loading berth as freighters may name," gave the freighters an option, so long as an impossible place was not chosen. See

Tapscott v. *Balfour*, 1 Asp. Mar. Law Cas. 501; 27 L. T. Rep. 710; L. Rep. 8 C. P. 46.

The risk is put upon the owners. *Tapscott* v. *Balfour* was approved in *Tharsis Sulphur and Copper Company* v. *Morell* (*ubi sup.*). As to what is reasonable, see

Bulman v. *Fenwick*, 7 Asp. Mar Law Cas. 388; 69 L. T. Rep. 651; (1894) 1 Q. B. 179.

[The LORD CHANCELLOR referred to *Dahl* v. *Nelson* (4 Asp. Mar. Law Cas. 392; 44 L. T. Rep. 381; 6 App. Cas. 38).] See also

Watson v. *Borner*, 4 Com. Cas. 335; on appeal, 5 Com. Cas. 377;
Harrowing v. *Dupré*, 7 Com. Cas. 157.

When a ship is ordered to a particular berth, it does not imply that the berth will be ready at the moment of her arrival. According to the authorities, the risk of delay falls on the owners in such a case. The conditions at the port of Newcastle, N.S.W., were fully discussed in *Barque Quilpué* v. *Brown* (9 Asp. Mar. Law Cas. 596; 90 L. T. Rep. 765; (1904) 2 K. B. 764), which was referred to in *Jones* v. *Green* (*ubi sup.*). The cases of *Lick* v. *Raymond* (7 Asp. Mar. Law Cas. 23, 97, 233; 62 L. T. Rep. 175; (1893) A. C. 22) and *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 285, 403; 88 L. T. Rep. 702; (1903) A. C. 329) in the House of Lords deal with the case of a glut of shipping when no lay days are mentioned in the charter-party. *Little* v. *Stevenson* (*ubi sup.*) supports the contention of the respondents. [The LORD CHANCELLOR.—That was a case of very exceptional circumstances, which could not have been foreseen by anyone.]

Carver, K.C. was heard in reply.

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

Aug. 4.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Halsbury). — My Lords: This is an action upon a charter-party. The vessel *Ardandearg* was chartered "to proceed to such loading berth as the freighters may name at Newcastle, New South Wales, and after being in loading berth as ordered, to load in the usual and customary manner a full and complete cargo of Australian coals, as ordered by charterers, which they bind themselves to ship." Then follow certain exceptions which do not become relevant to this case. Now, the *Ardandearg* arrived at her destination on the 14th July 1900, and was then ready to load her cargo. If the respondents had provided cargo at that date the vessel could have been loaded, and for that purpose would have at once obtained a loading berth. There was no cargo ready for her, however, until the 13th Aug., and, even then, not enough. She had twice to be moved from her berth under a very reasonable regulation at the port, that a vessel should not be permitted to occupy a berth when not loading, and as there was no coal for her she had, as I say, twice to be moved, and her loading was only completed by the 23rd Aug. Under these circumstances the plaintiffs brought an action for the loss and damage they had sustained in respect of the detention of the *Ardandearg*. Now, it cannot be denied that the merchant is under an absolute obligation to furnish the stipulated cargo, and I do not understand upon what theory the First Division of the Court of Session overruled the judgment of the Lord Ordinary. With great respect to their Lordships I may say generally that I think that there has been some confusion between the supply of a cargo and the obligation to load, and the qualifications thereof. I am very sorry if any observations of mine or of the late Lord Herschell's have been supposed to throw any doubt upon so well recognised a principle of commercial law as that a merchant is under an absolute obligation to supply the cargo. The case which is supposed to have created the doubt is *Little* v. *Stevenson* (8 Asp. Mar. Law Cas. 162; 74 L. T. Rep. 529; (1896) A. C. 108), and the passage referred to begins: "The proposition of law that I disputed was 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." And Lord Herschell observed: "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." I thought then, and I think still,

that, to use Lord Herschell's language, such an obligation on the shipper would be most unreasonable. But what relevancy had such a case to the case before your Lordships? The controversy turns, as the Lord Ordinary finds, upon the true construction of the charter-party in view of the facts as proved. I also agree with the Lord Ordinary that delay in the loading is one thing, and the failure to provide a cargo to load is another and a very different thing. He found as a fact that the failure of the defenders to perform their primary duty of providing a cargo was the cause of the delay.

I am not quite certain that I understand the second ground upon which it is contended that the ship was liable for delay in arriving at her chartered port. It seems to me that under the circumstances detailed by the master it was quite reasonable for him to do what he did. But of course, however reasonable, if it were a breach of contract, the reasonableness of the master's conduct would be no answer. But I fail to discover where is the contract of which it is a breach. She arrived before the date of the cancelling clause, and I am unable to follow the argument which is supposed to establish her responsibility. I think it quite immaterial to discuss cases in which it is either proved or assumed that there are particular circumstances known to both the parties, with reference to which they may be supposed to contract, which may affect both the providing and the loading of the cargo. It is enough to say that no such question arises here; and I am of opinion that the judgment of the Lord Ordinary ought to be restored, and the judgment of the First Division reversed.

Lord DAVEY.—My Lords: I am of opinion that the decision of the Lord Ordinary in this case was correct, and I am so well satisfied with the reasons for his opinion given by him that I should be content simply to express my agreement, were it not that we are differing from an unanimous judgment of the Inner House. Lord Pearson has held that the delay complained of was caused not by the exceptional congestion of shipping, but by the failure of the defenders (the present respondents) to perform their primary duty of providing a cargo, and that there are no clauses in the charter-party which, on sound construction, will excuse the respondents for the delay. In the case of *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 129, 302; 42 L. T. Rep. 845; 5 App. Cas. 599), Lord Blackburn, in advising this House, said: "I am not aware of any case contradicting the doctrine that in the absence of something to qualify it the undertaking of the merchant to furnish a cargo is absolute." It has been argued that this doctrine was departed from, and the obligations of the shipper or charterer to have his cargo ready were expressed in a less absolute form in some observations of the Lord Chancellor and Lord Herschell in *Little* v. *Stevenson* (*ubi sup.*). I do not understand that to be so. I think that what was there laid down must be read with regard to the facts of that case, and that all that was meant was that the shipper's or charterer's obligation is only to have his cargo ready when the ship is ready to receive it in ordinary course, and that he is not bound to be prepared for a contingency or fortuitous circumstance not contemplated by either of the parties. There is nothing to be found in the charter-party in the present case which, in my opinion, should be held to qualify this absolute obligation of the respondents. The exception of riot, &c., "and other causes beyond the control of the charterers which may delay her loading," in my opinion applies only to the process of loading the cargo when ready and not to delay in providing the cargo. It has frequently been laid down, and may be taken to be established law, that the mere existence of circumstances beyond the control of the shipper, which make it impracticable for him to have his cargo ready, will not relieve him from paying damages for breach of his obligation: (*Adams* v. *Royal Mail Steam Packet Company*, 5 C. B. N. S. 492; and *Ford* v. *Cotesworth*, 3 Mar. Law Cas. O. S. 190, 468; 19 L. T. Rep. 634; L. Rep. 4 Q. B. 127). In *Gardiner* v. *Macfarlane* (1893, 20 R. 414) the circumstances were very similar to those in the present case. The Lord Ordinary (Lord Low) there says: "I am of opinion that difficulty in obtaining a cargo on account of the output at the colliery which the charterers had selected being restricted is a matter with which the shipowners are not concerned, and the consequence of any delay arising therefrom must fall on the charterers." I think that this is a correct statement of the law, and that it is applicable to the present case.

It has, however, been held that where the cargo is to be provided from a particular place and the charter has been made in view of circumstances by which, as both parties know, the procuring of a cargo from that place may be delayed, the charterer is excused, and in that case the known causes of delay may be taken into account in considering whether the cargo was furnished within a reasonable time: (*Harris* v. *Dresman*, 23 L. J. 210, Ex.) I think that the opinion of the Lord President was founded on some such consideration. His Lordship thought that there were circumstances in this case known to both parties which prevented the obligation of the charterers possessing the absolute character alleged. The learned judge referred to the evidence on cross-examination of Mr. Clark, a member of the firm who were managing owners of the vessel and effected the charter-party with the respondents for this voyage. Mr. Clark appears to have had some previous experience with regard to sailing ships loading cargoes of coal at Newcastle; but he did not know with what colliery the respondents would make arrangements, and, in fact, he did not know the various collieries at Newcastle, and only knew some of them by name. But even if he must be taken to have known the usual and customary manner or the conditions of loading at the port, that is not the point. The complaint here is not of delay in loading but of delay in procuring the cargo. The respondents, it should be added, do not appear themselves to have been aware, when they effected the charter, of any difficulty that there might be in procuring the cargo at the colliery which they selected. It is proved by the evidence of the berthing master at Newcastle that he could have given a berth to the *Ardandearg* on the 14th July 1900, the day following her arrival in the port, if coal had been ready for her. But it appears that by a very reasonable regulation of the port a vessel is not allowed to occupy

a loading berth until she has received a loading order from the colliery. I am not sure that I clearly understand the argument which the respondents found upon this regulation. It seems to be argued that the ship was not ready to be loaded until the cargo was ready for her, and therefore (I suppose) the cargo was provided as soon as she was ready for it, which looks like an argument in a circle. Putting what is in truth the same argument in another way, it is also said that by the regulation "the turn of the colliery" becomes incorporated in and forms part of "the turn of the port," and therefore that the delay took place from the practice of the port over which the respondents have no control, and which they had no power to displace for the benefit of this particular ship. This, I think, is the main ground of Lord Kinnear's opinion. But however the argument is put I cannot accede to it. It appears to me that it is only putting the old question in another way. By whose default was it that the ship did not get a loading order? The answer, in my opinion, can only be that it was the default of the respondents in not providing the cargo when the ship was ready to go on the berth to receive it. It is said that the respondents did nothing unreasonable. Be it so. But through their misfortune (it may be) they have failed to perform their contract with the shipowners. In short, the respondents have not satisfied my mind that it was any part of their contract with the appellants that the latter should await the turn of the colliery or take the risk of the cargo not being ready. And I am of opinion that, in accordance with the authorities which were cited in the course of the argument, the respondents are liable to pay damages to the appellants for the detention of the ship. I am, therefore, of opinion that the interlocutor of the Inner House should be reversed, and the interlocutor of the Lord Ordinary restored with costs here and below.

Lord JAMES.—My Lords: I concur.

Lord ROBERTSON.—My Lords: I concur.

Judgment appealed from reversed. Judgment of the Lord Ordinary restored, with costs here and below.

Solicitors for the appellants, *Lowless* and *Co.*, for *J.* and *J. Ross*, Edinburgh.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Campbell Faill*, Edinburgh.

May 26, 29, *and Aug.* 4, 1905.

(Before Lords MACNAGHTEN, DAVEY, JAMES OF HEREFORD, and ROBERTSON.)

STRÖM BRUKS AKTIE BOLAG *v.* HUTCHISON. (*a*)

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

Carriage of goods—Breach of contract of carriage—Measure of damages—Remoteness—Penalty clause in contract.

The respondents had agreed by charter-party to load a cargo of goods of the appellants at a fixed time at a port in the Baltic for conveyance to Cardiff. They did not provide a ship as agreed, and the customers of the appellants, to whom they had sold the goods, bought goods against them, and recovered the price and expenses from the appellants.

The charter-party contained a clause: "Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith."

Held (reversing the judgment of the court below), that the appellants were entitled to recover from the respondents the amount which they had been compelled to pay to their customers.(*a*)

APPEAL from a judgment of the First Division of the Court of Session in Scotland, consisting of the Lord President (Lord Kinross), Lords Adam, M'Laren, and Kinnear, who had reversed a judgment of the Lord Ordinary (Lord Kyllachy). The case is reported 41 Sc. L. Rep. 274.

The respondents were shipowners in Glasgow, and were sued by the pursuers (appellants), a firm of manufacturers of wood pulp in Sweden, for damages for breach of contract contained in a charter-party concluded between the parties on the 20th Jan. 1900.

The pursuers concluded for 715*l.* 8*s.* 2*d.* of damages, and that sum was awarded them by the Lord Ordinary, but was reduced upon a reclaiming note by the First Division of the Court of Session to the sum of 50*l.*

Against the latter judgment the pursuers appealed.

The charter-party provided that the defendants were to send ships to Sweden, and there load from the pursuers 900 to 1000 tons of wood pulp, to be carried to this country by two shipments—the first in May, and the second in Aug.-Sept. 1900. The vessel was to be at liberty to call at any port or ports both before and after loading the cargo.

The only other clause that requires special mention stipulated as follows:

Penalty for non-performance of this agreement, estimated amount of freight on quantity not shipped in accordance herewith.

The respondents supplied a vessel, and received and delivered the first cargo. They did not, however, provide a ship in August-September for the second cargo. They offered to supply a ship in October. The respondents had, therefore, to admit a breach of contract, but they maintained that the pursuers had failed to prove more than nominal damages.

The damages which the appellants claimed to recover from the respondents were damages which they paid to their customers in this country (Owen and Co. Limited), to whom they had contracted to supply pulp.

The respondents maintained that such damages were remote and in amount excessive, and that *separatim* and in any event the appellants could not recover more than the amount of freight on the quantity not shipped.

J. A. Hamilton, K.C. and *J. Robertson Christie* (of the Scotch Bar) appeared for the appellants,

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

(*a*) It is to be noticed that Lord Davey says that from this is to be deducted "the value of the goods in Sweden and the amount of the freight and insurance." This does not seem in accordance with the judgment of the Lord Ordinary which was restored by the House of Lords.—ED.

and argued that the judgment of the Lord Ordinary was right, and that these damages were recoverable. The rule in Scotland as to notice of a contract over is not so strict as the English rule. They cited

Leckie v. *Ogilvy*, 1897, 3 Com. Cas. 29;
Delaurier v. *Wyllie*, 17 R. 167; (1889) 27 Sc. L. Rep. 148;
Ireland v. *Livingstone*, 1 Asp. Mar. Law Cas. 389; 15 L. T. Rep. 206; L. Rep. 5 H. L. 395;
Godard v. *Gray*, 24 L. T. Rep. 89; L. Rep. 6 Q. B. 139;
Harrison v. *Wright*, 13 East, 343; 12 R. R. 369;
Dimech v. *Corlett*, 12 Moo. P. C. 199;
British Columbia Sawmill Company v. *Nettleship*, 3 Mar. Law Cas. O. S. 65; 18 L. T. Rep. 604; L. Rep. 3 C. P. 499;
Dunn v. *Bucknall Brothers*, 9 Asp. Mar. Law Cas. 336; 87 L. T. Rep. 497; (1902) 2 K. B. 614;
Dunlop v. *Higgins*, 1 H. of L. Cas. 381.

The *Lord Advocate* (Scott-Dickson, K.C.) and *Bailhache*, for the respondents, contended that a carrier is not liable for damages caused by the breach of a special contract not communicated to him. The damages claimed are too remote and excessive, and in any case the appellants cannot recover more than the amount provided for by the penalty clause. They referred to

Horne v. *Midland Railway Company*, 28 L. T. Rep. 312; L. Rep. 8 C. P. 131;
Rodocanachi v. *Milburn Brothers*, 6 Asp. Mar. Law Cas. 100, 56 L. T. Rep. 594; 18 Q. B. Div. 67;
Bostock v. *Nicholson*, 91 L. T. Rep. 626; (1904) 1 K. B. 725;
Watt v. *Mitchell*, 1 D. 1157;
Warin v. *Forrester*, 4 R. 190;
Duff v. *Iron and Steel Fencing Company*, 19 R. 199;
Ireland v. *Merryton Coal Company*, 21 R. 989;
Dunn v. *Anderston Foundry Company*, 21 R. 880;
Den of Ogil Company v. *Caledonian Railway Company*, 5 F. 99; 40 Sc. L. Rep. 72.

Hamilton, K.C. in reply.—The case is covered by *Hadley* v. *Baxendale* (9 Ex. 341).

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

Aug. 4.—Their Lordships gave judgment as follows:—

Lord MACNAGHTEN.—My Lords: The appellants, who were pursuers in the action, are a Swedish firm carrying on business as manufacturers of wood pulp at Stocka. They claim damages from the respondents, shipowners at Glasgow, for breach of a contract of carriage. The contract was dated the 20th Jan. 1900. By it the respondents agreed to carry 900-1000 tons (charterers' option) of wood pulp to Cardiff. The cargo was to be lifted in two shipments, one in May f.o.w.. the second in August-September (owners' option). The ship was to have liberty to call at any port or ports in any order, to tow and assist vessels in distress, and to deviate for the purpose of saving life or property. The owners were to wire shippers of the cargo, Ströms Bruk, Stocka, six days' notice of readiness, also ship's departure from last port. This contract it seems was made by the appellants with the view of enabling them to fulfil a contract, dated the 4th Dec. 1899, for the sale and delivery of 900-1000 tons of wood pulp to Thomas Owen and Co. Limited, of Cardiff. The memorandum of sale contained a column of printed notes, opposite which were written particulars of the special terms of the contract. Against the note "mode and place of delivery" were the words "c.i.f., Penarth Dock, Cardiff," and against the note "time of delivery" the words "in two cargoes, first open water, and August-September 1900." The first shipment—a shipment of 500 tons—was made in due course and accepted. The respondents failed to perform their obligations with regard to the second shipment. The breach is not disputed. The only question is what damages, if any, are recoverable under the circumstances of the case. On the 24th Sept. 1900—that is, six days before the end of the month—it became evident that the respondents, who had given no "notice of readiness" or of "ship's departure from last port," were not in a position to fulfil their contract, and, consequently, that the appellants would not be in a position to fulfil their contract with Thomas Owen and Co. by means of the shipment which the respondents had contracted to deliver. In these circumstances Thomas Owen and Co., who were entitled to claim 400 tons more, bought in against the appellants in several parcels 367 tons of wood pulp for consumption at their works. There seems to be no market for wood pulp at Cardiff. They were, therefore, compelled to purchase as best they could in Manchester, Liverpool, and London, and to pay, in addition, the cost of carriage. It is not disputed that Thomas Owen and Co. acted reasonably, and that the pulp required could not have been bought at less cost. Thomas Owen and Co. made a claim against the appellants for 830*l.* 13*s.* 5*d.* in respect of the 367 tons which they had bought in. The appellants, as they were bound to do, paid them the amount of their claim. Then the appellants claimed over against the respondents. Their claim was for 715*l.* 8*s.* 2*d.* They brought into account the 830*l.* 13*s.* 5*d.* which they had to pay Thomas Owen and Co., and also 9*l.* 9*s.* 9*d.* for extra freight on the balance of thirty-three tons which Thomas Owen and Co. accepted at a later date, making up the full 400 tons to which they were entitled. On the other hand, the appellants, unnecessarily as it appears, gave credit for 125*l.* as profit on the 100 tons which the respondents were bound to carry but the appellants were not bound to deliver.

The respondents, however, refused to make compensation for their breach of contract, and then this action was brought. In the first place the respondents contended that, by the terms of the charter-party, damages for breach of contract was limited to the estimated amount of freight on quantity not shipped. Both courts have rejected this contention, treating the question as settled by authority. On this point I have nothing to add to what was said by the Lord Ordinary and by Lord M'Laren in the Court of Session. The question as to the measure of damages gave rise to a serious difference of opinion. The Lord Ordinary held the appellants entitled to recover the amount of their claim, with costs. In the Court of Session they were only awarded 50*l.* as nominal damages, and ordered to pay substantially the whole costs of the action. The decision proceeded on the ground that in the view of the court the appellants' contract with the respondents did not happen to

coincide exactly with their contract with Thomas Owen and Co. The loss which they sustained was therefore, it was said, due to their own fault. The true cause of their inability "to make delivery in terms of their contract was that they had not taken the shipowners bound to deliver the cargo within the time prescribed in their contract with Messrs. Owen and Co." Lord Kinnear, indeed, went so far as to say that "the one loss had nothing to do with the other." The learned counsel for the appellants in his opening address referred to the case of *Dunlop* v. *Higgins* (1 H. of L. Cas. 381), and contended that, according to the law of Scotland as explained by Lord Cottenham, a party disappointed by a breach of contract was entitled to compensation on a more liberal scale than would be allowed by the law of England. The case of *Dunlop* v. *Higgins* was decided in 1848.

Whatever may have been the state of the law at that date, I do not think the learned counsel succeeded in persuading your Lordships that there is any difference in the law of the two countries at the present time on such a question as that under consideration. The view enunciated by Lord Cottenham is certainly not law in England. Whenever that view has been referred to by counsel as a guide in an English case it has been unfavourably criticised, and notably by Willes, J. in *Borries* v. *Hutchinson* (18 C. B. N. S. 445, at p. 452) and Compton, J. in *Williamson* v. *Reynolds* (12 L. T. Rep. 729; 6 B. & S. 495, at p. 502). So far as I could gather from the learned counsel who addressed the House in the present case, *Dunlop* v. *Higgins* has rarely, if ever, been cited as an authority in Scotland. For the decision of the question before your Lordships, it will be enough, I think, to appeal to the rules as to the measure of damages which have been accepted in Scotland as well as in England, asking your Lordships' attention to the position of the litigant parties and the claim which has actually been made. Your Lordships will observe that this is not a case like many in the books where the carrier is bound to accept the goods, and some unforeseen accident by land or sea has prevented due delivery. It is a case where persons free to contract or not to contract have deliberately made a bargain and deliberately broken it for their own convenience, alleging only by way of excuse that they did not think the consequences would be so serious, and rather blaming the party they have disappointed for not keeping them up to the mark. True it is they said you made pressing inquiries as to the fulfilment of the contract, but that means nothing. You "merely requested us to hurry the boat, which is a very ordinary request." Then your Lordships will observe that, although it is not suggested that the respondents knew the particular terms of the bargain with Thomas Owen and Co., they must have known, as every business man in their position would know, that in all probability the goods were being dispatched to England in order to fulfil some contract either actually in existence at the time or in immediate contemplation, so that a breach of their contract with the manufacturers in Sweden might cause a breach of contract with some manufacturer or merchant in England, and lead to a claim of damages by him against the shippers of the goods. The respondents, therefore, were certainly not justified in assuming that punctuality was of little moment. Now, if the respondents had given timely notice of their inability or unwillingness to perform their contract, the appellants might possibly have secured other means of transport. In that case the measure of damages would probably have been just what was claimed in the case of the thirty-three tons—merely the difference in freight. But at the time when the appellants received notice of the contract having been broken, it would not have been possible for them to get a ship to go to Stocka so as to reach that port by the end of September. "Practically speaking," says Mr. Mackintosh, an independent witness who had considerable experience with shipping business in Baltic ports, "it was quite impossible in those days." So the rule laid down in *Rice* v. *Baxendale* (7 H. & N. 96) must be applied. That rule is this: "Setting aside all special damage, the natural and fair measure of damages is the value of the goods at the place and time at which they ought to have been delivered to the owner": (per Blackburn, J. in *O'Hanlan* v. *Great Western Railway Company*, 12 L. T. Rep. 490; 6 B. & S. 484).

The appellants' claim is made on that footing. All they want is to be protected against loss. They claim for the extra cost of supply at the stipulated time and at the agreed place of delivery goods as nearly as possible of the same description and quality as those which the respondents had undertaken to deliver. The appellants, as I said, do not claim profits. They do not even make any claim for the warehousing and insurance of the goods left on their hands, or for diminution in the value of those goods by reason of the subsequent fall in the market. They even concede to the respondents the profit in the extra 100 tons, to which, as far as I can see, the respondents can have no possible claim. In the Court of Session the respondents advanced with success a most ingenious argument. They said: "We have now discovered the exact terms of your contract with Thomas Owen and Co. Those terms do not correspond precisely with the terms of your contract with us. We might have fulfilled our contract to the very letter, and still you might have been left in the lurch as regards your contract with Thomas Owen and Co. We might have put off shipping your wood pulp to the very last day in September, and then we might have gone about picking up cargo at various ports in any order we pleased and so without deviating from our voyage, as under certain circumstances we were at liberty to do, it might have been rather late in the year before your wood pulp would have been delivered at Cardiff. You have claimed special damages—you have not proved the special damage you allege, and you have not pleaded general damage. So, though we have not thought it worth our while to appeal against the liberal award which has been made in your favour under the head of nominal damages, you are really entitled to nothing at all."

It seems to me that this argument is really founded on an inaccurate use, or perhaps I should say a less accurate application of the terms "special damage" and "general damage." That division of damages is more appropriate, I think, to cases of tort than to cases of contract. "General damages," as I understand the term, are such as the law will presume to

be the direct natural or probable consequence of the act complained of. "Special damages," on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and therefore they must be claimed specially and proved strictly. In cases of contract special or exceptional damages cannot be claimed unless such damages were within the contemplation of both parties at the time of the contract. Now, the appellants are not claiming here exceptional damages. They are claiming nothing but ordinary damages ascertained and limited by the special circumstances of the case. No doubt they are claiming over against the respondents the damages which they have had to pay to Thomas Owen and Co. But if there had been no contract at all between the appellants and Thomas Owen and Co., and Thomas Owen and Co. had made a similar contract with some third person who failed to perform his bargain, and Thomas Owen and Co. had bought against that third person just as they did against the appellants, their purchases would have been the best evidence possible of the measure of damages resulting fron the respondents' breach of contract. I am unable to see what difference it can make whether you claim damages generally and show that an award of general damages would include and cover a special loss from which you seek relief or whether you seek compensation for a special loss and show that the loss would be more than covered or compensated by an award of general damages. I do not think there is any substance in the respondents' argument. I prefer to rest my judgment on this broad ground. But I am not satisfied that the appellants have not claimed damages in general terms if it be necessary for them to do so. The first plea in law seems to be a claim for general damages and certainly no authority was cited to show that in such a case as this the court would refuse to assist the pursuer. Nor am I satisfied that the contract with Thomas Owen and Co. does not correspond exactly with the contract of carriage. There was evidence to the effect that according to mercantile usage the contract with Thomas Owen and Co., being a c.i.f. contract, would be satisfied by the delivery of the goods on board ship at Stocka at any time in September. The delivery of the second shipment would thus correspond with the delivery of the first shipment, which was to be "first open water." Certainly, Thomas Owen and Co. seem to have taken that view at first. For on the 5th Sept. 1900 they write from Cardiff: "As you are aware the balance of the Ströms sulphite is to shipped in August-September, and we shall therefore be glad if you will kindly tell us when we may expect the steamer to arrive here." Moreover, their manager, in his examination, admitted that they would have been satisfied with the shipment if it had been dispatched from Stocka before the end of September. I doubt, however, whether the court could decide that question in this action, and at any rate I do not think that the court ought to be astute in defeating an honest claim in favour of persons who have wilfully disregarded their obligations. I think that the appeal should be allowed, and the judgment of the Lord Ordinary restored with costs here and below, and I move your Lordships accordingly.

Lord DAVEY.—My Lords: The only question on this appeal is the amount of damages payable by the respondents for an admitted breach of contract. The conclusion which I have formed from a consideration of the cases cited at the Bar is that in recent years at any rate the English decisions as to the measure of damages have been followed by the Scotch courts, but with some elasticity in the application of them, and, if I may respectfully say so, I think it of great importance that in commercial cases there should be uniformity in the administration of the law. The learned judges in the Inner House agree with the Lord Ordinary in thinking that the respondents, when they entered into the contract of affreightment with the appellants, must be presumed to have contemplated that the appellants were shipping the goods in performance of a contract limited as to time of delivery. And having regard to the evidence as to the character of this pulp business, I see no reason to differ from this conclusion. But the learned judges differ widely from the Lord Ordinary in holding that the loss for which damages are claimed in the pleadings was not consequent on the respondents' failure to fulfil their contract. If, however, the Lord Ordinary has put the right construction on the contract of the appellants with their purchasers in Cardiff it is not disputed that he is right in his conclusion. The difficulty arises from a cause of which your Lordships have had frequent experience in commercial contracts—viz., the use of a printed form which is not exactly adapted to the particular case without making the necessary alterations. The material words of the contract are "Mode and place of delivery" (in print), "c.i.f. Penarth Dock, Cardiff" (in writing), "Time of Delivery" (in print), "In two cargoes, first open water and Aug./Sept. 1900" (in writing). Lord M'Laren says that he is unable to see how these words as regards the second delivery can mean anything but delivery at Cardiff before the end of September. But it is admitted that the words "first open water" mean by a shipment then made—*i.e.*, when the port of shipment is first free from ice—and it is equally easy to say with the Lord Ordinary that the words "Aug./Sept." must refer also to a shipment made in either of those months, or (in other words) that the time of delivery is defined by the date of shipment and not by the date of arrival. On the whole, I prefer the construction put upon the words by the Lord Ordinary, and I think that construction is aided by the fact of the contract being "c.i.f." with its recognised legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance, with a credit note for the freight, as explained by Lord Blackburn in *Ireland* v. *Livingstone* (15 L. T. Rep. 206; L. Rep. 5 H. L. 395). But I think that Mr. Hamilton perhaps put his argument too high in treating this consideration as conclusive. But I agree with Lord Macnaghten that on any view of the contract the interlocutor of the Lord Ordinary should have been sustained.

The learned judges have not laid down any particular measure of damages, for in the view which they have taken that the failure of the appellants to fulfil their contract with Messrs. Owen was not the consequence of the default of the respondents, as alleged in the condescen-

dence, Lord M'Laren held there was no evidence of any other damages, and gave 50*l.* as an estimated sum for any inconvenience the appellants have been put to, and this was acquiesced in by Lord Kinnear with some misgivings. I cannot agree that there is no evidence upon which the court could act. I am of opinion that the proper measure of damages would have been the cost of replacing the goods at their place of destination at the time when they ought to have arrived, less the value of the goods in Sweden and the amount of the freight and insurance. There was evidence that it was practically impossible to obtain another vessel to take the goods from Stocka at that time of year, and I think therefore that the appellants were justified in buying in or (which is the same thing for this purpose) allowing their purchasers to buy in as soon as it was apparent (as it was before the end of September) that the respondents could not perform their contract. And I think that the actual purchases made might properly be taken as evidence of the cost of replacing the goods in Cardiff in the middle of the month of October. On the other hand, the appellants had no other buyers ready to take their 400 tons of pulp, and there was evidence that it would have been a speculative and very risky thing to send that quantity to Cardiff or elsewhere for sale, or without having secured a purchaser, and that prices subsequently fell. I think, therefore, that there was evidence upon which the court might, without any injustice to the respondents, have found that the value of the goods in Sweden with freight and insurance would not exceed the price in Messrs. Owen's contract. I am not, therefore, disposed to disagree with the alternative view taken by the Lord Ordinary if his construction of the appellants' contract with the purchasers be not adopted. I should add that I am less impressed by the pleading difficulty than I might have been had I not found that neither the Lord Ordinary nor the Inner House considered themselves precluded from giving the pursuers damages other than those arising directly out of the contract with Messrs. Owen. On these grounds I am of opinion that the interlocutor of the Inner House should be reversed, and that of the Lord Ordinary restored with costs here and below.

Lord JAMES.—My Lords: I concur.

Lord ROBERTSON.—My Lords: I also concur.

Judgment appealed from reversed. Judgment of the Lord Ordinary restored, with costs here and below.

Solicitors for the appellants, *Rollit, Sons,* and *Burroughs,* for *James F. Mackey,* Edinburgh.

Solicitors for the respondents, *Holman, Birdwood,* and *Co.,* for *J.* and *J. Ross,* Edinburgh.

Supreme Court of Judicature.

COURT OF APPEAL.

April 5 and 6, 1905.

(Before COLLINS, M.R., MATHEW and COZENS-HARDY, L.JJ.)

THE MINNETONKA. (*a*)

Collision—Both to blame—Abandonment of voyage—Payment by cargo owners to owners of ship abandoning voyage—Action by cargo owners against owners of other ship—Recovery of sum paid by cargo owners.

The steamship U. *came into collision with the steamship* M., *and sustained damage which would have taken some time to repair, but did not put an end to the right of the shipowner to complete the voyage and so earn the freight. The cargo was being carried on the terms that the owners of the* U. *were not to be liable for damage caused by negligence. If the voyage had been proceeded with the cargo owners would have had to have contributed a sum in respect of general average, and they would have suffered loss by the deterioration of the cargo. The owners of the cargo therefore agreed with the owners of the* U. *that they should pay them a sum less than that which they would have had to contribute in general average, in order that the voyage should be treated as abandoned. Cross-actions for damage were then instituted between the owners of the* U. *and the owners of the* M., *in which both vessels were held to blame. The owners of the* U. *in those proceedings recovered half the loss they had sustained by reason of the collision. The owners of the cargo on the* U. *then sued the owners of the* M. *for the damage sustained by the cargo by reason of the collision, and included in their claim the adjusted proportion of the sum they had agreed to pay to the shipowners in respect of the abandonment of the voyage. That action was settled on the terms that both the cargo owners and the* M. *were to blame, and the cargo owners' claim was referred to the registrar. On the reference the registrar disallowed the sum the cargo owners had paid to the owners of the* U. *in respect of the abandonment of the voyage. The owners of the cargo appealed, and the judge, after sending the claim back to the registrar for a further report, confirmed the registrar's report.*

The cargo owners appealed to the Court of Appeal.

Held, reversing the decision of the court below, that the amount claimed was the result of a reasonable arrangement to minimise the loss, and was such a consequence of the collision that the cargo owners were entitled to recover from the owners of the M., *on the basis that both were to blame for the collision, half of their adjusted proportion of the sum so paid.*

The Marpessa, 66 *L. T. Rep.* 356; 7 *Asp. Mar. Law Cas.* 155; (1891) *P.* 403, *considered.*

Judgment of Bucknill, J. reversed.

APPEAL by plaintiffs, the commissioners for executing the office of the Lord High Admiral of

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

the United Kingdom of Great Britain and Ireland, owners of a cargo of coal laden on board the steamship *Uskmoor*, against a decision of Bucknill, J. confirming a report of the assistant registrar in favour of the defendants, the owners of the *Minnetonka*.

The case is reported in the court below: *The Minnetonka* (90 L. T. Rep. 354; 9 Asp. Mar. Law Cas. 544; (1904) P. 202).

The facts are as follows: On the 15th May 1902 the Admiralty chartered the *Uskmoor*, to carry a cargo of coal from the Tyne to Cape Town, the owners to receive one-third of the freight of 16*s.* per ton, if required, less 3 per cent. by draft at three days' sight upon the Accountant-General of the Navy on signing bill of lading. The quantity of the cargo was about 4460 tons.

The *Uskmoor*, while on the way from the Tyne to Cape Town, was on the 9th June proceeding down the English Channel when she came into collision off Beachy Head with the *Minnetonka*, and was so damaged that she had to put back to the Thames. On her arrival it was found necessary to dry dock her, and to do that it was necessary to discharge the whole of her cargo, and the Director of Navy Contracts was informed that the repairs would take six weeks. The Director of Navy Contracts thereupon wrote to the managing owners that the advisability of selling the coal and considering the voyage terminated would have to be considered, so as to avoid the expense of storage and reshipping. To this letter the managing owners of the *Uskmoor* replied that they were quite prepared to carry out the voyage and earn their freight, but if the Admiralty wished to terminate their contract the owners would do so for the consideration of 7*s.* 6*d.* per ton as full freight, which would have amounted to 1672*l.* 10*s.* A few days later the managing owners agreed to take 1000*l.* in respect of freight, the Admiralty giving them another cargo to replace the one they were carrying at the 16*s.* rate, or more if freights should rise. The underwriters also agreed to the proposal "to terminate and pay the shipowners 4*s.* 6*d.* a ton, which amount is to be apportioned as a substituted expense over all interests of ship, cargo, and freight."

On the 18th June the Director of Navy contracts wrote to the managing owners a letter which is set out in full in the report of the case in the court below—*Minnetonka* (*ubi sup.*)—which stated that "to minimise loss in the interests of all concerned the Admiralty is prepared to agree to the following arrangement, to which it is understood that you and the underwriters have given your concurrence—viz., the voyage to be terminated and the coal sold, the owners to be paid the sum of 1000*l.*, to be apportioned as a substituted expense in lieu of those which would otherwise have been incurred."

Further correspondence took place which resulted in the parties agreeing to substitute 1000*l.* for the expenses which it was assumed would have been incurred in respect of the cargo if the voyage had not been abandoned and which would have amounted to 1195*l.* 18*s.* 4*d.* for hire of barges, shifting the cargo, and reshipping it. The sum of 1195*l.* 18*s.* 4*d.* would have fallen on the different interests of the ship, freight, and cargo as follows: 219*l.* 11*s.* 3*d.* on ship, 644*l.* 2*s.* 1*d.* on freight, and 332*l.* 5*s.* on the cargo, that is the plaintiffs in the present action. On the 1000*l.* being substituted in the place of the 1195*l.* 18*s.* 4*d.* and apportioned among the three interests, the plaintiffs, the cargo owners, would have paid a sum of 276*l.* 18*s.* 6*d.* only in respect of charges on the cargo to the owners of the *Uskmoor*.

Cross-actions of damage by collision were commenced by the owners of the *Minnetonka* and *Uskmoor*, and were heard on the 9th July 1902, reported as *The Uskmoor* (87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250), both ships being found to blame.

After the trial the claims on both ships were referred to the registrar for the claims to be assessed, and that made by the owners of the *Uskmoor* was allowed at 2426*l.* made up as follows: 716*l.* cost of discharging cargo, 590*l.* in respect of other expenses, and 1120*l.* in respect of demurrage, a moiety of which sums, under the decree of both to blame, had to be paid by the owners of the *Minnetonka*.

On the 29th April 1903 the Admiralty issued a writ, as owners of the cargo on the *Uskmoor*, in respect of the damage they had sustained by reason of the collision; that action was settled on the terms of both vessels being to blame, and the damages were referred to the registrar.

The claim put forward by the Admiralty, as owners of the cargo against the owners of the *Minnetonka*, was made up as follows: 447*l.* 1*s.* 2*d.* the difference between the cost, 2440*l.* 11*s.* 2*d.*, and the selling price, 1993*l.* 10*s.*, of the coal, 5*l.* 5*s.* for survey fees, and 1000*l.*, being the amount agreed to be paid by the Admiralty to the owners of the *Uskmoor* in view of the voyage being abandoned.

The report of the assistant registrar before whom the reference was held is set out in full in the report of the case below: (*The Minnetonka*, *ubi sup.*). He held that the difference between the cost of the coal and the price realised was not recoverable because that loss had been caused by the cargo owner not exercising reasonable diligence in accepting a better offer than that ultimately obtained, but he allowed the claim for survey fees, half of which were recoverable from the owners of the *Minnetonka*.

With regard to the 1000*l.* agreed to be paid by the Admiralty to the shipowner for abandoning the voyage, the report stated:

> It is not clear from the evidence that the whole of this sum was to be paid. In our view of the case, however, this doubt is not material, for we are of opinion that, under all the circumstances, the reasonable and businesslike course for all parties was for the cargo to be sold in the Thames, and the payment of any sum to the shipowner by the cargo owner was not a consequence of the collision for which the wrongdoer is liable. The shipowner has recovered from the wrongdoer the cost of repairs and damages for the detention of his ship; and at the end of the period of detention he was in a position to, and did, take up a fresh charter. The duty of the shipowner being to carry the cargo to its destination, it was to his advantage to make arrangements with the cargo owners whereby he would be free from this duty and be able to take a new cargo when the repairs were finished. Any payment, therefore, made by the cargo owners to the shipowners is not a natural and reasonable result of the collision, and, therefore, is not recoverable against the wrongdoer.

The claim for the 1000*l.* was therefore disallowed.

The Admiralty appealed, and on the 13th July 1903 a motion on behalf of the Admiralty to vary the report so far as it referred to the claim for 1000*l.* came before Bucknill, J.

After argument the learned judge referred the report back to the assistant registrar to ascertain whether any part of the sum of 276*l.* 18*s.* 4*d.*, a moiety of which was claimed by the cargo owners, had been already allowed to the owners of the *Uskmoor* in their claim against the *Minnetonka*.

The assistant registrar in his further report, the material parts of which are set out at length in the report of the case in the court below, stated that "on the claim of the *Uskmoor* only the actual expenses incurred for discharging the cargo and for the hire of barges were allowed, no part of the present claim had been dealt with in the ship's reference," though all sums in respect of loss of freight and for expenses at the port of loading were allowed to the shipowners. The report also found that the voyage was not commercially at an end; that on the 18th June the repairs were expected to take six weeks; that the 1000*l.* was agreed to be paid on the terms contained in the letter of the 18th June; that the solicitors for the owners of the *Uskmoor* stated that the Admiralty, as cargo owners, would be called upon to pay their share; that it was reasonable and for the benefit of all concerned that the voyage should be abandoned, so that the loss to all parties might be minimised; he also found that "the agreement by the Admiralty to pay 1000*l.*, or a part thereof, was not a reasonable agreement, because the object of the abandonment of the voyage was to save future expenses, and it was unreasonable for the cargo owners to pay any sum to the shipowners, since it was the duty of the shipowners to take all measures necessary to enable them to carry the cargo to its destination, and, as the voyage was not commercially at an end, the cargo owners could have insisted on their cargo being carried to its destination without any payment to the shipowners except that of the agreed freight."

The assistant registrar in his report further found that "the agreement, so far as it relates to the payment of 1000*l.*, or any part thereof, was one arising out of the relation between ship and cargo, and that the collision was not the cause of it, and that the sum claimed is inadmissible as a head of damage in an action against the wrongdoing ship; that, by the agreement made in June 1902, the owners of the *Uskmoor* recovered from the owners of the *Minnetonka* a complete indemnity for all damages actually incurred arising out of the collision; and that "that indemnity was obtained on the basis of the voyage being abandoned, and included all loss of expenses and all loss of profits from the date of eleven days before collision when the *Uskmoor* commenced her voyage by bunkering in the Tyne."

The Admiralty appealed against the further report, but on a motion in objection to the report Bucknill, J. affirmed the decision of the assistant registrar and dismissed the appeal with costs, on the ground that the Admiralty, in respect of the claim of 276*l.* 18*s.* 4*d.*, the part of the 1000*l.* due from the Admiralty as cargo owners to the owners of the *Uskmoor*, had failed to prove that that sum was a loss directly sustained in consequence of the wrongdoing of those in charge of the *Minnetonka*.

The Admiralty appealed to the Court of Appeal.

Acland, K.C. and *Wills* for the appellants, the Admiralty, the owners of cargo laden on the *Uskmoor*.—The sum agreed to be paid by the Admiralty, the cargo owners, is a liability incurred in consequence of the collision. The owners of the *Minnetonka* are liable for half the sum—276*l.* 18*s.* 4*d.*—agreed to be paid:

The Milan, 1 Mar. Law Cas. O. S. 185; 5 L. T. Rep. 590; Lush. 388.

They are liable for that amount, for the sum agreed to be paid is a sum paid in substitution for an expense which would have been recoverable if the cargo had been actually carried:

The Thuringia, 26 L. T. Rep. 446; 1 Asp. Mar. Law Cas. 283.

After the collision the owners of the *Uskmoor* could have insisted on carrying this particular coal to the Cape to earn their freight. That circumstance distinguishes this case from that of *Jackson* v. *Union Marine Insurance Company* (31 L. T. Rep. 789; 2 Asp. Mar. Law Cas. 435; L. Rep. 10 C. P. 125), in which the repairs of the ship would have taken so long that the voyage was commercially ended by the accident. The Admiralty, therefore, could not put an end to the charter, and they would have incurred expenses with regard to the cargo (*Svenden* v. *Wallace*, 52 L. T. Rep. 901; 5 Asp. Mar. Law Cas. 453; 10 App. Cas. 404) which they could have recovered from the owners of the *Minnetonka* if the voyage had been continued. They cannot be in a worse position by reason that they have minimised the loss which would in that case have fallen on the wrongdoer. It is suggested that the cargo owners were unreasonable in agreeing to pay any sum to the shipowners, because it was "the duty of the shipowner to take all measures necessary to enable him to carry on the cargo to its destination," and Carver's Carriage by Sea, s. 302, is cited as an authority for that proposition; but in that section the obligation on a master of a ship as representing the owner to do all he can in a port of refuge to repair and complete the voyage, so as to carry out the contract with the cargo owner, is being dealt with. The section does not deal with a case where, to minimise the loss it may be to the interest of the cargo owners that the voyage should be abandoned on terms such as were agreed to in this case. The obligation mentioned in Carver's Carriage by Sea, s. 302, on the master is well known: (*Notara* v. *Henderson*, 26 L. T. Rep. 442; 1 Asp. Mar. Law Cas. 278; L. Rep. 7 Q. B. 225), but it is not directly in point.

Aspinall, K.C. and *Arthur Pritchard* for the respondents, the owners of the *Minnetonka*.—The only damage which the cargo owners are entitled to recover in this action is the actual loss directly resulting from the collision. The actual losses resulting from the collision were paid to the *Uskmoor* by the owners of the *Minnetonka* as the result of the reference held in the action between the two ships, and included any claim the owners of the *Uskmoor* might have with regard to the cargo. The expenses which this sum represents are hypo-

thetical, and are something additional to the actual loss. The court always allows the shipowner something in respect of any special beneficial contract he may have entered into, and no doubt that has been done. This is an attempt to make the wrongdoer pay more than the total amount of the actual damage.

Acland, K.C. in reply.—The cargo owners were bound to act prudently and to minimise their loss, the sum paid to those who could have insisted on the voyage being continued to induce them to abandon it is less than the sum which the cargo owners would have paid if the voyage had been continued; the arrangement was therefore reasonable. The owners of the *Uskmoor* did no doubt receive a full indemnity in their action against the owners of the *Minnetonka* for the damages sustained by them as shipowners, but that does not prevent the cargo owners from also receiving such an indemnity in respect to the cargo. The cargo owners are therefore entitled to recover half of this sum.

Collins, M.R.—This is an appeal from the decision of Bucknill, J., who had been invited to review the report of the registrar and merchants on a matter which had been referred to them. The question arose in an Admiralty action between the Admiralty and a vessel called the *Minnetonka*, and the circumstances shortly are these: The Admiralty had chartered a vessel called the *Uskmoor* to carry a cargo of coal from the Tyne to South Africa, and when the *Uskmoor* was proceeding on her voyage down the English Channel near Beachy Head, she came into collision with the *Minnetonka*, with the result that she was seriously damaged and had to put back to London. Considerable time would have been spent in repairing the ship, but, as the ship was quite capable of being repaired, the shipowner had a right to insist on repairing it, that he might carry the cargo to its destination and earn the freight. One-third of the freight had been paid in advance. There was at the time an action pending between the owners of the *Uskmoor* and the *Minnetonka* with regard to the damage caused by the collision, and it had not then been decided who was to blame for the collision. Naturally the owners of the *Uskmoor* considered, and no doubt represented to the Admiralty, that their vessel was not to blame, and that the *Minnetonka* was alone to blame. So that at this time the rights as to the collision between the *Minnetonka* and the *Uskmoor* had not been ascertained, the *Uskmoor* had been disabled for the time being, but was capable of being repaired, and her owners were insisting on their right to repair her and carry her cargo on to its destination. In those circumstances a compromise was arranged between the Admiralty and the owners of the *Uskmoor*. Reasonable steps were taken to ascertain what would be the relative cost of carrying on the cargo to its destination, with the necessary delay for repairs, involving the transhipment and reshipment of the coal, and the possible deterioration of the cargo in the process, and a suggestion was made on the part of the owners of the *Uskmoor* that they should abandon the attempt to carry this cargo to its destination in consideration of a sum of about 276*l*. That was an offer to compromise, and terms were discussed. Ultimately a calculation was made as to the length of time during which the repairs would probably last, and as to the cost of warehousing the cargo during that period and of shipping and unshipping. A calculation having been made upon that basis, the owners of the *Uskmoor* and the Admiralty arrived at the conclusion that the reasonable thing, instead of pursuing the voyage and incurring this expense, was that they should agree upon a compromise involving the abandonment of the voyage. Having ascertained, by calculation according to the best estimate they could make, what the contribution of the cargo would be, upon an average statement, in the event of the voyage being continued, and having arrived at the conjectural figure of 332*l*. they arranged a compromise by which the Admiralty agreed to pay the owners of the *Uskmoor* 276*l*. By doing that they reduced the sum they would have had to pay on their calculation if the cargo was carried on to its destination, and they also avoided, as far as they were concerned, loss on account of the deterioration of the cargo. The arrangement was also advantageous to the shipowner, inasmuch as he was at liberty to get a cargo later on, as soon as the ship was repaired, and to get another cargo possibly at a better freight. At all events both sides saw the advantage of settling the matter at once upon the terms I have named, instead of each standing on his rights, with the possible consequence of no advantage to either party. If that was a reasonable compromise to make it seems to me that the amount of that compromise fairly measures the damages obtainable by the Admiralty against the wrongdoers, the owners of the *Minnetonka*.

There is a very important point in this case which did not come out in the court below, and which was elicited by a question put by Mathew, L.J. to counsel for the Admiralty—that is, that as between the Admiralty and the owners of the *Uskmoor*, the latter are protected by the exemptions in the charter-party from all liability for negligence, and that, therefore, in arranging the compromise between themselves and the owners of the *Uskmoor* the Admiralty had to regard the owners of the *Uskmoor* as persons who, as between the Admiralty and the owners of the *Uskmoor*, were free from blame, although the owners of the *Uskmoor*, as against the owners of the *Minnetonka*, were afterwards held partly to blame for the collision. That did not affect the rights of the owners of the *Uskmoor* as between themselves and the Admiralty, and therefore the Admiralty were not in a position to say, "You are not entitled to receive anything from us with regard to this collision, which was partly caused by your fault." The learned registrar's report was the basis of the argument addressed to the court below and confirmed by the learned judge, and, though the learned registrar had not allowed this sum to the Admiralty, we find as a fact that no part of the 276*l*. has been recovered by the owners of the *Uskmoor* from the owners of the *Minnetonka*, and the owners of the *Minnetonka* have not paid any part of that sum. Now, that being the fact, it gets rid, in my judgment, of a very formidable argument, if not the main argument, for the respondents in this case. They say it cannot be reasonable to have compromised upon such terms when the persons to whom you are going to pay 276*l*. when they receive it will

receive it in addition to a sum received by them on similar grounds in proceedings between them and the owners of the *Minnetonka*. For some time we were under the impression that if the owners of the *Minnetonka* were called upon to pay this sum they would be paying again to the Admiralty a sum already paid by them by virtue of proceedings taken by the owners of the *Uskmoor* against the owners of the *Minnetonka*. Now, however, we have carefully looked at the findings of the registrar on the matter of fact, and his findings distinctly negative any part of that sum of 276*l*. 18*s*. 4*d*. entering into any arrangement between the owners of the *Uskmoor* and the owners of the *Minnetonka*, or being paid by the owners of the *Minnetonka* to the owners of the *Uskmoor*.

Therefore, the case comes back to this. Does the arrangement made by the Admiralty represent a reasonable compromise between the parties at the time it was made? For reasons I have given I think it was a reasonable compromise; but the junior counsel for the respondents, in his very ingenious argument, took another point. He says, however reasonable the Admiralty may have been when they made the arrangement they were bound to readjust it in view of possible litigation between the owners of the *Uskmoor* and the owners of the *Minnetonka*, the fact not having been ascertained whether both were to blame or which. He says that some provision should have been inserted in the agreement to allow of its being readjusted in accordance with the result of that litigation; but when one comes to look at the point in respect of which that contention is made it seems to me it does not arise, because when we have once disposed of the fact that this sum did not come, and ought not to come, into discussion between the owners of the *Minnetonka* and the owners of the *Uskmoor*, it entirely disposes of the suggestion that it was unreasonable to make a settlement without regard to the subsequent litigation. It could not be an element, and was not an element, in the adjustment of the rights between the owners of the *Uskmoor* and the owners of the *Minnetonka*. That being so, it seems to me clear—after disengaging this matter, which was very complex in its statement, from all the confusion which surrounded it, and having ascertained the facts upon which the registrar's report was given, and the learned judge's judgment proceeded—that the Admiralty are entitled to recover from the owners of the *Minnetonka* the sum claimed. With respect to the learned judge's judgment, it seems to me that he really had not before him the facts as ascertained and explained to us. His judgment seems to have proceeded upon grounds quite outside the grounds which have been pressed upon us in the discussion in this court. As far as I can understand the grounds of his judgment, they seem to have been rather based upon the expression of law which he extracted from the case of the *Marpessa* (*ubi sup.*). I cannot pretend to say that I very clearly follow the train of reasoning based upon that case, but it seems to suggest that the wrongdoer, who is liable for some sum in respect of damage caused to the plaintiff, is relieved from all liability in respect of it if that sum of money has been arrived at by some compromise between the parties, whether reasonable or not, on the ground that the sum payable in respect of which the claim is made against the wrongdoer is a sum which became payable under the compromise, and therefore is not the direct consequence of the collision. It seems to me that the only consideration is whether the compromise is reasonable—whether it was a reasonable way of adjusting the sum for which the wrongdoer was liable—and that the simple process of assessment does not break the chain of causality. The points which have been carefully discussed before us—first, what were the real facts found by the registrar; and, secondly, was the compromise reasonable—do not seem to have been argued before the learned judge. They have been argued before us, and I do not think we are really differing from his view in holding that this sum is recoverable from the owners of the *Minnetonka*. The appeal must succeed.

Mathew, L.J.—I am of the same opinion. The owners of the *Uskmoor* were, as between themselves and the Admiralty, not to blame, and therefore were entitled to have the average contribution ascertained in the usual way; and it seems to me to be perfectly clear that the arrangement come to between the Admiralty and the owners of the *Uskmoor* was reasonable, not only as regards those interests, but also as regards the interests of the owners of the *Minnetonka*. The owners of the *Minnetonka*, fortunately for them, are only condemned in one-half of the necessary expenditure. Now, the necessary expenditure here, if the arrangement was reasonable as between the cargo owners and the owners of the *Uskmoor*, was 276*l*. It was arrived at upon the footing that averages of far larger amount would have to be paid if the voyage was proceeded with. It was a perfectly reasonable and businesslike arrangement, and one of which it appears to me that the owners of the *Minnetonka* have no right to complain. It is said, however, that it would be a great injustice to put this charge, reasonable though it be, upon the owners of the *Minnetonka*, because there has been a reference, and the result was to include this very sum in the damages, which must be paid by the owners of the *Minnetonka* to the owners of the *Uskmoor*. After discussion and examination, and with the assistance of the registrar, it is now made clear that the documents have been misinterpreted in that respect, and the sole question therefore is whether it was a reasonable arrangement. It seems to me that it was reasonable.

Cozens-Hardy, L.J.—I agree.

Solicitors for appellants, *The Treasury Solicitor*.
Solicitors for respondents, *Pritchard* and *Sons*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 9, 1905.

(Before Sir GORELL BARNES, President.)

THE OPTIMA. (a)

Salvage—Property salved handed to agent of owner—Sale by agent—Payment of proceeds of sale into bank—Action in rem *against proceeds of sale.*

A vessel, the O., having stranded, was abandoned by her master and crew.

The master appointed N. agent for the owners, and directed N. to make arrangements to salve the stores on the O. N. proceeded to make such arrangements. Meanwhile other salvors proceeded to the wreck and salved the stores, and handed them to N., who had informed them he was the owner's agent. N. sold the stores, and, after deducting the costs of the sale, paid the balance of the money realised by the sale into a separate account at a bank.

The salvors then applied to N. to settle their claim for salvage. N. refused to do so. The salvors thereupon issued summonses in the County Court in an action in rem *against the proceeds of sale of the stores in the hands of N.*

The owners moved the court for a writ of prohibition to prevent the County Court judge proceeding with the hearing of the alleged salvage suits.

Held, that a writ of a prohibition should issue, as the County Court had no jurisdiction to entertain an action against the proceeds.

MOTION for writ of prohibition to be issued to the judge of the County Court of Norfolk, holden at Yarmouth, to prohibit him from proceeding with three consolidated actions *in rem*.

The plaintiffs in the three actions were George Harvey, shipbroker, of Great Yarmouth; William Fleming, and thirty-nine others, of Gorleston, boatmen; and Alfred Whiley and nineteen others, of Gorleston, boatmen.

All three actions purported to be actions *in rem* to recover salvage for services rendered in salving the stores from the German barque *Optima*. In the plaint notes in all three actions, in the description of the defendants the words "owners of the" were struck out, and the defendant was described as "the proceeds of the sale of the stores of the *Optima* (now in the hands of H. Newhouse)."

The facts which gave rise to the proceedings were that on the 19th Jan. 1905 the German barque *Optima* stranded on the Haisborough Sands, and on the following day Henry Newhouse, Lloyds' agent at Yarmouth, was appointed by the master agent for the owners. On the 21st Jan., after an unsuccessful attempt had been made to salve the *Optima*, the master and crew were landed, and the master asked Henry Newhouse to make arrangements to salve the stores of the *Optima*, and Newhouse proceeded to do so. Before Newhouse had completed his arrangements, the plaintiffs in all the three actions went off to the *Optima* and stripped her of all movable stores and apparel, which they brought ashore. Henry Newhouse requested them to deliver the goods to him as agent for the owners. This was done on the understanding, as the salvors alleged, that they were to look to him for salvage for the services which they had rendered in bringing the goods ashore.

The stores, which were delivered to Newhouse by the plaintiffs, were sold by public auction, the plaintiffs helping to distribute bills to advertise the sale. After deducting the costs of the sale, the stores realised the sum of 286*l.* 15*s.* 6*d.*, and Newhouse placed this sum in the bank in a separate account headed "*Optima* account."

The plaintiffs after the sale asked Newhouse to settle their claims for salvage, but this he declined to do, referring them to the foreign owners.

On the 10th March the plaintiff George Harvey instituted the first action in the County Court, and the solicitor acting for Henry Newhouse accepted service of the summons, and gave an undertaking to appear. On the same day the same plaintiff obtained an *ex parte* order on Henry Newhouse to pay into court the sum of 150*l.* out of the money in his hands realised by the sale, or to give security for that amount. An attempt was made to set aside this order, but it failed, and the solicitor acting for Newhouse then gave an undertaking to provide bail to meet the claim and costs.

The two other actions were afterwards instituted by the other plaintiffs, and orders were made in them against Henry Newhouse to give further security. On the application of the solicitor acting for Henry Newhouse on the hearing of one of these summonses an order was made consolidating the three actions.

The owners and underwriters of the *Optima* then moved the High Court asking that a writ of prohibition should issue to the County Court judge to prohibit him from proceeding with the hearing of the three consolidated actions. The affidavits in support of the motion stated that the proceedings in the County Court were prejudicial to the owners and underwriters, as Henry Newhouse would claim an indemnity from them as owners of the stores in respect of any salvage and costs he might be ordered to pay.

Balloch for the owners and underwriters of the *Optima*, in support of the motion.—No action *in rem* can lie against the proceeds of sale of a ship in the hands of a private person. The only right *in rem* is against the *res* salved, and the court has no jurisdiction to try this action. The proceeds of the sale of the *res* are not a specific property, it is merely a debt due from the bank to Newhouse.

A. D. Bateson for the salvors.—An action *in rem* against the proceeds of sale of a vessel has been recognised.

The Anna Helena, 1869, Record Office Instance Papers (Series 4), No. 4849.

In that case a warrant of arrest was issued against the schooner *Anna Helena*, tackle, and cargo now or lately laden, and freight, the return by the marshal's substitute certified that the warrant "was duly executed . . . by arresting the proceeds (gross) of the sale of the schooner or vessel *Anna Helena* amounting to 45*l.* sterling now in the hands of Thomas Barcham . . .

(a) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

auctioneer, by showing the original warrant under seal to him, who accepted the service thereof for and on behalf of himself and by leaving with him a true copy." The cause was afterwards withdrawn. There are two questions in this case: (1) Could the plaintiff issue a writ? and (2) could he serve it? As to the first, it is common practice for a necessaries man or others to issue a writ against proceeds, where they are in court. [The PRESIDENT.—That is done because there has been a sale under the order of the court, and the court holds the proceeds subject to all liens that may be proved to exist against the *res*.] The forms of action show that there can be actions against the proceeds of sale even when they are not in court. The rules for the High Court of Admiralty 1859, made by the judge of the Admiralty Court and authorised by Order in Council, provide for them; the directions for filling up forms are as follows: "If the cause is against proceeds, the title of the cause shall be 'Proceeds of the'" and "the description shall be 'the proceeds arising from the sale of the.'"

Coote's Admiralty Practice 1860, pp. 171 and 192; Williams and Bruce Admiralty Practice 1886, pp. 565, 578.

Though those rules are annulled by the Supreme Court Rules 1883, they are still in force where no other provision is made:

Supreme Court Rules, Order LXXII., r. 2.
Williams and Bruce's Admiralty Practice 1886, p. 565.

In the case of *The Elephanta* (15 Jur. 1185) a cause of bottomry on ship, cargo, and freight, where the ship had been abandoned and part of the cargo had reached England, and another part had been sold abroad, the sum realised had been deposited in a London bank with the privity of the bond holder, and Dr. Lushington held that the bond could be enforced against the proceeds of the sugar sold abroad, as well as against the ship and that part of the cargo which was brought to this country. [The PRESIDENT.—The sale there had been agreed. Williams and Bruce Admiralty Practice 1902, p. 263, note (*e*), was also referred to for observations on *The Elephanta*.] Under the old practice, instead of arrest, a monition could issue to a person to bring money into court:

The Lord Aukland, 2 Wm. Rob. 301.

The plaintiffs in this case cannot now arrest the *res*, for, owing to the conduct of Newhouse, they consented to the sale:

The Royal Arch, Swabey, 269, at 285.

As to the second point, if the plaint is good, there is a good service of the summons by the acceptance of service of the defendant's solicitor, and no warrant of arrest is necessary:

County Court Rules 1903 and 1904, Order XXXIX., r. 6; Order VII., r. 12.

The plaintiffs clearly have a good cause of action against Newhouse, and by unconditionally appearing and asking for the three suits to be consolidated, he has waived any objection to the jurisdiction. The applicants here are strangers to the actions proceeding in the County Court, and as the grant of a writ of prohibition is discretionary it should not be granted to them:

Reg. v. *Twiss*, 20 L. T. Rep. 522; L. Rep. 4 Q. B. 407.

Balloch in reply.—Where there is a total absence of jurisdiction the court is bound to grant prohibition, even though the applicant has consented to it:

Farquharson v. *Morgan*, 70 L. T. Rep. 152; (1894) 1 Q. B. 552.

The only foundation to a right for salvage is a lien on the property:

Kennedy's Law of Civil Salvage 1891, p. 7.

The PRESIDENT.—This is a matter upon which a good deal of learning has been expended by counsel, but which is really of an extremely simple character. It is a motion for a writ of prohibition to issue to the judge of the County Court of Norfolk, holden at Yarmouth, prohibiting him from proceeding with the hearing of three actions *in rem*, which have been consolidated. The first appears to be an action, according to the notice of motion before me, by George Harvey, shipbroker, of Great Yarmouth; and as a defendant there is named a most remarkable class of defendant, such as never has been heard of before in this court—namely, "the proceeds of the sale of the stores of the ship *Optima*, now in the hands of Henry Newhouse, of Great Yarmouth, shipbroker." The two other actions are against the same so-called defendant. The ground upon which the motion is made is that the court below has no jurisdiction to hear or determine the said action. Now, it appears that in the month of January last the *Optima* got ashore on the Haisborough Sands, and Mr. Newhouse, whose name is mentioned in the papers, was appointed agent for the owners and underwriters, and he appears to have made arrangements for salving the apparel of the ship. I suppose the vessel herself was lost. As far as I understand the facts, he was making these arrangements and was preparing to do what was necessary to salve certain apparel and stores on the ship, when the plaintiffs in these three actions—I do not know how or why—appear to have taken possession of these materials themselves. I presume their case is that they did it under circumstances which amount to salvage. These materials were brought ashore, and, as far as I understand the facts, they were ultimately delivered to Mr. Newhouse, who sold them, with the result that, after paying expenses, there is a sum of 286*l.* 15*s.* 6*d.* at the credit of the account in the bank where he has placed the money. In that state of things the plaintiffs commenced their actions, and the plaints are in the terms I have mentioned. The words "owners of the" are struck out, where the name of the defendants would ordinarily appear, and the claim in the first action, which is a sample of the others, is against "the proceeds of the sale of the stores of the ship *Optima*, now in the hands of Henry Newhouse." In that action an *ex parte* order was obtained directing Mr. Newhouse to bring into court 150*l.* or to give security. Mr. Newhouse thereupon entered an appearance, and it is perfectly obvious from the proceedings that have taken place that he appeared merely to protect himself against the order to bring this money into court, or a part of it, and that he has done what he can to stay these proceedings going forward. Whether or not the plaintiffs have any right of action against Mr. Newhouse personally, this is not the time to consider. These are simply salvage actions to recover salvage out of these

proceeds. The particulars of claim show that these being the claims, objection is now taken by the owners and underwriters of the *Optima* to these being heard, and they wish to obtain an order prohibiting the court below from proceeding with these consolidated actions. Now the point is simply this: Can the actions, which are alleged to be actions *in rem*, be maintained? In other words, has the court below jurisdiction to entertain claims of this nature? There are two kinds of actions which can be maintained; one is a personal claim against the owner of property salved for salvage, the other is a claim *in rem* against the property salved, for salving it. This is the first time I have ever heard of a claim being made against the proceeds of the sale of the property while in the hands of someone, who sold it, unless indeed it was sold while in the hands of the court. It is perfectly true that in some cases, where the proceedings are *in rem* against the property, and where that property has been arrested and sold by the court, the court, having the proceeds in its hands and having, by virtue of the sale, freed the ship from all liens and claims against it in the hands of the purchasers, who take it by virtue of the title confirmed by the court, the court retains those proceeds to answer all claims that may be made against the ship. That principle has no application to cases in which goods or ships are sold by agents who retain the proceeds. The liens which existed against the *res* remain, and travel with the *res* into the hands of whoever chooses to buy, and those liens can be enforced by process against the *res*, in whosesoever hands it is, subject to their being lost by laches. The extraordinary position taken up by the counsel for the plaintiffs is that, although that is so, yet he has a lien against the proceeds in the hands of the person who has received them. He therefore must maintain that he has two liens—one against the *res*, and another against the proceeds. Such a thing is quite unknown, and it seems to me that these actions are based upon a misconception of the rights of the parties. If the plaintiffs have any right, it seems to me it is to arrest those materials in a proper salvage suit. They have not done so. They stood by and allowed the *res* to be sold. It may be they have a right against the person to whom they handed the materials because of some promise said to have been made by that person, but they have no right against these proceeds, and the court below has no jurisdiction to entertain a suit against this money, which really belongs to the owners or underwriters of the ship. Therefore a writ of prohibition must issue.

Solicitors for the salvors, *Pritchard* and *Son*, agents for *Wiltshire* and *Co.*, Great Yarmouth.

Solicitors for the owners of the *Optima*, *Stokes* and *Stokes*, agents for *Chamberlin*, Great Yarmouth.

[NOTE.—The salvors afterwards brought actions against Mr. Newhouse in the County Court at Yarmouth on the common law side, and recovered judgment against him.]

May 8 and 17, 1905.

(Before the PRESIDENT, Sir Gorell Barnes).

THE CIRCE. (*a*)

Collision—Both to blame—Seaman drowned—Payments by shipowners to relatives of deceased seaman—Spanish Accidents Act 1900*—Claim by shipowners against owners of other ship for half the payments—Division of loss.*

The Spanish steamship, the S., *came into collision with the French steamship the* C. *Some seamen on board the* S. *were drowned, and the owners of the* S. *had to pay to the relatives of the drowned seamen certain sums under the Spanish Accidents Act* 1900. *Such payments are payable under the Act, although there is no proof of negligence on the part of the shipowner who employs the seamen. The claims by the owners of the* S. *and* C. *were settled on the terms that both ships were to blame for the collision. The owners of the Spanish steamship, the* S., *sought to recover from the owners of the* C. *half the amounts paid under the Spanish Act to the relatives of the deceased seamen.*

Held, that they were not entitled to recover anything in respect of the amounts so paid because the amounts so paid were not damages recognised by English law, but were payments made under a foreign statute in respect of an accident; and, that the rule as to the division of loss as enforced in the Admiralty Court could not apply to them, as they were not damages which could have been recovered under the Admiralty jurisdiction, and did not come within the Admiralty rule of division of loss.

MOTION in objection to the registrar's report.

On the 18th May 1904 a Spanish steamship, the *Sestao*, collided with the French steamship *Circe*. In consequence of the collision four seamen on the *Sestao* were drowned; they had not personally been guilty of any negligence which contributed to the collision. The claims by the owners of the *Sestao* and the *Circe* were settled on the terms that both vessels were to blame for the collision.

The owners of the Spanish steamship, the *Sestao*, had to pay certain sums to the relatives of the seamen who had been serving on the *Sestao*, and who had been drowned as a result of the collision. The payments were made in accordance with the terms of the Spanish Accidents Act of the 30th Jan. 1900.

Art. 2 of that Act is as follows:

Masters are liable for any accidents to their employees on account and in the exercise of their profession or work, unless the accident be due to *force majeure* alien to the work in which the accident is produced.

Art. 3 enumerates the industries in which masters are liable to their servants if accidents occur in the exercise of their work. Among them is included "The carriage and transport by land, sea, or river."

Art. 5 provides that if the accident causes the death of the workman, masters are to pay the funeral expenses and an indemnity of limited amounts to the widow and certain descendants and ascendants.

The owners of the *Sestao* had paid sums amounting to 164*l.* 17*s.* 10*d.* to the widows and relatives of the deceased seamen.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

On the hearing of the reference to assess the amount due to the owners of the *Sestao* from the owners of the *Circe*, the owners of the *Sestao* sought to recover half the sum so paid—82*l.* 8*s.* 11*d.*—from the owners of the *Circe*, as damages caused by the collision.

The registrar allowed the claim. In his report he stated that

> The plaintiffs are by the Spanish law of the 30th Jan. 1900 obliged to pay to the relatives of men injured or killed by accident when in their employment a specified indemnity. No limitation in the nature of that known to English law in respect of the negligence of fellow workmen has been proved, and I take the Spanish law to be unlimited. Art. 3 of the Act includes accidents arising from carriage and transport by sea. Therefore I think this case differs from that of *The General Havelock* (*Shipping Gazette*, 13th April 1905), recently decided by me, which involved a somewhat similar point. In other words, this claim would fall within the Admiralty class of damage referred to in that case.

The owners of the *Circe* appealed against the decision of the registrar.

Laing, K.C. and *Charles Stubbs* for the appellants, the owners of the *Circe*.—The payments made to the relatives of these men are not damages arising out of the collision; they are made under the terms of a foreign statute. Sums paid to the relatives of deceased seamen under Lord Campbell's Act (9 & 10 Vict. c. 93) are not damages arising out of a collision within the meaning of a running-down clause in a policy of marine insurance:

> *Taylor* v. *Dewar*, 10 L. T. Rep. 267; 2 Mar. Law Cas. O. S. 5; 5 B. & S. 58.

The claims in respect of the loss of life which gave rise to that action appear to have been heard in the Admiralty Court, because, before *The Vera Cruz* (51 L. T. Rep. 104; 5 Asp. Mar. Law Cas. 254, 270, 386; 9 P. Div. 96; 52 L. T. Rep. 474; 10 App. Cas. 59), it was thought that such claims could be enforced by an action *in rem*.

Aspinall, K.C. and *Dawson Miller* for the respondents, the owner of the *Sestao*.—The case of *The General Havelock* (P. 1906, 3n.) is not in point, for in that case the deceased seamen were tortfeasors, and were themselves guilty of negligence which brought about the collision, the shipowners were therefore under no obligation to pay any sums to the relatives of the deceased men and could not recover from the owners of the other vessel half of what they had paid. The principle of the Admiralty rule is "equality of participation in the loss arising from a common fault":

> *Stoomvaart Maatschaapij Nederland* v. *Peninsular and Oriental Steam Navigation Company*, 47 L. T. Rep. 198; 4 Asp. Mar. Law Cas. 567; 7 App. Cas. 795, at p. 801.

That principle has not been limited to damages sustained by injury to property. The rule has been applied to the expenses of sending home distressed seamen, a claim arising under the statutory provisions of the Merchant Shipping Acts. It has also been applied to the expenses paid to a local authority for removing a sunken vessel. [THE PRESIDENT.—It is very doubtful whether such a claim is within the Admiralty rule.] It has been applied to damage done to a third ship arising from a collision caused by collision between two other ships.

> *The Frankland*, 84 L. T. Rep. 395; 9 Asp. Mar. Law Cas. 196; (1901) P. 161.

In that case it was laid down that "all damages arising out of the collision are to be divided equally." No case lays down what "the rules hitherto in force in the Court of Admiralty," referred to in sect. 25, sub-sect. 9, of the Judicature Act 1873 (36 & 37 Vict. c. 66), are when applied to an action for damages arising out of a collision where both ships are in fault. They can only be gathered from particular instances found in the cases.

Laing, K.C. in reply.—These payments are not damages which could have been given by the Admiralty Court:

> *The Vera Cruz* (*ubi sup.*).

The rule as to the division of loss only applies to damages recoverable under the Admiralty jurisdiction, and does not apply to damages for which a common law action would lie. The present claim is one enforced under a Spanish Act, and is unknown to the *lex fori*. These payments are not damages flowing from the collision.

THE PRESIDENT.—In this case there was a collision between the *Sestao*, a Spanish ship, and the *Circe*, a French ship, on the high seas on 18th May 1904, which resulted in four men on the *Sestao* being drowned. In a suit which was instituted in this division between the owners of the two vessels, an agreement was made as follows: "We, the undersigned, solicitors for the plaintiffs and defendants respectively, hereby agree to a settlement of this action on the basis of both vessels being to blame for the collision in question, and pray a reference to the registrar and merchants to assess the amount of damages." The matter having been dealt with by the registrar, he expressed an opinion that the plaintiffs, the owners of the *Sestao*, could recover the damages which are stated in the schedule to his report. That schedule contains the amount claimed by the various persons, who appear to be widows and children of the deceased seamen. The claims allowed in respect of those relatives amounted in English money to 164*l.* 17*s.* 10*d.*, and that sum, on the basis of both ships being to blame, has been halved, making the sum recoverable 82*l.* 8*s.* 11*d.* The report of the registrar proceeds thus: "The plaintiffs are by the law of the 30th Jan. 1900—that is, by the Spanish law—obliged to pay to the relatives of men injured or killed by accident when in their employment a specified indemnity. No limitation in the nature of that known to English law in respect of the negligence of fellow workmen has been proved, and I take the Spanish law to be unlimited. Art. 2, sub-sect. 8, refers to accidents in the course of navigation, and therefore I think the case differs from that of *The General Havelock* (*ubi sup.*), recently decided, which involved a somewhat similar point—in other words, this claim would fall within the Admiralty class of damages referred to in that case." The Spanish code which affects this matter is annexed to the report. It is headed "Accidents Act," and, according to art. 2 of the Spanish Accidents Act of 1900, "masters are liable for any accidents to their employees on account and in

the exercise of their profession or work, unless the accident be due to *force majeure*, alien to the work in which the accident is produced." Among the industries or work for which masters are liable in art. 3 is included "the carriage and transport by land, sea, or river." Art. 5 deals with the indemnity to be paid in respect of accidents.

Now, the class of claim which apparently has been paid by the plaintiffs, the owners of the Spanish ship, is not a class of claim which could be made under English law. It is not a claim recognised by English law. If the claim had been made against an English ship by the relatives of persons drowned in consequence of a collision, in which the ship they were on was concerned, if there was no fault on the part of that ship the representatives of the drowned persons would have no claim against the owners; but if there was fault on the part of that ship, for which the drowned persons were not individually responsible, still, according to the doctrine of common employment, they would have no remedy against the owners of that ship. Therefore the position of the representatives of drowned persons who could make a claim at all against either of the ships in default would be this—they could only make a claim against the owners of the vessel which came into collision with the vessel on which the drowned persons were serving. Now, if a claim could be made against the owners of the other vessel, it could be made by virtue of Lord Campbell's Act. That was decided in the case of *The Bernina* (58 L. T. Rep. 423; 6 Asp. Mar. Law Cas. 257; 13 App. Cas. 1), otherwise known as *Mills* v. *Armstrong*. The headnote in that case states that "a collision having happened between the steamships *Bushire* and *Bernina*, through the fault or default of the masters and crews of both, two persons on board the *Bushire*, one of the crew and a passenger—neither of whom had anything to do with the negligent navigation, were drowned. The representatives of the deceased having brought actions *in personam* in the Admiralty Division against the owners of the *Bernina* for negligence under Lord Campbell's Act: Held, affirming the decision of the Court of Appeal, that the deceased persons were not identified in respect of the negligence with those navigating the *Bushire*; that their representatives could maintain the actions; and could recover the whole of the damages, the Admiralty rule as to half damages not being applicable to actions under Lord Campbell's Act." The report of the case in the House of Lords does not deal fully with the question of half damages, because at p. 3 of the report the statement may be found that "the question upon the Admiralty rule as to half damages was mentioned by the appellants' counsel, but was not argued before this House." When, however, one turns to the reports of the case in the Court of Appeal, *The Bernina* (56 L. T. Rep. 258; 6 Asp. Mar. Law Cas. 75; 12 P. D. 58), one finds that that matter was fully considered. In the course of the judgments in that case these observations were made by the learned Master of the Rolls (Lord Esher) and also by Lindley and Lopes, L.JJ. Lord Esher said: "We have therefore to apply those propositions to the actions mentioned in the special case. But before doing so, we must state that, for the reasons given by Butt, J., we are in accord with him in saying that actions brought under Lord Campbell's Act are not Admiralty actions at all; that they are pure common law actions; that they are not touched by the Judicature Act 1873, s. 25, sub-s. 9, that they are to be ruled in every respect by the common law. We desire to say that we do not express in this judgment any opinion as to whether an action brought at common law in respect to damage to cargo will, by virtue of the above section, be governed by the Admiralty practice laid down in the case of *The Milan* (1 Mar. Law Cas. O. S. 185; Lush. 388), or whether the application of the section is to be limited to actions for injury to one of two ships, or to both, by a collision between them; or whether even in an Admiralty action by an owner of cargo the whole of the judgment in that case will ultimately be upheld." Lindley, L.J. said this: "The provision of Lord Campbell's Act as to damages was wholly inapplicable to the Court of Admiralty when the Act was passed. At that time no action for damages in the then technical sense of the expression could be brought in the Court of Admiralty. Moreover, that court did not consist of a judge and jury, nor had it any machinery for summoning juries by whom damages could be assessed, or by whom damages could be divided amongst persons beneficially entitled to them by the statute. Although, therefore, actions under Lord Campbell's Act can now be brought in the Admiralty Division of the High Court, it is plain that the damages must be assessed by a jury, as directed by the statute, and not by the judge, with or without other assistance, according to the rules which are usually applied in that court in cases of collision. When the Judicature Acts were passed, the Court of Admiralty had no rules applicable to actions brought under Lord Campbell's Act, simply because that court had no jurisdiction to try such cases. It follows as a consequence that, whether we regard the right to sue or whether we regard the damages to be recovered in actions founded on Lord Campbell's Act, it is impossible to comply with clause 9 of sect. 25 of the Judicature Act 1873. It is manifest that this clause of the Judicature Act has no application to such actions, although it does apply to ordinary actions for collisions at sea." Lopes, L.J. said very much the same thing, where he said: "First, is the Admiralty rule as to joint liability for joint negligence applicable to this case? According to the Admiralty rule, when both vessels are to blame, the owners and cargo-owners of each can recover half their loss from the other. This rule, before the Judicature Acts, clearly did not apply to claims brought by passengers or by representatives of deceased passengers under Lord Campbell's Act. Such claims were not brought in the Admiralty Court at all, because there was no question of maritime lien; but were brought in a court of common law, in which the ordinary rule as to contributory negligence was in force. Since the Judicature Acts, the Probate, Divorce, and Admiralty Division has jurisdiction concurrent with the other divisions to try claims of this kind. Whether the admiralty rule as to joint liability for joint negligence applies to this class of case depends on sect. 25 of the Judicature Act 1873, sub-s. 9. It is in these words: 'In any case in proceedings for damages arising out of a collision

between two ships, if both ships shall have been found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the courts of common law shall prevail.' The rule in Admiralty was only to prevail so far as it conflicted with the rule of common law. But there never was any conflict between the Admiralty and common law rule. On the principle *Actio personalis moritur cum persona*, none of these actions could be maintained before the passing of Lord Campbell's Act, and could not have been brought in the Admiralty Court before the passing of the Judicature Acts, when the Admiralty Court became a branch of the High Court. It is clear, too, from Lord Campbell's Act that that Act was never intended to apply to a court where there was no machinery for a trial by jury, and where the damages could not be assessed by a jury. I am clear, therefore, that the Admiralty rule as to joint liability for joint negligence does not apply to the present cases." The reasoning on which that proceeds is also supported by the view of the Court of Appeal in the case of *The Vera Cruz* (*ubi sup.*). That was a case in which Butt, J. had held that an action *in rem* would lie under Lord Campbell's Act. In the Court of Appeal it was said that the action was not within the Admiralty Court Act 1861, and therefore the Admiralty Division had not jurisdiction over such an action. There is one passage in the judgment in that case which it is material to consider in the present case. Although it is to be found in each of the judgments, I think it is most conveniently put by Lord Bowen: "Shortly, the question is whether this is a claim for damage done by a ship, and I think that the history of the law on this point proves that it is not. Apart from that, however, the obvious meaning of the Act leads to the same conclusion, for the Act gives a claim for damage done by the ship; this, and this only, is the cause of action. 'Done by a ship' means done by those in charge of a ship, with the ship as the noxious instrument. The plaintiff is in this dilemma; the only claim that can arise must either be a claim for the killing of the deceased, or the injuriously affecting his family. The killing of the deceased *per se* gives no right of action at all, either at law or under Lord Campbell's Act. But if the claim be, as it can only be, for the injuriously affecting the interests of the dead man's family, the injurious affecting of their interests is not done by the ship in the above sense. It arises partly from the death which the ship causes, and partly from a combination of circumstances, pecuniary or other, with which the ship has nothing to do. The injury done to the family cannot, therefore, be said to be done by the ship." Before I pass from the case of the *Vera Cruz*, I may say that that case went to the House of Lords, and is reported in 52 L. T. Rep. 474; 5 Asp. Mar. Law Cas. 386; 10 App. Cas. 59. The decision of the Court of Appeal was affirmed. It is clear, therefore, in regard to cases of this character, that in England the persons who represent these deceased seamen could make no claim against their own ship. They could make a claim against the other ship, but they would claim in the ordinary way under Lord Campbell's Act if, as has been held, that applies to a foreign vessel. I need not, however, consider that here. They would recover damages in full, and, if it was sought to apply the Admiralty rule, I suppose it would only be sought to apply it by the defendants—the owners of the ship—themselves seeking to obtain from the other ship a contribution on the basis of both being to blame. I think that was the claim in the case of *The General Havelock* (*ubi sup.*), which failed, though the judgment in that case appears to have proceeded upon special reasons —namely, on the ground that an agreement had been entered into; but, to my mind, there would be no justification whatever for an attempt to make the other vessel pay half the damages, because the Admiralty rule is not applicable to it at all. It has nothing to do with such a subject, because it was not part of the damages which could be dealt with, or even taken into consideration in the Admiralty Court.

Turning, therefore, to the present claim, in the first place, to my mind, it is a claim which is not for damages in the true sense at all. It is merely a claim under a foreign statute, by the owners of the ship, which appears to be made independently of any question of negligence at all. It appears to be made because, by an Act which is somewhat analogous to the Workmen's Compensation Act, certain obligations are imposed upon the owners of the ship, which obligation is independent, it seems to me, of the question whether there was any blame or not on the part of those in charge of that ship. They are not damages at all, but a payment made by reason of the desire of the Spanish Government to provide an accident payment very much in the same way as is provided by the Workmen's Compensation Act in this country. Then, again, if one passed from that point and were to treat them as damages, which could be recovered against any ship in fault, possibly they might make a claim out against their own ship, if the master was in fault, according to foreign law, and perhaps in this country; but then that would still not be a claim for damages such as could be made in the Admiralty Court, to which the rule as to the division of loss applies. Anybody who has taken the trouble to follow the history of that rule will see how inapplicable it is to a case of this character. There is a most admirable chapter on this subject in the recent edition of Marsden's Collisions at Sea, where the rule is traced from the Laws of Oleron, and where it is shown how that rule has been varied and acted upon in all sorts of different ways, possibly originating in a case of contribution between two ships where neither was in fault, and later being applied where the judges were uncertain which vessel was in fault, and thought it a fair thing to divide the loss. The learned author also points out how the rule was developed, and from being treated as *rusticum judicium* has crystallised into the form in which it is usually applied in this court, if not almost daily, certainly very frequently, to ships and cargoes. It has never yet, however, so far as I am aware, been applied to claims which have been put forward by persons representing others who have been drowned or killed in the course of a collision or after a collision between two ships. No case was cited to me in which the rule had been applied, and I do not think any case has

been made out by the persons who at present, upon this report, have succeeded in recovering half the damages justifying them in doing so. In my view, these half damages must be excluded from the plaintiffs' claim in this case, and this motion, which was made on behalf of the defendants, will be allowed with costs.

Solicitors for appellants (defendants), *Stokes* and *Stokes*.

Solicitors for respondents (plaintiffs), *W. A. Crump* and *Son*.

June 27, 28, *and July* 3, 1905.

(Before BARGRAVE DEANE, J., assisted by two of the Elder Brethren.)

THE UPTON CASTLE. (*a*)

Collision — Steam trawler—Lights — Trawler's duty to sailing vessel—Regulations for Preventing Collisions at Sea 1897, *arts.* 2, 9, 20, 26.

The steam trawler U. C., *a vessel of upwards of* 20 *tons gross register, fishing in the Bristol Channel, exhibited the lights prescribed by art.* 9 *of the Collision Regulations. After getting in her trawl the* U. C. *went full speed ahead, still exhibiting the lights prescribed by art.* 9 *of the Collision Regulations, and very shortly afterwards ran into the sailing vessel* R. *Those on the* R. *had seen the lights of the* U. C. *for about half an hour before the collision.*

Held, that the steam trawler the U. C. *was alone to blame for the collision, because at the time of the collision she had ceased trawling and was a steam vessel under command, and as such she should have exhibited the usual under-way lights for such a vessel prescribed by art.* 2 *of the Collision Regulations, and should have kept out of the way of the sailing vessel.*

ACTION of damage by collision.

The plaintiffs were the owners of the ketch *Rival*, the defendants and counter-claimants were the owners of the steam trawler *Upton Castle*.

The collision which gave rise to the action occurred about 9.30 p.m. on the 25th Feb. 1905 in the Bristol Channel off Trevose Head, the wind at the time being S.W., a strong breeze, the weather fine and clear, and the tide flood of the force of one-and a-half knots.

The case made by the plaintiffs was that some little while before 9.30 p m. on the 25th Feb. the *Rival*, a wooden ketch of 110 tons gross and 60 tons net register, manned by a crew of four hands all told, was, whilst on a voyage from Southampton to Briton Ferry with a cargo of scrap iron, off Trevose Head, Bristol Channel. The *Rival*, under two jibs, foresail, mainsail, gaff top sail, and mizzen top sail, was sailing free on a course of N.E. by E., making between five and six knots. Her regulation lights for a sailing vessel under way, including a stern light, were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Rival* saw a white light at the masthead and a white light clear of the deck of the *Upton Castle* about one and a half miles off and bearing about three points on the port bow. The *Rival* kept her course for some time, but as the lights of the *Upton Castle* drew nearer and she appeared to be heading so as to cross the bows of the *Rival* the helm of the *Rival* was starboarded a little and the lights were brought on to the starboard bow. The helm was then ported, and the *Rival* was brought back on her course. The *Upton Castle* gradually drew past the starboard side of the *Rival*, until she had got well abaft the starboard beam, and shortly afterwards the *Upton Castle* was observed to have altered her course and to be heading in about the same direction as the *Rival*. The *Rival* kept her course, and the *Upton Castle* gradually drew on to her starboard bow, but instead of keeping out of the way, as she could and ought to have done, she was seen to alter as if under a starboard helm, opening a red light on her mast underneath the white light, and to be apparently attempting to cross the bows of the *Rival*, and, although loudly signalled to and hailed, the *Upton Castle*, coming on with her port side about amidships, struck the stem of the *Rival*, doing her considerable damage; the *Upton Castle* was then exhibiting two white lights, one at each corner of the bridge.

The plaintiffs charged those on the *Upton Castle* with improperly failing to keep out of the way of the *Rival* and with failing to exhibit proper under-way lights and with exhibiting improper lights.

The case made by the defendants was that shortly before 9.30 p.m. on the 25th Feb. the *Upton Castle*, a steel screw ketch of 145 tons register, manned by a crew of nine hands all told, was lying dead in the water heading about N.W., taking her trawl on board about ten miles N.E. by N. of Trevose Head. The regulation lights for a steam vessel of over 20 tons gross register engaged in trawling were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances the green light of a sailing vessel was seen about abeam on the port side about a quarter of a mile distant. Shortly afterwards, as the approaching vessel, which proved to be the *Rival*, showed no signs of altering her course, the engines of the *Upton Castle* were rung full speed ahead and her helm was put hard-a-port, in the hope of taking the vessel clear, but almost immediately after this the *Rival* struck the *Upton Castle* on the port side aft with her stem, doing damage.

Those on the *Upton Castle* charged the *Rival* with improperly failing to keep clear of the *Upton Castle*.

The material parts of the Collision Regulations which were referred to were as follows:—

Preliminary. — "Steam vessel" shall include any vessel propelled by machinery. A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore, or aground.

Art. 2. A steam vessel when under way shall carry—(*a*) On or in front of the foremast, or if a vessel without a foremast, then in the fore part of the vessel, at a height above the hull of not less than 20ft., and, if the breadth of the vessel exceeds 20ft., then at a height above the hull not less than such breadth, so, however, that the light need not be carried at a greater height above the hull than 40ft., a bright white light so constructed as to show an unbroken light over an arc of the horizon of twenty points of the compass, so fixed as to throw the light ten points on each side of the vessel —viz., from right abead to two points abaft the beam

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

on either side, and of such a character as to be visible at a distance of at least five miles. (*b*) On the starboard side a green light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the starboard side, and of such a character as to be visible at a distance of at least two miles. (*c*) On the port side a red light so constructed as to show an unbroken light over an arc of the horizon of ten points of the compass, so fixed as to throw the light from right ahead to two points abaft the beam on the port side, and of such a character as to be visible at a distance of at least two miles.

Art. 9. As regards [British] steam vessels engaged in trawling [in the sea off the coast of Europe, lying north of Cape Finisterre], when under steam such vessels, if of 20 tons gross register tonnage or upwards, and having their trawls in the water, and not being stationary in consequence of their gear getting fast to a rock or other obstruction, shall between sunset and sunrise either carry and show the lights required by [art. 3 of the Regulations of 1884, now art. 2], or shall carry and show in lieu thereof and in substitution therefor, but not in addition thereto, other lights of the description set forth [below]: On or in front of the foremost head and in the same position as the white light which other steam ships are required to carry, a lanthorn, showing a white light ahead, a green light on the starboard side, and a red light on the port side; such lanthorn shall be so constructed, fitted, and arranged as to show an uniform and unbroken white light over an arc of the horizon of four points of the compass, an uniform and unbroken green light over an arc of the horizon of ten points of the compass, and an uniform and unbroken red light over an arc of the horizon of ten points of the compass, and it shall be so fixed as to show the white light from right ahead to two points on the bow on each side of the ship, the green light from two points on the starboard bow to four points abaft the beam on the starboard side, and the red light from two points on the port bow to four points abaft the beam on the port side; and (2) a white light in a globular lanthorn of not less than 8in. in diameter, and so constructed as to show a clear, uniform, and unbroken light all round the horizon; the lanthorn containing such white light shall be carried lower than the lanthorn showing the green, white, and red lights as aforesaid, so, however, that the vertical distance between them shall not be less than 6ft. nor more than 12ft.

Art. 9, which was art. 10 of the old rules, is in force until such time as an Order in Council shall change it.

It has been added to and amended by Orders in Council of the 30th Dec. 1884 and the 24th June 1885.

The words in the square brackets are not in the text of the order, but are inserted to avoid printing the orders in detail.

Art. 20. When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel.

Art. 26. Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines, or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats.

Balloch for the plaintiffs.—It is the duty of a steam vessel to keep out of the way of a sailing vessel. On the evidence it is clear that the *Upton Castle* had hauled her gear some time before the collision, and was going ahead; she was, therefore, carrying wrong lights, and was infringing art. 2 of the Collision Regulations. There is no suggestion that the sailing vessel did not keep her course, and if she is to blame the defendants must make out that it is the duty of a sailing vessel, under these circumstances, to keep out of the way of a steam vessel. The *Upton Castle* is a "steam vessel" within the meaning of the preliminary article of the Collision Regulations, and she was also "under way" within the meaning of that article. It was therefore her duty, under art. 20, to keep out of the way of the *Rival*, a sailing vessel. It is true that a sailing vessel was held to blame for running into a steam trawler exhibiting lights similar to the lights exhibited in this case:

The Tweedsdale, 61 L. T. Rep. 371; 6 Asp. Mar. Law Cas. 430; 14 P. Div. 164.

But the facts in this case are not the same as in that. That case was also decided under the Collision Regulations of 1884. In the Collision Regulations of 1897 a new article appears—art. 26—which directs that sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, lines, or trawls. That article shows that sailing vessels have no duty cast on them to get out of the way of steam trawlers even when fishing.

Noad for the defendants.—The story told by the plaintiffs is false, as is shown by the fact that they are unable to give any details of what the *Upton Castle* was doing from the moment they first sighted her on the port bow until they see her again on their starboard quarter. The collision was caused by the bad look out on the part of those on the *Rival*. The lights exhibited by the *Upton Castle* were proper lights (*The Tweedsdale, ubi sup.*), and it was the duty of the *Rival* to keep clear of her.

Balloch in reply.—Art. 26 of the present regulations shows that steam trawlers cannot expect sailing vessels to keep out of their way.

BARGRAVE DEANE, J.—This is an action for damage brought by the owner of the ketch *Rival*, a vessel of 60 tons register, manned by a crew of four hands, against the owners of the *Upton Castle*, which is a steam trawler, and was manned by a crew of nine hands. The collision took place off Trevose Head, on the north coast of Devonshire, on the 25th Feb. 1905, about 9.30 p.m. It is almost impossible to harmonise the stories told by one side and the other. The master of the ketch was on deck, one hand was at the tiller; he was a Swede, and was unable to give us much information; the other two hands were below. The master's evidence was that somewhere about 9 p.m. he was on a course of N.E. by E. when he saw two white lights three points on his port bow. He did not know what they were, and after a little time as the lights got nearer he told his man at the tiller to starboard, and he starboarded sufficiently to bring those lights about a point on his starboard bow. He says he continued to watch them, and the lights got on to his starboard beam. He says that then he saw that one light was on the bridge of the other vessel. That is his story, and he says that he kept on his course, and that the other vessel, the steam trawler, steamed ahead right across his bows, and before he could do anything he was hit by being struck on the stem by the

port side aft of the *Upton Castle*. The story told by those on the trawler is that they were fishing that night round a buoy which they had out, and that at one time their head was N.W., but before the collision they had brought it to E.N.E., practically the same heading as the ketch. That would account for the ketch seeing two white lights. The trawler was hauling in her trawl, and therefore she was practically not moving, and was keeping, I suppose, practically the same heading. So far nothing had happened, but we have got to consider what was going on on board the trawler. All hands were employed hauling in the trawl except the master, who was on the bridge, and he no doubt was fully engaged, as the rest of the crew were, in seeing what the trawl was bringing up. Apparently just before the collision the net had been got in, and then, the net being on board, the master set his engines ahead, and he himself took the wheel. The engines of the trawler were going ahead for about a minute before the collision. We have the evidence of the master and chief engineer as to that, and the full speed of the trawler was seven to eight knots. The question that then arises is, Why did the trawler not see the ketch sooner? As far as we can judge nobody on board that trawler was keeping a look-out. The master was on the bridge, but he never saw this ketch, although it must have been in sight for about half an hour, and it is obvious that there was in fact nobody keeping a look-out on the trawler. The master, as soon as the trawl was on board, put the engines ahead and went to the wheel, and he then says he saw the green light of the ketch on his port side, heading straight into him. That proves, as a matter of fact, that this trawler had gone ahead crossing the bows of the ketch, and that when he ported his helm he ported it too late to avoid the collision. It is difficult to see why the master of the trawler did not see the ketch sooner than he did. Why did he put his engines full speed ahead if he saw the ketch at a time when he would probably have avoided the collision if he had not put his engines ahead? Our finding on the facts is, that there was no proper look-out kept on the trawler; that those on the ketch did keep a proper look-out, and they did nothing to bring about the collision. Something has been said about the look-out on the ketch, but we think the master of the ketch was in the best possible position for looking-out. From where he was he could see under the sail, and he could also see over the rail on his starboard side, and so could see all round. We think he was in the proper place, and we therefore find as a fact that the ketch is not to blame, and that, owing to want of a proper look-out on the trawler, she at the time performed a wrong manœuvre in going ahead without first looking all round to see if anything was in the way.

Now comes the question of law. It has been suggested that the trawler was not to blame, in consequence of the view expressed by Sir Charles Butt in the case of *The Tweedsdale* (*ubi sup.*). I have very carefully considered the case of *The Tweedsdale* (*ubi sup.*), but I do not think that case is of assistance in this case. The substance of that case is this, there are in the light sections of the sailing rules alternative lights provided for trawling vessels. They may either carry the ordinary lights for a steamship—that is, a red light on the port side, a green light on the starboard side, and a masthead light—or they may carry what some of the witnesses have called a duplex light, one lamp hoisted up to the masthead and showing a white light forward, a red light on the port side, a green light on the starboard side, with a dark arc aft. The trawler may carry the duplex light when she is fishing, instead of the usual side lights; and undoubtedly the decision in *The Tweedsdale* (*ubi sup.*) amounts to this, that when a vessel is trawling, and therefore not under command, she ought to show those lights to indicate to other vessels that she is not under command but is trawling, and that therefore it would be the duty of the other vessels to keep out of her way. In this case the lights carried by the trawler, the *Upton Castle*, were the duplex lights—the lamp of three colours and no side lights; and at the time when this trawler was going ahead at full speed after she had got her trawl on deck, she had up her trawling lights as if she were a vessel not under command. If the judgment in *The Tweedsdale* (*ubi sup.*) is looked at, it will be found that Sir Charles Butt carefully pointed out that those alternative lights were only to be carried when the vessel was not under command, and that, as soon as she ceased to be trawling and was fully under command, and able to go full speed ahead, she should put up the usual side lights. I will only read, to emphasise this and to show that I accept the judgment in full, the last part of the judgment of Sir Charles Butt, at p. 171 of the report in 14 P. Div.; 6 Asp. Mar. Law Cas., at p. 432. It is as follows: "It must be observed that the regulation gives a trawler an option; she may either carry the lights which this trawler was carrying at the time, or she may carry in lieu thereof the regulation lights prescribed by art. 3—that is, an ordinary steamer's lights. I think the option so given must be exercised with discretion, and I think the discretion given must be used in this sense. If a trawler has not only sufficient way on her to keep herself in command, but also sufficient way to act with effect in altering her course for an approaching ship, then what I may call the ordinary regulation side lights—that is, the lights prescribed by art. 3—should be carried, and those in charge of her should act as the regulations require an unencumbered vessel to act. If the trawler has no more than steerage way, and has little power, therefore, of keeping out of the way of another vessel, she should carry what I call the extraordinary regulation lights—namely, the lights prescribed in the schedule I have just read, and the lights which this trawler was, in fact, carrying at the time of the collision. She should carry those lights and she should act as this vessel did. She should refrain from making any alteration of her course and leave the other vessel to keep clear of her." In that case the trawler the *City of Gloucester* did nothing, she had her trawl down and she kept her course, and the sailing vessel, the *Tweedsdale*, was held to blame for not keeping out of her way. If this trawler, the *Upton Castle*, was carrying those alternative lights, then she had no right to go ahead at full speed and throw herself across the bows of this ketch. Returning again to the passage in the judgment of Sir Charles Butt, it continues: "The *City of Gloucester*, as I have said, was going at such a rate as to give her bare steerage way, she was

carrying the lights last mentioned, and I therefore hold her free from blame in this matter. I have been obliged to put the best construction I can upon rules which are not easy of interpretation, and I am perfectly well aware that it is almost impossible to put any construction that would not be open to some objection. The one I have adopted leaves a serious responsibility upon persons in charge of trawlers, and probably upon their owners, because they have to make up their minds as to what speed will barely give steerage way, and what will give something more; in other words, they must decide when their vessel ought to carry ordinary lights under art. 3, and when she ought to carry the exceptional lights." In this case, following that decision, the trawler ought, as soon as she was under command and in a position to go full speed ahead, and before she went full speed ahead to have changed her lights and put up the ordinary side lights, so as to give an indication to other vessels of what she was and under what conditions she was steering. For this reason I am of opinion that so far as the law is concerned at the time when this vessel, the *Upton Castle*, got across the bows of the ketch she was a vessel under command, which ought to have had the proper regulation lights up, and ought to have kept out of the way of the ketch, and ought to have had a proper look out, which would have enabled her to see the ketch, and brought home to the minds of those in charge of her that it was not advisable to go full speed ahead. Following this decision, I am of opinion that at the time when the trawler was on the starboard side of the ketch there was no risk of collision, the position was that of sailing vessel and steamer, and it was the duty of the steamer to keep out of the way of the sailing vessel, and it was the duty of the sailing vessel to do nothing. In this case the sailing vessel did nothing, and she was right in doing nothing. The trawler is alone to blame for going full speed ahead across the bows of the sailing vessel when she was on the starboard side of the ketch.

Solicitors for the plaintiffs, *Williamson, Hill,* and *Co.*, agents for *Ingledew* and *Sons*, Cardiff.

Solicitors for the defendants, *Crump* and *Son.*

Supreme Court of Judicature.

COURT OF APPEAL.

Monday, June 26, 1905.

(Before COLLINS, M.R. and ROMER, L.J.).

THE HAVERSHAM GRANGE. (*a*)

Collision — Vessel injured by two collisions — Measure of damage caused by second injury — Cost of dry docking—Demurrage.

A vessel, the M., *was run into and injured by another vessel, the* C. *The injury inflicted by the* C. *was of such a nature that the* M. *had to be dry docked for repairs in order that she might be made seaworthy. The* M. *was afterwards run into by the* H. G. *and further damage was done, to repair which it was necessary that the* M. *should be dry docked. After the collision with the* H. G., *the owners of the* M. *engaged a dry dock for the purpose of doing the repairs rendered necessary by both collisions. The time occupied in repairing the damage caused by the* C. *alone was twenty-two days. The time occupied in repairing the damage done by the* H. G. *alone was six days. Both sets of repairs were done at the same time, and the* M. *was not detained for more than twenty-two days. On a reference to assess the amount of the damage sustained by the owners of the* M., *the owners of the* M. *claimed from the owners of the* H. G. *half the cost of dry docking and incidental expenses and three days' demurrage. The registrar disallowed the claim. The President (Sir Gorell Barnes) affirmed the decision of the registrar.*

On appeal by the owners of the M. *to the Court of Appeal:*

Held, that the owners of the M. *were not entitled to recover demurrage from the owners of the* H. G.; *but that, following the decision in* Vancouver Marine Insurance Company *v.* China Transpacific Steamship Company (55 *L. T. Rep.* 491; 6 *Asp. Mar. Law Cas.* 68; 11 *App. Cas.* 573), *they were entitled to recover half the cost of dry docking and incidental expenses incurred during the time both sets of damage were being repaired.*

MOTION in objection to the report of the registrar.

The following were the facts as found by the registrar: —

On the 25th Dec. 1904, at 11 p.m., the *Maureen* was struck by the *Caravellas*, doing her damage forward. For that collision the owners of the *Caravellas* admitted their liability for 50 per cent. of the damage caused by that collision. In order to repair that damage it was necessary for the *Maureen* to go into dry dock.

On the 26th Dec. 1904, about twelve noon, the *Maureen* was struck by the *Haversham Grange*, damage being done to the *Maureen* on the starboard side and to her bilge keels. The owners of the *Haversham Grange* admitted liability for the damage done by their vessel. In order to repair that damage it was necessary for the *Maureen* to go into dry dock.

The two sets of repairs were subsequently carried out, the dry dock being engaged at the same time for both sets of repairs. The repairs rendered necessary by the damage done by the *Haversham Grange* were done at the same time as the repairs rendered necessary by the damage done by the *Caravellas*, and did not increase the amount paid as dock dues, or the length of time during which the repairs were in progress.

The reference came before the registrar on the 12th April 1905, and the parties agreed that to repair the damage caused by the *Caravellas* would have taken twenty-two days, and to repair that caused by the *Haversham Grange* would have taken six days.

The items of the plaintiffs' claim which were objected to by the owners of the *Haversham Grange* were the following: "(1) To cost of shifting steamship *Maureen* from her discharging berth to dry dock for repairs (part cost charged

(*a*) Reported by L. F. C DARBY, Esq., Barrister-at-Law.

only, as *Maureen* had been damaged by another collision, which also rendered it necessary for her to be repaired and go to dry dock), 11*l.* 7*s.* 6*d.*; (2) to cost of docking and shoring vessel (half cost charged only), 6*l.* 5*s.*; (6) to part dry dock dues, 24*l.*; (8) to part of amount paid for adjusting compasses, 2*l.*; (9) to loss of the use of the *Maureen* in and about repairs for three days. The time occupied was six days, 122*l.* 17*s.* 3*d.*"

At the hearing of the reference it was contended on behalf of the plaintiffs that they were entitled to charge the owners of the *Haversham Grange* with the items set out above on the ground that it was necessary to dry dock the *Maureen* to repair each set of damage, and that each wrongdoer should bear half the cost of the operations common to both sets of repairs, and should contribute equally towards the loss sustained by the detention of the *Maureen* while both sets of repairs were being effected.

It was contended on behalf of the defendants that the owners of the *Caravellas* were solely liable for all these expenses, because at the time of the second collision those expenses were bound to be incurred, and that the injury caused by the *Haversham Grange* did not increase them.

The registrar in his report disallowed the items on the grounds that in an action of tort all that had to be considered was what were the consequences of the collision, and what were the losses caused to the owners of the *Maureen* by the collision. As the owners of the *Maureen* were not put, as regards dock dues and demurrage, to any more expense by reason of the collision with the *Haversham Grange* than would have been incurred without such collision, he held that the contention of the defendants was correct, and disallowed the claims made for dock dues and demurrage.

The owners of the *Maureen* on the 18th April 1905 filed a notice of objection to the report of the registrar, and on the 20th April the solicitors for the owners of the *Caravellas* and *Haversham Grange* consented and agreed to the objections to the registrar's report being heard on motion.

The case came before the court on the 8th May on motion, and, after hearing the arguments of counsel, the President reserved judgment till the 17th May 1905.

May 17, 1905.—The President.—This is a case which gives rise to matters of some little interest, but to my mind it is not a very serious point. The question which has to be determined arises on a few short facts, and the question is whether the plaintiffs, the owners of a vessel called the *Maureen*, are entitled to recover against the owners of the *Haversham Grange* a proportion of dock dues and similar payments and demurrage. The facts are these: On the 25th Dec. 1904, at 11 p.m., the *Maureen* was struck by the *Caravellas*, doing her damage forward. For this collision the *Caravellas* admitted her liability for 50 per cent. of the damage. In order to repair this damage it was necessary for the *Maureen* to go into dry dock. On the 26th Dec., about twelve noon, the *Maureen* was struck by the *Haversham Grange*. Damage was done on the starboard side and to the bilge keels. The *Haversham Grange* admitted liability for this damage, to repair which it was necessary for the *Maureen* to go into dry dock. The two sets of repairs were subsequently carried out, the dry dock being engaged for each set of repairs at one and the same time. The repairs of the *Haversham Grange* damage were done at the same time as the repairs of the *Caravellas* damage, and did not increase the amount of the dock dues, or the length of time during which the repairs were in progress. Thereupon the plaintiffs, the owners of the *Maureen*, I suppose because their claim against the *Caravellas* was limited to 50 per cent. of the damage, have contended that they were entitled to charge a proportion of the dock dues and the demurrage to the *Haversham Grange* collision; and the ground of the contention was that, as it was necessary for each damage that the *Maureen* should be dry docked and be repaired, the plaintiffs were entitled to make this claim, and that they have made it on the basis of each vessel which did damage being liable for half of the following items—namely, the cost of shifting the steamer *Maureen* from her discharging berth to the dry dock for repairs, the cost of docking and shoring the vessel, the dry dock dues, a small part of a small amount for adjusting compasses, and the loss of the use of the *Maureen* during the time of the repairs for three days (that is half of the six days during which the damage done by the *Haversham Grange* took place, because, if I remember rightly, the repairs done by the *Caravellas* took considerably longer—I think, if I am correct, some twenty-two days). The registrar has reported as follows: "In my opinion in an action of tort such as this, all that has to be considered is, what are the consequences of the collision and what are the losses caused to the owners by such collision. In the present case the owners of the *Maureen* were not put, as regards dock dues and demurrage, to any more expense by the collision with the *Haversham Grange* than they would have incurred without such collision, and, therefore, I hold that the owners of the *Haversham Grange* are right in their contention" — that contention on the part of the *Haversham Grange* being that they are not responsible for any part of the items to which I have referred; and they say that they are not so responsible, because, the first collision having damaged the vessel to such an extent that she could no longer be used without repairs, which would take a longer time than the repairs of the damage done by the *Haversham Grange* afterwards, that in the first place no demurrage could possibly be claimed, as there was no delay caused by the *Haversham Grange* because the vessel would be longer delayed and useless because of the *Caravellas* damage. Secondly, that none of the items which I may characterise, generally, as dock dues, because they are all on the same footing as dock dues, are due to the second accident, because she must have been docked in consequence of the first accident, and was, therefore, damaged to an extent which is measured by the cost of such putting into dry dock, plus the repairs, and that no extra expense was caused by the second collision, and the repairs caused by the second collision could be done while she was in dock, and in a less time than the repairs of the first collision. The point which was made principally by the plaintiffs, who seek to put a part of that half liability on the defendants, was that the case is governed by the decision in what is known as the *Vancouver* case (reported in 11 App. Cas., under the name

of *Marine Insurance Company* v. *China Transpacific Steamship Company Limited*) (*ubi sup.*), and that the effect of the decision is to show that in circumstances such as these the expense should be divided. It is important first to point out that that case has no application whatever to the claim for demurrage, and the learned counsel who argued in support of putting forward the present claim against the *Haversham Grange* felt the difficulty of asking that half the demurrage should be paid by the second vessel doing damage, and half by the first vessel doing damage, because it is obvious that the rule which has to be applied is simply this: to ascertain what damage was done by the wrong committed by the second wrongdoer, and if the second wrongdoer runs into a vessel which is already incapacitated by something which has previously happened, so that the second damage did not delay her one minute, it is impossible, to my mind, to say that the second wrongdoer is to be responsible for part of the delay which he has not in fact caused. *The Vancouver* has no application to this point. and I think it is quite clear that the defendants are not liable for any part of the demurrage.

But the case, it is said, is applicable to the claim so far as it relates to dock dues. That was a case of a totally different character to the present case. It was an action on a policy of marine insurance where a vessel had become so foul that she required to be put into a dry dock, and where, also, she had sustained certain damage to her stern frame, and which also necessitated her being put into dock. I do not wish to spend time in reading the whole of the headnote which sets out these facts, but it is sufficient to say that the contention in that case was that the underwriters were responsible for part of the dock dues because they ought to be treated as part of the cost of repairing the damage which they were responsible for, and that, if they were responsible for part of the dock dues, then the loss which would fall on them would exceed 3 per cent. and make them liable, whereas, if it was excluded, the fact was that the amount of repairs would come under 3 per cent., and therefore there would be no liability on the underwriters. That case was in the Queen's Bench Division, and judgment was entered for the defendants there. In the Court of Appeal the plaintiffs were successful, and the case then went to the House of Lords and the decision of the Court of Appeal was affirmed; and the point made by counsel in the present case is that that case is binding and governs the present case. To my mind it does not. Of course, it is a decision which is binding absolutely upon the point to which it relates; and this court is bound by it; but when the judgments in that case are examined they appear to me to put the case upon a principle which does not apply to the present matter. If, in the first place, the judgment of Lord Esher is considered, it will be seen that it places the two parties who were considered in this matter as so related, and in such a situation to each other, that, as a matter of business—that is his expression—the amount of the dock dues should be divided between them, and that that is the general view taken by the Court of Appeal, and I think also in substance by the House of Lords, is well illustrated by a passage which I quote from the judgment of Fry, L.J., at p. 583, where he says this: "Now, 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." It appears to me that that proposition, and that view of the matter, shows that that case has no real parallel to the present case, because the only question in the present case is: What amount of damage did the second wrongdoer do? There is no question of a person acting for himself and for underwriters in getting the repairs carried out; there is no question of concurrence; there is really only this question—namely, What further damage did the second wrongdoer do beyond what had already been done by the first? In the judgment of Lord Herschell there is very much the same view expressed, and at p. 589 I find this observation: "It was contended by the Attorney-General and Mr. Barnes, for the appellants, that the loss sustained by the shipowner by the disaster insured against was to be measured by the depreciation of the value of his vessel thereby occasioned. And they ingeniously argued that in the present case, inasmuch as the vessel whose sternpost was injured had already so foul a bottom as to necessitate docking before another voyage was prosecuted, she was only depreciated to an extent that would be covered by the cost of the necessary repairs, plus the cost of the extra docking for that purpose beyond what was requisite for cleaning her. It is on this point that I have entertained doubts whether the view presented on behalf of the appellants was not the sound one." This is the way that point is answered: "But I have come to the conclusion that a particular average loss is not as an ordinary rule to be measured in the manner contended for. Although there was considerable difference of opinion expressed by the judges in the Court of Appeal in the case of *Pitman* v. *Universal Marine Insurance Company* (4 Asp. Mar. Law Cas. 444, 544) as to the mode in which the amount of the particular average loss in that case was to be arrived at, all the judges were, I think, agreed that where there is a partial loss in consequence of injury to a vessel by perils insured against, and the ship is actually repaired by the shipowner, he is entitled as a general rule to recover the sum properly expended in executing the necessary repairs less the usual allowances." It would seem to me that but for that rule it was thought that the damage done was depreciation. Well, that is really the case in the case of a wrongdoer. What damage does he do? He depreciates the ship by the amount of the injury which he inflicts. How is that depreciation practically measured? By seeing

how much it costs to repair, and the cost of repairing includes dry docking; but if, for another reason, the owner of the damaged vessel is already about to repair the ship, and has already to incur dock dues, it does not add one particle to the dock expenses, in claiming against the wrongdoer, that the owner aforesaid has done the repairs caused by the wrongdoer while the owner was doing something which he is already obliged to do in order to repair the ship. Of course, the wrongdoer has to be made responsible for all actual repairs necessitated by his wrongdoing; but it seems to me that the cost of the dock dues is not an additional expense which falls upon the second wrongdoer. There is a further case upon this point, which I do not think touches the present question, and that is the case of *Ruabon Steamship Company* (81 L. T. Rep. 585; 9 Asp. Mar. Law Cas. 2; (1900) A. C. 6), in which *The Vancouver* was referred to and commented on, but it has, to my mind, very little bearing on the present case. I think, therefore, that the registrar was right in this case, and that the defendants, the owners of the *Haversham Grange* are not liable for any portion of the expenses which are in dispute in the present matter, and therefore the motion which seeks to have the items, which have been disallowed, allowed, and the report reversed, fails, and, in my opinion, the motion must be dismissed.

From that decision the owners of the *Maureen* appealed.

June 26.—*Laing*, K.C. and *Dawson Miller* for the appellants, the owners of the *Maureen*.—The principles laid down in the case of *The Vancouver* (*ubi sup.*) govern this case, and the expenses incurred in docking the vessel ought to be borne equally by the wrongdoers. They cannot be in a better position than the underwriter who was bound to indemnify the owners against a loss under the policy in that case. The owners of the *Maureen* are entitled to be indemnified by the wrongdoer at once, and so the cost of each set of damage should be calculated separately. It is, however, only reasonable that, if both sets of damage are repaired together, the claims against each wrongdoer should be reduced proportionately if a saving of cost has been effected. Lord Brampton in his judgment in the case of *The Ruabon* (*ubi sup.*) says that "where two operations are essentially necessary to be performed upon the hull of the ship" in order to put her into condition to send her to sea, and "neither of such operations could be performed unless the ship were dry docked," and it is deemed expedient to do both operations at the same time, the cost of dry docking and the dock dues must be shared in proportion, "having regard to the period of joint or separate use of it." The case of *The Acanthus* (85 L. T. Rep. 696; 9 Asp. Mar. Law Cas. 276; (1902) P. 17) has no application to this case, for in that case, although the owners derived a benefit from the dry docking, the wrongdoers were not entitled to any contribution from them in respect of it. With regard to the demurrage claim, the same principle is applied; to repair the damage caused by the *Haversham Grange* would have taken six days, but, as the other repairs were going on at the same time, the owners of the *Haversham Grange* are only charged with three days. [ROMER, L.J.—I do not see how you can say this vessel was detained by the collision with the *Haversham Grange*; the first collision would have caused her detention for twenty-two days, and, in fact, she was detained for that length of time.] The owners need not have done both repairs at the same time.

Maurice Hill (*Aspinall*, K.C. with him) for the respondents, the owners of the *Haversham Grange*.—First, with regard to the demurrage. [COLLINS, M.R.—You need not argue the demurrage point; you may confine yourself to the dock dues.] As to the dock dues, the *Maureen*, after her collision with the *Caravellas*, was bound to go into dry dock. The cost of the repairs rendered necessary by that collision being 1300*l.*, and the cost of the repairs rendered necessary by the collision with the *Haversham Grange* being 190*l.*, the repairs necessitated by the *Caravellas* damage would take much longer to do. Lord Brampton, in his judgment in the case of *The Ruabon* (*ubi sup.*), says he did not find "anything in *The Vancouver* case which would justify such division of dock dues, unless in such cases as I have mentioned," and the cases he had mentioned are those quoted by counsel for the appellants, but they are not cases which are analogous to this one. The cases of *The Vancouver* (*ubi sup.*) and *The Ruabon* (*ubi sup.*) have no bearing on cases of damage by a tortfeasor. The only thing for which a tortfeasor is liable is the consequence of the wrong done by him; he is liable for the damage which results from the wrong done At the time the *Haversham Grange* collided with the *Maureen* all these docking expenses would have been incurred, and would have had to have been met by the owners of the *Caravellas*. How can it be said that they are in part a consequence of the wrong done by the *Haversham Grange*? The only question decided in *The Vancouver* case was that a particular average loss sustained by the shipowner exceeded 3 per cent. within the meaning of the warranty contained in a policy of assurance underwritten by the insurers. That was pointed out by Lord Macnaghten in his judgment in the case of *The Ruabon* (*ubi sup.*). There is no principle of law which requires a person to contribute to an outlay because he has derived a benefit from it, and *The Vancouver* case did not decide that such a person should be made to contribute.

Laing, K.C. in reply.—A tortfeasor cannot be in any better position than an underwriter. They both have to indemnify the injured party against the loss sustained. The only question here is what is the cost of repairing the damage caused by the *Haversham Grange*. Even if the owners of the *Maureen* were not going to repair the vessel at all they could recover that, for it is the measure of the loss sustained.

COLLINS, M.R.—This is an appeal from a decision of the President upon a question of whether or not one of two tortfeasors—I call them tortfeasors because some stress has been laid in the argument on the fact that they are tortfeasors—who caused the damage to a particular ship by coming into collision with it is entitled to say that the damage for which he is liable must be measured by excluding altogether the cost to which the injured vessel was put in going into dry dock, inasmuch as it would have had to have gone into dry dock to repair the

damage already inflicted by the earlier collision with the other tortfeasor. That is the point. This steamer was coming up the Thames, and a ship called the *Caravellas* came into collision with it and did very considerable damage. Afterwards, as it proceeded further on its course, another vessel, called the *Haversham Grange*, came into collision with it also, striking the other side of it, apparently, and did damage, but nothing like so great damage as had been done by the *Caravellas*. The vessel had to be put into dry dock, and the repairs rendered necessary by both collisions were effected when the ship was put into dry dock, and the shipowner claims that, in assessing his damage against the *Haversham Grange*, which was the second ship which came into collision with his vessel, he is entitled to include in his measure of damage against the second ship a proper proportion of the cost of putting the ship into dock, and, I presume, of taking it out. On the other hand, the owners of the *Haversham Grange* contend that they cannot be charged with any part of the cost of putting the ship into dock, because, when the *Haversham Grange* came into collision with the *Maureen*, she was already a damaged ship, and they say they are not liable for any of that damage. They say she was a damaged vessel, and a vessel in that damaged condition would have been bound to go into dry dock whether their vessel had collided with her or not. Therefore they begin the discussion after they have taken into consideration all the damages caused by the first collision which have to be paid by the owners of the first wrongdoing ship. They say they did no damage until after that, and therefore they are not liable for anything until that has been paid by the first wrongdoer who caused the taking of the ship into dry dock to be necessary. The question is whether that is a right contention or not. The learned President, following the decision of the learned registrar, has adopted the view that no part of the putting of the ship into dry dock ought to be claimed against the owners of the second wrongdoing ship, the *Haversham Grange*.

On considering the whole matter, I have come to the conclusion that the principles of *The Vancouver* (*ubi sup.*), decided in the House of Lords, which is the leading case on the matter, and which is reported under the name of *Marine Insurance Company* v. *China Transpacific Steamship Company* (*ubi sup.*), cover this case. It seems to me, by the well-known practice of the Admiralty Court, what we have got to ascertain in this case is this, What ought to be taken as the cost of repairing the damage done by a wrongdoer? No doubt, as counsel for the *Haversham Grange* has pointed out, a tort has been committed, and the tortfeasor is responsible to the extent of the damage done. Whether the ship is repaired or not is not at all material, but practically, in ascertaining what the amount of the damage is, the standard adopted is the cost of effecting the repairs rendered necessary by the action of the wrongdoer. Now, in this particular case the ship was put into the dock for the purpose of effecting the repairs, and the right of the shipowner was to recover against each of the tortfeasors all the costs attributable to the wrong committed by him, and therefore, as against each of them, it seems to me the only thing to be ascertained was, What was the cost to the ship for repairing the particular wrong done by the particular wrongdoer? The result of the two wrongs together is, of course, that the ship went into dock and the whole mischief was repaired. A calculation had to be made to ascertain what the total cost of all the mischief was, and to apportion between the two delinquents the particular part of the cost attributable to the wrong caused by each of them; and it seems to me, upon the principle of *The Vancouver* (*ubi sup.*), so far as there was a common factor in the case, and to the extent of the time occupied in the common process of repairing the mischief done by each of them, that that must be apportioned between the two ships. The principle in *The Vancouver* case was laid down chiefly in the judgment of Lord Herschell, and in attempting to summarise it myself in the case of *Ruabon Steamship Company* v. *London Assurance* (77 L. T. Rep. 402; 8 Asp. Mar. Law Cas. 369; (1897) 2 Q. B. 456), and, subject to a qualification which has been introduced by the *Ruabon* case, I think it does express the principle, I say: "I think the principle of that case is that, where 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 between 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." I adhere to that, subject to this qualification, which has been introduced by the case of *Ruabon Steamship Company* v. *London Assurance Company* (*ubi sup.*), that the repairs must have been such as in the circumstances the owners of the ship had no alternative but to have executed. It does not apply to a case where he avails himself of the convenient opportunity of doing the repairs, the ship being in dock; but it does apply to a case in which he could not avoid going into dock to do either repairs, and where all repairs were in fact done. I find this statement of principle in the judgment of Lord Brampton in the case of *The Ruabon* (*ubi sup.*). He says, referring to the case of *The Vancouver* (*ubi sup.*): "Since the decision of *The Vancouver* case, by which, of course, we are bound, and which to me seems to be founded on good sense, it is not, in my opinion, open to question that where two operations are essentially necessary to be performed upon the hull of the ship in order to render her in a condition to justify a prudent owner in sending her again to sea, and one of such operations being to effect repairs for the cost of which underwriters are responsible, the other to clean and scrape the ship necessitated by wear and tear, the cost of which must be borne by the owners themselves, and neither of such operations could be performed unless the ship were dry docked, and

both of which operations the owners and underwriters, or owners acting for themselves and also for the underwriters, deem it expedient should be performed at one and the same time, or that one should immediately follow the other without any substantial interval under one continuous dry docking, in such cases the cost of docking and all dock dues during the period the vessel is in dock must be shared in proportion, having regard to the period of joint or separate actual use of it." Now, in that case there is no doubt whatever that the two operations described by Lord Brampton were essentially necessary, because both sets of repairs were essentially necessary; and, therefore, that case *primâ facie* seems to me to come directly within the principles of *The Vancouver*. The argument here is twofold. It is said that in *The Vancouver* case you are dealing with questions between an uninsured owner as to one part of the repairs and an underwriter who was bound to indemnify as to the other part of the repairs, and that therefore that case is distinguishable from this one, where the parties concerned are both tortfeasors. At one time I thought it was suggested that there was some difficulty arising by reason of the rule that there could be no contribution between two tortfeasors; but the learned registrar himself repudiated any suggestion of difficulty on that ground, and he has pointed out to us that, though it was pressed upon the learned judge, the learned judge has not adopted it.

Therefore we must look to some other fact or principle to take this case out of the principles which, as I have explained, support the decision in *The Vancouver* case. It is said that a tortfeasor is, after all, in a different position, and in a better position, than an underwriter; that he is not in the position of an underwriter and bound to indemnify, but that, although bound to indemnify inasmuch as he is a tortfeasor, and bound to make good the damage caused, yet he is in a better position than an underwriter whose contract is to indemnify. I fail to realise that position, and I think if one once arrives at this, that the measure of his liability is the cost of repairing the damage which he has done, then it becomes simply a question of arithmetic, and the principle laid down in *The Vancouver* case obliges me to say that you must not treat the fact that the first set of repairs had to be done as excluding the obligation to pay for his part of the common costs incident to both sets of repairs when the second set is done. It seems to me that the plaintiffs are not excluded from considering that one of the parties, or both of them, are tortfeasors, because the common factor, in the two cases is that these two parties, I do not care whether by virtue of a contract, or by virtue of a wrong, when the repairs are done, are obliged to make them good. That is the result of being put in the position of a person who is bound to indemnify the plaintiff for the wrong he has done. When once you have decided the cost at which the repairs were done, and find out what part of those costs each of the wrongdoers ought to pay, it seems to me the principles laid down in the case of *The Vancouver* oblige you to treat the two common factors in that process as costs which must be divided in their proper proportion. For these reasons I think that the learned judge of the court below was wrong in adopting the view that the measure of the liability of the *Haversham Grange* must be ascertained in view of the fact that there was a consummated wrong which would have involved a certain cost to the owner of the ship, even if no other wrong had been committed, and that that excludes any possible liability on the part of the second wrongdoer to contribute to any part of the common expenses of the repairs. For these reasons it seems to me it resolves itself into a question of the proper way of looking at the repairs, which is the ordinary way of ascertaining the damage to be recovered from a wrongdoer, and that upon that account the common items should be divided. That disposes of the appeal so far as the expenses of going into and coming out of the dock are concerned. There is another matter which raises a question entirely independent of the principles which I have been discussing, and that is the claim for the detention of the ship. It turns out that the ship must have been, and in point of fact was, detained the whole time in dock by the repairs which had to be executed in consequence of the damage done by the first of the two ships, the *Caravellas*, and that in point of fact, although the repairs rendered necessary by the *Haversham Grange* were done simultaneously, the ship was not detained an hour longer by reason of that fact. In view of that it seems to me impossible to say that any claim for detention exists against the *Haversham Grange*, and that therefore, so far as that part of the case is concerned, it must be dismissed.

ROMER, L.J.—I have come to the same conclusion on both points. I will only add a few words with regard to the dock dues. In this case two injuries had been occasioned to the *Maureen* by two collisions—one with the *Caravellas*, and the other with the *Haversham Grange*, the *Haversham Grange* being the second in point of time. It was after both accidents had happened that the vessel was taken to the dry dock, and while she was in the dry dock it was used for the joint purpose of repairing the damage done by each collision. In that state of things, I think it is reasonably clear that the ship was taken into dock, and the dock was utilised for the purpose of both injuries, so that the ship that occasioned the second injury could not say that the dock had not been used to repair the damage for which she was liable. The *Haversham Grange* was liable for the injury caused by the second collision, and her owners used the dock for the purpose of doing the repairs rendered necessary by the injury that she had occasioned. That being so, it appears to me that you have a case of the user of a dock by two persons to repair separate injuries, each of which required docking to enable the injuries to be repaired; and it appears to me also that, that being so, and so far as the dues at entry are concerned, you ought to consider that the dues were incurred on behalf of both wrongdoers, and, so far as they were common dues used in repairing both ships, you ought to consider those dues as utilised on behalf of both. I think that was the principle clearly laid down in the case of *The Vancouver* (*ubi sup.*), as interpreted and explained by the case of *The Ruabon* (*ubi sup.*), and especially by the judgment of Lord Brampton in the latter case. It appears to me that those cases lay down the principles to be applied

to these dock dues. It is said that, because the injury occasioned by the *Haversham Grange* was second in point of time, some special benefit thereby accrued to the owners of the *Haversham Grange* in respect to the costs of these dock dues. It was said that, as between the injuries occasioned by the *Caravellas* and the injuries occasioned by the *Haversham Grange*, you ought to treat the injuries caused by the *Caravellas* as necessitating, either on the part of the owners of the *Maureen*, or on the part of the owners of the *Haversham Grange*, a liability on the part of the owners of the *Caravellas* to dock and to pay the expenses of the docking and of the detention while the *Maureen* was in the dock, so that the owners of the *Haversham Grange* would have the benefit of that docking without any liability to contribute to the cost of it. In other words, that, because the injury done by the *Haversham Grange* was second in point of time, therefore the docking must be held to be done solely for the purpose of repairing the first injury. To my mind, that is not an accurate or proper way of looking at the matter at all. It appears to me that, both injuries having been done, it cannot be said that there is any right on the part of those who had occasioned the second injury to say that there was any obligation on the part of the persons who had occasioned the first injury to free them from any part of the obligations they otherwise would have incurred if there had been no first injury at all. To my mind it is clear, as I have said, that, where the docking was done on behalf of both, both ought to contribute in accordance with the principles laid down in the case of the *Vancouver*. In my opinion, the owners of the *Haversham Grange* should bear a share of these dock dues, and the appeal on that point should be allowed.

Solicitor for the appellants (the owners of the *Maureen*), *C. E. Harvey*.

Solicitors for the respondents (the owners of the *Haversham Grange*), *W. A. Crump* and *Son*.

Aug. 8 *and* 9, 1905.

(Before Collins, M.R., Romer and Mathew, L.JJ.)

The Emilie Millon; Gulbe and others *v* Owners of the Emilie Millon. (*a*)

APPEAL FROM THE COURT OF PASSAGE AT LIVERPOOL.

Dock—Unpaid dock dues—Statutory right of dock board to detain ship until dues paid—Mersey Dock Acts Consolidation Act 1858 (21 *&* 22 *Vict. c. xcii.*), *s.* 253.

The Mersey Docks and Harbour Board have statutory power, while any dock or harbour rates remain unpaid in respect of any vessel, to "cause such vessel to be detained until all such rates have been paid."

A vessel in the Mersey Docks, in respect of which docks rates were unpaid, was sold under an order of an Admiralty Court in an action by the master and crew for wages. The board having refused to allow the vessel to leave the dock until the rates were paid, an order was made that the vessel should "be delivered to the purchaser free from all claims and demands against her upon payment of the purchase money into court," and that "any right of the board to payment of their charges in priority to other claimants" should be preserved as against the fund in court.

Held (allowing the appeal), that the right of the dock board to detain the vessel until all rates were paid was absolute, and that no order could be made for the delivery of the vessel from the dock until all the dock rates were paid.

Appeal of the Mersey Docks and Harbour Board from an order made by the judge of the Court of Passage at Liverpool.

The vessel *Emilie Millon* in March 1905 entered the docks of the Mersey Docks and Harbour Board and became liable to pay tonnage rates.

While the vessel was in the docks, actions were brought in Admiralty in the Court of Passage at Liverpool by the master and crew in respect of wages, and by a "necessaries man," and judgments were obtained against the ship. The ship was then arrested by the marshal of the court, but remained in the dock.

An order was then made for the sale of the ship by the marshal of the Court of Passage; and the marshal effected a sale by private treaty.

Tonnage rates being unpaid in respect of the vessel, the dock board refused to allow the vessel to be removed from the docks until those rates were paid. The purchaser objected to pay the purchase money until the ship could be taken out of the docks.

Thereupon an application was made to the judge of the Court of Passage, the dock board being made respondents and appearing under protest, and on the 31st July an order was made as follows: "That the sale of the *Emilie Millon* be confirmed, and that the vessel be delivered to the purchaser free from all claims and demands against her on payment of the purchase money into court, less Messrs. Kellock's charges. That the marshal's account be taxed and paid out of the money when in court. That any right of the Mersey Docks and Harbour Board to payment of their charges in priority to other claimants which they may be entitled to under their Acts of Parliament be preserved as against the fund in court."

The amount of the purchase money of the ship would be insufficient to pay all the charges and liens, and the unpaid tonnage rates.

The Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.) provides:

Sect. 247. Any collector of tonnage rates may receive, by way of deposit, and on account of the rates to which any vessel may be liable, such a sum of money as shall in his opinion be sufficient to cover the amount thereof; and the production of a certificate from him that such deposit has been made shall, as an authority to the collector of customs to allow the entry of such vessel to be made, be equivalent to the production of a receipt for the payment of such rates by the collector thereof, but such vessel shall not be entitled to clearance outwards until a receipt for the full amount of all rates payable in respect of such vessel, signed by some collector of such rates, shall have been produced to the proper officer of customs.

Sect. 253. While any dock tonnage rates or harbour rates remain unpaid in respect of any vessel liable thereto, the collector of such rates shall not receive any

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

further or other entry in respect of such vessel, and the board may cause such vessel to be detained until all such rates shall have been paid.

The Mersey Docks and Harbour Board appealed. The master and crew were the only respondents who appeared at the hearing of the appeal.

Carver, K.C. and *Leslie Scott* for the appellants.—The order of the learned judge was wrong. It is clear from the provisions of sect 253 of their Act that the dock board have an absolute right to detain a vessel in the dock until all unpaid tonnage rates are paid. The order which has been made deprives them of that right. The effect of the order is that the costs of sale and of the marshal will be deducted before the money is paid into court, and that the dock board will have to fight over the balance, instead of being secured by their right to detain the ship until they are paid in full. The statute does not give the dock board any lien, or any claim against the purchase money. The statute gives a general right of detention against all the world irrespective of any liens, and that right overrides all other rights.

Ross-Brown for the respondents.—This order was quite right. This statute only gives the right of detention for unpaid tonnage rates subject to any maritime lien then attached to the vessel. The master and crew had a maritime lien on this ship for wages, and obtained judgment against the ship. The right given by sect. 253 to the dock board does not override that maritime lien. That lien is a subtraction from the absolute property of the owner:

The Ripon City, 8 Asp. Mar. Law Cas. 304; 77 L. T. Rep. 98; (1897) P. 226, 242.

The right of the dock board is only against the shipowner, and must be subject to the paramount lien which is a subtraction from the property of the owner. The master and crew, having a maritime lien on the ship for their wages, are in a better position than the shipowner with regard to the dock board, and the owner cannot deprive them of that lien by taking the ship into the dock and neglecting to pay the dues. The lien of master and crew for wages has priority over the possessory lien of a shipwright for repairs, and the position of the dock board is analogous to that of the shipwright. The order of the learned judge was, therefore, right, as the vessel cannot be effectively sold and the purchase money obtained in order to pay the wages until the ship is released from the dock.

Carver, K.C. replied.

Collins, M.R.—It appears to be quite clear on the express wording of the two sections—sects. 248 and 253 of the Mersey Dock Acts Consolidation Act 1858 (21 & 22 Vict. c. xcii.)—which have been referred to, that an express statutory right of detention in respect of rates unpaid has been conferred upon the Mersey Docks and Harbour Board as a condition of this ship going into and going out of the dock. This order seems to ignore that right, because it orders the ship to be taken out of the dock, and substitutes a charge, if any, upon the fund. There is no charge. The only protection the dock board have is to keep the vessel under their control. That right they have by statute, and nobody can undo or annul that statutory provision in their favour. I think this order was misconceived, and must be set aside.

Romer, L.J.—I quite agree. It is not accurate to say that the Mersey Docks and Harbour Board have a lien on the ship; it is rather a right to detain the ship and prevent its going out. That right is clearly given to the dock board, and they have nothing to do with any question or disputes as between the owners and the crew, or with any sale of the ship to any purchaser. Those are matters that concern the persons interested in the ship. That does not concern in any way the dock board. The dock board are entitled to say as against the ship, whoever is the owner, that this ship cannot be taken out, in the express words of the statute, unless the dock dues are paid. The order as framed deprives them of that right, and without their consent purports to give them an option to try and make some claim to a lien in priority. They have no lien in priority. Upon this order, if it stood, if the ship had gone out, the dock board would have been left to make a futile claim against the fund in court. The order is clearly wrong and ought to be discharged, and the matter must be remitted back to the judge with the direction to make such order as between the parties interested as he may be advised to make. So far as the dock board are concerned, no order which he can make can take away their rights without their consent.

Mathew, L.J.—I am of the same opinion. The literal construction of the section here seems perfectly reasonable. It gives the dock board a right to detain the ship for the dock dues. The learned counsel for the respondents argued that we ought to read into both or either of these sections a proviso that the right of the dock board to detain the ship shall cease if it appears that there are maritime liens upon it which were created before she came into the dock. See what the consequences would be. In every case where a vessel is brought into dock or placed in dock the burden would be put upon the dock board of inquiring into the previous claims upon her, and of deciding whether the ship should come in or not. It seems to me it is incredible that the Legislature could have meant to put any such obligation upon the dock board. The literal construction of the statute is entirely in their favour, and this order, therefore, must be set aside.

Appeal allowed.

Solicitors for the appellants, *Rawle, Johnstone, and Co.*, for *W. C. Thorne*, Liverpool.

Solicitor for the respondents, *R. J. Steinforth*, Liverpool.

July 4, 5, 6, 7, 8, 27, 28, *and Dec.* 20, 1905.

(Before VAUGHAN WILLIAMS, STIRLING, and COZENS-HARDY, L.JJ.)

ASSHETON-SMITH *v.* OWEN. (*a*)

APPEAL FROM THE CHANCERY DIVISION.

"Port"—Ships loading and unloading—Statutory tolls and dues—Private docks and quays constructed by and belonging to landowner—Claim for exemption—"Limits of the port"—Enlargement—Fiscal port—Contemporanea expositio—*Carnarvon Harbour Act* 1793 (33 *Geo.* 3, *c. cxxiii.*)—*Carnarvon Harbour Act* 1809 (49 *Geo.* 3, *c. xxiv.*)—*Evidence—Admissibility.*

Near the village of Port Dinorwic, which is situate about four miles north of Carnarvon, the plaintiff and his predecessors in title had constructed docks and quays on his own land, at which he was in the habit of loading vessels owned or chartered by him with slates from the Dinorwic quarries, which formed part of his estate, for the purpose of their being conveyed by sea to purchasers. These docks and quays were built subsequently to 1809, *and at a place further inland than the natural high-water mark at that date. These vessels usually passed out of the Menai Straits by the north end thereof. The vessels on their return brought back to Port Dinorwic other goods for the plaintiff's use, and these goods were unloaded at his docks and quays. The plaintiff and his predecessors had up to a short time before the commencement of the action paid dues for such vessels.*

The trustees of Carnarvon Harbour Trust are entitled to levy rates and duties upon ships loading and unloading "within the limits of the port" of Carnarvon under the Carnarvon Harbour Acts of 1793 *and* 1809.

Held, first, that the words "limits of the port" in those Acts meant the fiscal port, and that the plaintiff's docks and quays were within such limits.

Held, secondly, that that which the plaintiff and his predecessors had done amounted to an enlargement of the limits of the fiscal port of Carnarvon, and extended the same to any dock or quay constructed subsequent to the Acts on land beyond the line of high-water mark.

Admissibility of ancient survey as evidence discussed.

Decision of Kekewich, J. affirmed.

THE plaintiff, George William Duff Assheton-Smith, was tenant for life in possession of the Vaynol estate, in the county of Carnarvon, which has a frontage of about two miles along the east side of the Menai Straits. The action was brought to obtain a declaration that the plaintiff was not liable to pay certain rates and dues in respect of vessels using the plaintiff's docks and quays.

The town of Carnarvon is situate on the Menai Straits about four miles south of Port Dinorwic, which is a village on the east side of those straits, and such part of Port Dinorwic as abuts on the Straits belonged to and formed part of the Vaynol estate.

At or near the village of Port Dinorwic, partly on the Vaynol estate and partly on land leased to the plaintiff by the Crown, docks, wharves, and quays had since the year 1809 been constructed and maintained by the plaintiff and his predecessors in title.

These docks, wharves, and quays were situate further inland than the original high-water mark of the sea at that place, but were connected with the sea by an artificial channel.

Part of the Vaynol estate consisted of the slate quarries known as the Dinorwic quarries, from which slates were brought down to Port Dinorwic and there loaded at the plaintiff's docks, wharves, and quays on vessels which belonged to the plaintiff and other vessels chartered by the plaintiff for carrying slates, and were by them conveyed by sea to purchasers. Such vessels usually passed out of the Menai Straits by the north end thereof.

The plaintiff's vessels and all such other vessels as were chartered as aforesaid were loaded entirely with slates and other goods belonging to the plaintiff, and they brought back for the plaintiff's use or consumption goods to Port Dinorwic which were unloaded at the plaintiff's docks, wharves, and quays.

The defendant, Henry Owen, was the collector and treasurer of the trustees of Carnarvon Harbour Trust, they being able to be sued in the name of their treasurer by virtue of the Act 33 Geo. 3, c. cxxiii. (1793).

By that Act, which was declared to be an "Act for enlarging, deepening, cleansing, improving, and regulating the harbour of Carnarvon, in the county of Carnarvon," it was recited that the harbour, and the several channels leading thereto, had of late years by the flux and reflux of the tides, and from various other causes, been greatly choked and filled up with mud, sand, and dirt, and vessels of burthen were thereby prevented from getting up to the quays, wharfs, and landing places within the harbour, and the shipping lying in the harbour were exposed to inconvenience and danger; that the quays and piers already made and constructed within the harbour were not sufficient for the preservation thereof, or for the reception and convenient lying of the ships and vessels resorting thereto, or for requisite and convenient dispatch in loading and unloading; and that it would be of great benefit and advantage to the merchants and others living in or trading to and from the town and port of Carnarvon, and of public utility, if the harbour, and the several channels leading thereto, were properly enlarged, deepened, cleansed, improved, and regulated, and if new and additional piers and quays were constructed and built for the preservation and protection of the harbour, and the accommodation of the trade thereof.

Then numerous named persons were thereby constituted and appointed trustees for putting the Act in execution.

Then followed the subjoined material provisions:

> Sect. viii. And be it further enacted, that the said trustees, or any seven or more of them, may and they are hereby authorised to lay and fix buoys and beacons in proper places upon the bar, and other banks and shores leading to and in the port of Carnarvon, and may from time to time remove, alter, displace, and replace the same, as they shall find necessary and proper, for the safety of ships and vessels.

By sect. ix. the trustees were authorised and empowered to erect, and from time to time to

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

remove and alter, as occasion might require, one or more pier or piers, and one or more lighthouse or lighthouses, with their necessary buildings, upon a certain point called Llandwyn Point, and from time to time keep and maintain the same.

By sect. x. power to scour, cleanse, deepen, improve, and enlarge the harbour, and to erect quays, piers, &c., was conferred upon the trustees.

By sect. xi. the trustees were empowered to contract for erecting works, &c.

By sect. xii. the rates and piers, quays, &c., were vested in the trustees.

Sect. xiii. prohibited ballast or rubbish being emptied into the harbour.

Sect. xvi. And be it further enacted, that for the better effecting the several matters and things to be done in pursuance of this Act, and supporting the same for the future, there shall . . . be paid to the said trustees and their successors, . . . and they the said trustees and their successors . . . are hereby authorised and empowered to demand, collect, receive, and take, of, and from the master or owner, masters or owners, or other person or persons having the rule or command of every ship or other vessel, the several rates or duties following; (that is to say): For all ships or vessels belonging to foreign subjects, coming from foreign parts, and unloading their cargoes within the limits of the said port of Carnarvon, any sum not exceeding twelvepence per ton: For all ships or vessels belonging to foreign subjects, passing or sailing through the Straits of Menai, or arriving in the said port by stress of weather, or otherwise, without unloading all or any part of their cargoes within the limits of the said port, any sum not exceeding sixpence per ton: For all ships or vessels belonging to His Majesty's subjects, coming from foreign parts (Ireland excepted) unloading their cargoes within the limits of the said port, any sum not exceeding sixpence per ton; but if only coming to the said port by stress of weather, or otherwise, or sailing through the said Straits, not exceeding threepence per ton: For all coasting vessels unloading within the limits of the said port, any sum not exceeding threepence per ton; but if only unloading part of their cargoes, and proceeding to another port with the remainder, not exceeding twopence per ton: For all coasting vessels unloading within the limits of the said port, having above one-half of their cargoes of coals, and the remainder of any other goods, wares, or merchandize, any sum not exceeding twopence per ton; but if with coals only, not exceeding one penny per ton: For all ships or vessels loading within the limits of the said port, with slates, copper ore, corn, or any other merchandize, bound to any foreign parts, Ireland, or coastways, any sum not exceeding threepence per ton: For all coasting vessels laden or part laden with goods (except limestone, sand, and manure) passing through the said Straits, any sum not exceeding one penny halfpenny per ton; if laden with limestone or in ballast, not exceeding a halfpenny per ton.

Sect. xxxvii. Saving also to all and every other person and persons, bodies politic and corporate whatsoever, all such right, title, estate, and interest whatsoever, as they and every or any of them had and enjoyed of, in, to, or out of the premises herein mentioned, or any of them, or any part thereof, before the passing of this Act, or could or might have enjoyed in case this Act had not been made, anything herein contained to the contrary notwithstanding.

The Act of 33 Geo. 3, c. cxxiii., was amended and added to by the Act 49 Geo. 3, c. xxiv. (1809), which contained the following material provisions:

Sect. v. And be it further enacted, that there shall be paid by every person whomsoever, who shall lade or unlade, or import or export any grain, seeds, goods, wares, merchandize, baggage, parcel, or other article, matter, or thing whatsoever within the said harbour of Carnarvon, or within the limits of the said port, over and above all other rates and duties to which the same respectively are by virtue of any law or statute subject or liable, any sum or sums of money, not exceeding the several rates and duties hereinafter mentioned and contained in the second schedule hereunto annexed, marked (B).

Sect. vii. And, to the intent the said rates or duties may be duly answered and paid, be it further enacted, that no collector or comptroller of His Majesty's Customs, receiver of entries, or ship's surveyor or searcher, waiter, or other officer of the Customs whatsoever, belonging to the port of Carnarvon, within the port of Chester, shall at any time after the said fifth day of July next after the passing of this Act, give or make out any cocket or other discharge, or take any report inwards or outwards for any ship or other vessel, or permit any ship or other vessel to come in or go out of the said harbour, or from any landing place within the limits of the said port, until the master or owner, or other persons having the rule or command of such ship or other vessel, shall produce a certificate from the collector or collectors, lessee or lessees, to be appointed in pursuance of this Act, that the rates or duties by this Act granted are paid or secured to be paid; which said certificate the said collector or collectors lessee or lessees, is and are hereby required to give without fee or reward; and that any collector or comptroller of His Majesty's Customs, receiver of entries, or ship's surveyor or searcher, waiter, or other officers of the Customs whatsoever, making default in any of the premises enjoined by this Act, shall forfeit and pay the sum of twenty pounds. . . .

Sect. xv. And be it further enacted, that it shall be lawful for the said trustees, or any seven or more of them, to blast, break, or remove, or cause to be blasted, broken, or removed, all, every, or any of the rocks at the Swellies, or in any other part of the said Straits within the said port of Carnarvon, for the more safe passage of ships and vessels to and from the said harbour, and through the said Straits; and that the sum of three hundred pounds, already expended in the improvement of the Swellies, shall be and is hereby declared to be a charge on the duties hereby granted, as fully and effectually as any other sum borrowed or to be borrowed under or by virtue of this Act

Sect. xvi. And be it further enacted, that the said trustees, or any seven or more of them, shall be and they are hereby authorised and empowered to fill up, embank, and secure, with such materials as shall be deemed expedient, so much of the shore ground or strand in front of or adjoining to the said harbour of Carnarvon, which has already been or shall hereafter be acquired, or which may be purchased by or vested in the said trustees under the authority and in virtue of the powers in this Act contained, or which can be gained from the sea or reclaimed, for the improvement of the said port and harbour, and for the erection of any wet or dry docks, quays, breasts, piers, jetties, or wharfs, or for the making of embankments of ground for the purpose of enabling the said trustees to build thereon sufficient warehouses and other buildings, and complete the other purposes of the present Act in relation to the improvement of the port and harbour of Carnarvon, and the increasing the accommodation to the trade carried on therein.

Sect. lxxv. Saving always to all and every other person and persons, bodies politic and corporate whatsoever, all such right, title, and interest whatsoever, as they and every or any of them had or enjoyed of, in, to, or out of the premises herein mentioned, or any of them or any part thereof, before the passing of this Act, or could have enjoyed in case this Act had not been made, anything herein contained to the contrary notwithstanding.

Schedule (A). For all ships or vessels belonging to foreign subjects, coming from foreign parts, and unloading their cargoes within the limits of the said port of Carnarvon, any sum not exceeding the sum of one shilling per ton; but if only unloading part of their cargoes, and proceeding to another port with the remainder, not exceeding the sum of ninepence per ton. For all ships or vessels belonging to foreign subjects, loading within the limits of the said port with slates or any other merchandize, any sum not exceeding the sum of sixpence per ton. For all ships or vessels belonging to foreign subjects, passing or sailing through the Straits of Menai, or arriving at or in the said port by stress of weather or otherwise, without unloading all or any part of their cargoes within the limits of the said port, any sum not exceeding the sum of sixpence per ton. For all ships or vessels belonging to His Majesty's subjects, coming from foreign parts (Ireland excepted), unloading their cargoes within the limits of the said port, any sum not exceeding the sum of sixpence per ton; but if only unloading part of their cargoes and proceeding to another port with the remainder, not exceeding fourpence per ton; but if only coming to the said port by stress of weather, or otherwise sailing through the said straits, not exceeding the sum of threepence per ton. For all coasting vessels unloading within the limits of the said port, any sum not exceeding the sum of threepence per ton; but if only unloading part of their cargoes, and proceeding to another port with the remainder, not exceeding the sum of twopence per ton. For all coasting vessels unloading within the limits of the said port, having above one-half of their cargoes of coals or culm, and the remainder of any other goods, wares, or merchandizes, any sum not exceeding the sum of twopence per ton; but if with coals or culm only, not exceeding one penny per ton. For all ships or vessels loading within the limits of the said port with slates, copper ore, corn, or any other merchandize, bound to any foreign parts, Ireland or coastways, any sum not exceeding threepence per ton. For all coasting vessels laden or part laden with goods (except limestone, sand, and manure), passing through the said Straits, any sum not exceeding twopence per ton; if laden with limestone or in ballast, not exceeding one penny per ton.

Sched. B. specified the rates and dues to be paid for landing and shipping of goods, wares, and merchandize, in the port of Carnarvon, which might be imported, exported, brought and carried coastwise, referred to in and by the Act.

Notwithstanding the plaintiff's contention that Port Dinorwic was not nor were any of his docks, wharves, or quays within the limits of the harbour of Carnarvon, the trustees claimed and insisted that they were entitled to tolls on vessels which passed through the north end of the Menai Straits to or from Port Dinorwic, although they did not pass through the south end of the straits or sail further south than Port Dinorwic; and that they were entitled to rates or dues on slates and other goods loaded or unloaded at Port Dinorwic whether the same were loaded or unloaded on the plaintiff's property or not.

The trustees insisted that Port Dinorwic and the plaintiff's docks, wharves, and quays were within the limits of the harbour of Carnarvon, and that their jurisdiction extended from the Britannia Rock in the Menai Straits to Afon Wen in Carnarvonshire, and to Malldraeth in Anglesea.

It appeared that the plaintiff and his predecessors in title had for a great number of years paid to the trustees rates and duties on vessels passing through the north end of the Menai Straits to or from Port Dinorwic or the plaintiff's docks, wharves, and quays, and rates and duties on slates and other goods loaded and unloaded on or from vessels at Port Dinorwic, an d on or from the plaintiff's docks, wharves, and quays.

The trustees had always refused to clean and did not maintain the plaintiff's docks, wharves, and quays, or the approaches thereto, the same being his property; and according to his allegation they incurred no expenditure in respect thereof nor did they render any meritorious or other services in connection with the tolls, dues, and rates claimed by them.

This allegation was, however, denied by the trustees, on whose behalf it was alleged by the defendant that the approaches to Port Dinorwic had been improved by placing a beacon on the embankment of the Britannia Bridge to the north and all the dredging, cleansing, buoying, and lighting done by the trustees to the south of Port Dinorwic was of service to Port Dinorwic, and the buoys extended nearly up to Port Dinorwic from the south, no buoys being necessary to the north of those so placed by the trustees; that the sum of 300*l.* had been spent by the trustees upon blasting the rocks in the Menai Straits to the north of Port Dinorwic; that they had provided mooring posts on both sides of the Menai Straits, extending from Voryd on the south up to and including Port Dinorwic on the north, to enable vessels to load and unload, and that such posts were renewed from time to time as required.

Under the Act 13 & 14 Car. 2, c. 11, and the Acts succeeding thereto, commissions had from time to time been issued for defining the limits of the port of Carnarvon and a fiscal port known as the fiscal port of Carnarvon, and for assigning lawful landing and loading places within the same without leave first obtained from the officers of His Majesty's Customs.

In the ninth year of the reign of George I. (the 3rd July) one such commission was issued, and thereunder by an instrument dated the 21st Nov. in the tenth year of the same reign the limits of the fiscal port of Carnarvon were defined, and lawful landing and loading places without leave first obtained from the officers of His Majesty's Customs were assigned. The landing and loading places so assigned were adjacent to the town of Carnarvon.

The plaintiff alleged that the fiscal limits so assigned did not include the plaintiff's lands (whether owned or leased), nor his docks, wharves, and quays; but this allegation was denied by the defendant.

By a commission from the Court of Exchequer dated the 12th June 1844 and an instrument thereunder dated the 15th Nov. 1844 the fiscal limits of the port of Carnarvon were altered, and lawful landing and loading places were assigned.

The plaintiff alleged that his docks, wharves, and quays were not within such limits, nor were they any of the places so assigned; but this allegation was denied by the defendant.

The plaintiff's claim against the defendant was as follows:

1. A declaration that Port Dinorwic, including the plaintiff's lands, docks, wharves, and quays was not within the limits of the port or harbour of Carnarvon referred to in the Acts of 1793 and 1809.

2. A declaration that the trustees were not entitled to claim tolls on vessels which passed

through the north end of the Menai Straits to or from Port Dinorwic or the plaintiff's lands, docks, wharves, and quays, or any rates or dues on slates or other goods loaded or unloaded on or from vessels at Port Dinorwic, or on or from the plaintiff's lands, docks, wharves, or quays.

3. An injunction restraining the trustees from claiming from or enforcing payment by the plaintiff of any tolls, dues, or rates under the Acts of 1793 and 1809, or levying or attempting to levy by any process whatever any tolls, dues, or rates upon or in respect of the plaintiff's or other vessels using, frequenting, loading, or unloading in or from the plaintiff's lands, docks, wharves, or quays or Port Dinorwic, or upon or in respect of the plaintiff's or other goods so loaded or unloaded.

The action came on for trial before Kekewich, J. in July 1904, when his Lordship reserved judgment.

On the 3rd Aug. 1904 the following written judgment was delivered:—

KEKEWICH, J.—The importance of this case to the parties, and the character of the points arising for decision, amply justify the elaborate treatment which it has received. I have not intentionally omitted to consider any point or any argument brought before me, but they will not all be noticed in this judgment, which may conveniently be limited to the decision of a few salient points sufficient for the disposal of the case. The first and great question is, What is the meaning of the word "port," not standing alone, but used in connection with other words in the Act of 1793? That is a question of construction by no means free from difficulty. One approaches it with the knowledge learnt from decided cases and other authorities that the word "port" is capable of more than one meaning. This has been expounded at length by Lord Hale in oft-quoted passages, which I will not reproduce here. Suffice it to say that, besides a natural meaning and an artificial meaning, it has also a civil meaning, by virtue of which it denotes certain privileges and franchises given to it by civil authority. Again, the limits of a port vary according to the purpose for which it is instituted, and the port for fiscal purposes is not the same as it is for municipal or local purposes or for pilotage or commercial purposes. Besides these there may be business purposes which point to another different meaning, and for these, as in commercial contracts, the limits of a port are determined neither by its fiscal, municipal, or pilotage limits, but by usage by the mercantile community. For the substance, and, indeed, for some of the language, of these remarks I am indebted to Mr. Wood Renton, who in the tenth volume of his Encyclopædia of the Laws of England, under the head "Port," has usefully collected and collated many authorities, including some that were cited in argument. Some of those authorities were cited for the purpose of showing how the word "port" ought to be construed in an instrument like that under consideration. I do not for a moment say that they do not deserve attention, but I do not think that any of them can safely be accepted as a guide to the construction of this particular instrument, because they were dealing with instruments in different language conceived for a different purpose, and the observations of the judges who decided them must necessarily be treated as directed to the instruments before them. One of them, however, the case of *Kingston-upon-Hull Dock Company* v. *Browne* (2 B. & Ad. 43) does lay down a rule of unquestionable weight which must be borne constantly in mind. This is what Lord Tenterden says in delivering the judgment of the court (p. 58): "These rates are a tax on the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or, at least, not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it. And it is not to be expected generally that a tax or burthen will be imposed upon persons who do not in any degree participate in the benefits of the measure which the tax was intended to remunerate. There may be special and particular circumstances which may make it fit for the Legislature to do this, but it is not to be expected or presumed generally." It was convenient, if not altogether necessary, to prove that the port of Carnarvon was, before the date of the Act and subsequently, used in more than one sense, and, in construing the Act, one must remember not merely that the word "port" was capable of different meanings, but that those different meanings were present to the minds of those who spoke and wrote about the port of Carnarvon. A cursory examination of the Act shows that the framer of it was one who used the word in different senses, and that he was not always careful to distinguish the sense in which it was used in a particular passage. The ordinary canon of construction—namely, that a word or phrase used many times in the course of an instrument must always be taken to mean the same thing—cannot be properly applied here, and, indeed, an attempt so to apply it would lead one into endless confusion. My task is to determine the meaning in particular passages notwithstanding that the word may have a different meaning in other passages, and to do this by careful consideration of the whole instrument. The first thing that strikes one on reading the Act of 1793 is that it is stated in its title to be concerned with the harbour of Carnarvon, and the introductory recitals confirm this and lead one to expect provisions dealing only with the harbour and not with the port of Carnarvon except in the sense which is a common if not the primary sense of port—that is, a harbour or place of refuge. Nevertheless, provisions touching the port in a more extended sense would not be incompatible with an Act dealing mainly with the improvement of the harbour, for obviously the harbour might be improved by works executed at a considerable distance from it. The surveyor of the Customs of the port of Carnarvon, a phrase in which "port" must, I think, be used in a more extended sense, and the eligibility for office of justices of the peace for the county of Carnarvon point to an interest in others than the inhabitants of the town and the immediate neighbourhood of the harbour; but these are small things to which it would be unreasonable to give weight, and I only notice them to pass them by. In sect. 8 we find words deserving more attention. The trustees are authorised "to lay and fix buoys and beacons in proper places upon the bar, and other banks and shores leading to and in the port of Carnarvon." The bar is not the harbour or within the port

in any narrow sense, but it is within the port in the more extended sense—that is, the Customs port—and if it is here spoken of as being in the port of Carnarvon it seems to follow that that port of Carnarvon must be the Customs port. The grammatical construction of the sentence is not plain, but I cannot think that the bar is properly spoken of, as banks and shores may be, as leading to the port of Carnarvon. If the bar does not lead to the port of Carnarvon, it must be here referred to as in it, and in my opinion that is the proper construction. In the next section we find power to erect lighthouses at Llandwyn Point, but there is no mention in that section of harbour or port, and the only observation on it is that it contemplates works which may be for the improvement of the harbour only far outside that harbour. The next four sections deal only with the harbour; but then follow sect. 16, which is the foundation of the claim by the trustees against the plaintiff and respecting which there was unlimited discussion. The trustees are authorised to levy certain dues which are classed under seven different heads, all of which, except the second and last, refer to places within the limits of the said port of Carnarvon. They include those for all ships or vessels loading within the limits of the said port with slates or other merchandise. Vessels are loaded with slates at the plaintiff's quays, and if those quays can properly be said to be within the limits of the port of Carnarvon dues can be levied for all such vessels. Before considering the meaning of the phrase "within the limits of the said port," I will say a word about the two excepted heads. By the second duties are imposed on "all ships or vessels belonging to foreign subjects, passing or sailing through the Straits of Menai, or arriving in the said port by stress of weather, or otherwise, without unloading all or any part of their cargoes within the limits of the said port." It will be observed that even here the phrase "within the limits of the said port" occurs, but not precisely in the same connection as in the other heads. The point is that a duty is imposed on all vessels passing or sailing through the Straits of Menai, and therefore can be charged on vessels which never come into the harbour of Carnarvon, and never need come near it, except that Carnarvon being situate on the Straits the harbour must be passed by any vessel sailing through them. A similar observation occurs on the last head, which imposes duties on all coasting vessels passing through the said Straits, but never mentions the harbour of Carnarvon or the port in any sense whatever. Some meaning must be given to this phrase "within the limits of the said port." It may mean no more than "in the said port." But such a conclusion would be against the ordinary rules of construction, and would impute a strange intention to the framer of this clause, who has here used a phrase not elsewhere found in the Act, though the port of Carnarvon is frequently mentioned. A like difficulty occurred with reference to the port of Hull in the case already quoted of *Kingston-upon-Hull Dock Company* v. *Browne* (*ubi sup.*), and the judgment of the court contains some observations on the language there employed; but I think it better not to treat that as an authority beyond saying that the court recognised a distinction between "port" and "limits of the port," which necessarily connoted a distinctive meaning. We all know that the phrase "limits of the port" is a common one, and is used with reference to the apportionment for fiscal purposes of stretches of the foreshore. There is in evidence in this case a Royal Commission issued in 1723 for the delimitation of several ports, including the port of Carnarvon, and there is also in evidence the report of the commissioners. In that document they expressly appoint, set down, and settle the extent, bounds, and limits of the said port, and the same phrase is used by the same commissioners acting under the same authority respecting the ports of Beaumaris and Pwllheli. It seems to me reasonable to hold that the phrase "within the limits of the said port" was recognised as having a technical meaning, and that it was used in this 16th section in that meaning. Before passing away from the section, it is well to notice one comment on it made adversely to this construction. The duties are made payable at some place or places within the town of Carnarvon to be appointed by the trustees; and it is said that it can never have been the intention of the Legislature that duties leviable over so wide an area as the Customs port of Carnarvon should be payable in the town of Carnarvon. The answer is that a debt must be made payable somewhere, and that the suggested inconvenience of making it payable in the town of Carnarvon is not practical or substantial. More was made of an objection of a different character. Applying the principle to which attention was called at the commencement of this judgment, it was urged that duties should not be levied beyond the harbour of Carnarvon—that is to say, beyond the port of Carnarvon, limited by connection with the harbour, because those within the extended area obtain no benefit from the works of the trustees, or, in other words, there is no equivalent for the tax sought to be imposed on them: (see *Matson* v. *Scobel*, 4 Burr. 2258). The argument would be perfectly sound if it were supported by facts; but it is not. The trustees have constructed and maintained a lighthouse and a breakwater at the southern entrance to the Menai Straits, which are valuable to all vessels entering the Straits on that side, whether they are bound for the harbour of Carnarvon or not, and at considerable expense. They have buoyed, and they keep buoyed, the Straits from the southern entrance to a point far beyond the town of Carnarvon. Those buoys are for the most part useful to vessels proceeding to and from the harbour of Carnarvon, but it is admitted that they are also useful to vessels passing through the Straits or bound for some port north of Carnarvon. They have not buoyed the northern end of the Straits, because buoys are not required there; but they seem to have done something in the way of removing obstacles to navigation, and they certainly have improved the northern entrance to the Straits by blasting the Britannia Rock. It is urged that the trustees, as regards those last improvements, claim to have done far more than they actually have done; and that, in truth, the greater part of the improvements was effected at the public cost. But the Amending Act of 1809 mentions their having expended the sum of 300*l.* in the improvement of the Swellies, and, small as that sum is in comparison with what is said to have been expended out of public moneys, it is

enough to meet the argument that no benefit has been conferred. Little need be said about the Amending Act of 1809. That, again, is an Act for the further improvement of the harbour of Carnarvon, and what is said on that point in connection with the original Act is equally apposite here. This is at least as much confusion of language in the use of the word "port" as there was in the original Act, and it is often employed as equivalent of "harbour"; but the 5th section, which imposes duties by or in reference to a schedule, again employs the phrase "within the limits of the said port," and the same phrase occurs in the 7th section, where the port of Carnarvon is recognised as being within the port of Chester. That surely points to the larger meaning of the word "port." The schedule referred to in the 5th section is for our purpose merely a repetition of the body of the 16th section of the original Act, and no separate comment need be made thereon. There remains a question of difficulty to which, to judge from the urgency and frequency of argument, the plaintiff attaches supreme importance. The plaintiff's docks and quays in and at which the vessels which are sought to be taxed are loaded were constructed by him or his predecessors in title on his own private land. This is admitted. But in constructing those docks and quays he has given the sea access to those lands, and the question is whether by so doing he has thereby enlarged the port in the extended sense which I have given to it. There is a small stream running from inland to the sea at this point. Apparently in old times it was cut off from the sea by some mill-works, and little, if any, of the water of the stream found its way into the sea. There is a dispute what was the high-water mark at this time, and particularly what was the high-water mark in 1793 and 1809. In connection with this there has been tendered in evidence an ancient terrier, from which and other materials there has been constructed a map purporting to show the lines of high-water mark at different dates. The terrier is unsigned, and there is no evidence to prove by whom, or for what purpose, or by what authority it was made. On consideration I do not see my way to admit it. The question of admissibility is, however, in my judgment, immaterial, because I think that the solution of the point now under consideration does not depend on the line of high-water mark at any particular time, nor is the mere fact that the line has been pushed or brought further inland relevant to the issue. There have been cited numerous authorities respecting the ownership of the soil where land formerly covered by the sea has been left dry, or where land formerly above high-water mark has been encroached on by the sea. In my judgment, those cases are not in point. We are considering, not who is the owner of the soil, but whether the royal prerogative must be treated as limited by an ancient line of high-water mark, notwithstanding that it has disappeared and the line is now found further inland. Nor, to my thinking, is it material to consider how this extension has taken place—or, in other words, it is immaterial whether the extension has been imperceptible in its progress or sudden, or whether it has been caused by natural or artificial means. The way in which I regard the question is this. It is undoubtedly true, as stated in a well-known passage which I quote from Mr. Stuart A. Moore's work, History and Law of the Foreshore and Seashore, p. 301, that "there is no land adjacent to the sea but is in one port or another." Add to this a passage from Hale's First Treatise quoted in the same book, p. 327: "And therefor it seems that unless a port become totally unuseful by accident as being sanded or stopt up by the sea, it cannot be abolished without an Act of Parliament"—and it seems to me that we have gone a long way towards the solution of this question. It is true that the industry of counsel has not furnished me with any learning respecting the artificial extension of the bounds of the sea, nor have I myself been able to discover any. It is true, also, that a port is generally understood to imply a public interest, and that here the docks and quays and the approaches to them are admittedly on private ground; but yet I cannot see how they can be held to be outside some port or another without absurdity, and, if they are within any port at all, they must be within the port of Carnarvon. What are the limits of that port at this particular spot? The high-water mark of a century more or less since, which is no longer high-water mark at all? If that be impossible, what can the limits be except the high-water mark of the present day, even though it be the result of man's work? If the limits of a port are narrowed by the recession of the sea, why are they not extended by the advance of the sea, whether that be due to natural or artificial causes? What can it matter that the sea has been compelled to come in instead of obeying unassisted natural forces? The entire extent of the ocean is presumably constant, and what is lost in one place must be gained in another, so that the influx occasioned by the plaintiff's works must have caused a corresponding reflux elsewhere. There has been lost to the port of Carnarvon elsewhere, or haply to some other port, just what has been gained here. I have searched in vain for a statement of any principle; but the one which I have endeavoured to express and apply seems to me necessarily to follow from the nature of things and the commonly acccepted definition of "port" where it is not held to be restricted to a particular haven or harbour and the doctrines relating thereto. I have looked at the many cases cited in argument respecting the meaning of "port" in some of which the restrictive meaning has been given to the word, while in others a more extensive one has been adopted, and in none of them have I found any authority for a conclusion different from that at which I have arrived. The result is that, in my opinion, the plaintiff has failed to establish his case, and there must be judgment for the defendant, with costs.

Subsequently to the delivery of the foregoing judgment the plaintiff died; and by an order made in the action the succeeding tenant for life and the executors of the plaintiff were ordered to be substituted as plaintiffs for the purpose of carrying on the proceedings.

They now appealed from the decision of Kekewich, J.

Danckwerts, K.C. (*P. Ogden Lawrence*, K.C., *A. F. Peterson*, and *Bryn Roberts* with him) for the appellants.—The first question to be decided is what is the meaning of "port" in the

special Acts of 1793 and 1809, whether it means the local port or the fiscal port. I submit that the latter is the true construction:

Customs Act 1558 (1 Eliz. c. 11), ss. 1, 2, 3, 12, repealed by Customs Act 1825 (6 Geo. 4, c. 105), s. 11;
Kingston-upon-Hull Dock Company v. *Browne*, 2 B. & Ad. 43.

The powers of the trustees of the harbour are derived entirely from those special Acts; and in construing such Acts, if there is any doubt, the construction most beneficial to the public will be adopted:

Stourbridge Canal Company v. *Wheeley*, 2 B. & Ad. 792;
Stockton and Darlington Railway Company v. *Barratt*, 11 Cl. & F. 590, at p. 601.

The word "port" must be taken in its commercial sense:

Price v. *Livingstone*, 5 Asp. Mar. Law Cas. 13; 47 L. T. Rep. 629; 9 Q. B. Div. 679.

In these Acts "port" means the commercial port of Carnarvon. That it does not mean the port for fiscal purposes is shown by the words in the sections relating to loading and unloading, which refer to the place where the facilities are provided. A port is a place where ships go for unloading:

Sailing Ship "Garston" Company v. *Hickie and Co.*, 5 Asp. Mar. Law Cas. 499; 53 L. T. Rep. 795; 15 Q. B. Div. 580, at p. 590;
Hunter v. *Northern Marine Insurance Company Limited*, 13 App. Cas. 717;
Reg. v. *Hannam*, 2 Times L. Rep. 234.

There are various Acts which authorise the Crown from time to time by warrant to alter the limits of fiscal ports—*e.g.*, the Customs Act 1845 (8 & 9 Vict. c. 86), s. 153, and the Customs Act 1846 (9 & 10 Vict. c. 102), ss. 13 to 16, which repealed sect. 153 of the former Act, and made a new enactment. The language of sect. 16 applies to commercial purposes only. There can be no levy of tolls and dues unless a corresponding benefit is conferred upon the persons made chargeable to the same; and in the present case the predecessor in title of the appellants derived no advantage from the works of the trustees of the harbour. Other authorities on this point are

Hale de Portibus Maris, Part 2, cc. 2, 3; Harg. Law Tracts, pp. 43, 48;
Gann v. *Free Fishers of Whitstable*, 2 Mar. Law Cas. O. S. 179; 11 H. of L. Cas. 192;
Foreman v. *Free Fishers and Dredgers of Whitstable*, 3 Mar. Law. Cas. O. S. 337; 21 L. T. Rep. 804; L. Rep. 4 E. & I. App. 266;
Nicholson v. *Williams*, 1 Asp. Mar. Law. Cas. 67; 24 L. T. Rep. 875; L. Rep. 6 Q. B. 632.

On the question of taking duties, see

Winch v. *Conservators of the Thames*, 31 L. T. Rep. 128; L. Rep. 9 C. P. 378;
Shepherd v. *Hills*, 11 Ex. 55.

As to the construction of documents, see

North-Eastern Railway Company v. *Lord Hastings*, 82 L. T. Rep. 429; (1900) A. C. 260, at p. 268;
Sheppard v. *Gosnold*, Vaughan, 159, at p. 170.

On the question of statutory franchise, see

Darley v. *The Queen*, 12 Cl. & F. 520.

Then there is an alternative side to the case which, however, only arises if the court is against me on the other points—namely, that the docks, wharves, and quays which were constructed by the predecessor in title of the appellants are in fact outside the port of Carnarvon, even if taken in the sense of the fiscal port. [VAUGHAN WILLIAMS, L.J.—The better course will be to postpone the arguments on that branch of the case until we have heard the respondent's counsel on the other points.]

Warmington, K.C. and *R. M. Montgomery* (with them *Stewart-Smith*, K.C.) for the respondent.—We submit that the expression "limits of the port," as referred to in the first Act and repeated in the second Act, includes Port Dinorwic. [VAUGHAN WILLIAMS, L.J.—In Tomlin's Law Dictionary the term "port" is defined. The question is whether there is any enactment to prevent any landing or discharge of goods except at or from a port, and whether there is any difference between customable and non customable goods.] As to statutes, so far as we know, no distinction is thereby made between those two classes of goods. The only authority as to landing on a person's own land goods which are non-customable is the American decision in *Baltimore Wharf* case (3 Bland Ch. R. 383). A report of that case also appears in Houck on the Law of Navigable Rivers (pp. 183-187). The case is cited as an authority in Coulson and Forbes on the Law of Waters, 2nd edit., pp. 50, 57. [VAUGHAN WILLIAMS, L.J.—I understand the law to be that no goods from abroad subject to a duty can be landed except at a port. STIRLING, L.J.—There is a statement in Hale de Portibus Maris (*ubi sup.*) to that effect. That passage applies to landing a person's own goods, but does it apply to landing goods for exportation?] The distinction appears to be that generally goods exported are not subject to duty. Reverting to the question of the meaning of "port" and "limits of the port," it was said on behalf of the appellants that there cannot be a levy of tolls and dues without services. In the case of franchise ports where tolls and dues have been levied, it is not sufficient to show that they have been paid time out of mind. But a legal origin must be established, and that can be done by showing services, or that the *locus in quo* is within the limits of a port, in which case no services need be proved. The fact that there is a port, imports consideration for the tolls and dues. The question of services rendered does not affect the legal question. It only affects the question of hardship. The port in the present case is wider than "port" in the local and popular sense. Moreover, the predecessor in title of the appellants did benefit by the works of the harbour trustees, and the dues charged by the trustees were, the evidence shows, regularly paid for many years before the commencement of this action. Another case on the point is *Beilby* v. *Raper* (3 B. & Ad. 284), but that authority does not appear to go further than *Kingston-upon-Hull Dock Company* v. *Browne* (*ubi sup.*). It only carries out the doctrime of that case.

Danckwerts, K.C. in reply.—The present subject is dealt with in

Bacon's Abr., 7th edit., vol. 7, p. 328, tit. "Customs."

In accordance with the common law as laid down

in the case of *Forcman* v. *Free Fishers and Dredgers of Whitstable* (*ubi sup.*), there must be a consideration in order to support tolls and dues. Where there is a port there must be some benefit derivable from the tolls and dues payable. In order to tax another set of subjects, if there are two possible constructions, that which is most favourable to the taxpayer ought to be adopted:

Matson v. *Scobel*, 4 Burr. 2258.

As to meaning of "port," see also

Callis on Sewers, 4th edit., p. 71;
4 Co. Inst., c. 24, p. 148.

[VAUGHAN WILLIAMS, L.J.—Before we determine whether or not we find it necessary to hear you upon the question whether or not the docks are in fact outside the port of Carnarvon, we will consider the points which have so far been argued.]

Cur. adv. vult.

Subsequently the court ordered the case to be restored to the list for the purpose of being argued upon the question above referred to.

P. Ogden Lawrence, K.C. and *A. F. Peterson* (*Danckwerts*, K.C. and *Bryn Roberts* with them) for the appellants.—Even taking the port of Carnarvon as being the fiscal port, our submission is that Port Dinorwic is not within that fiscal port. No dues for loading and unloading should, at any rate, be charged. All that ought to be charged is in respect of ships passing up and down the Menai Straits. There is no evidence to show that at the time when the docks, wharves, and quays were constructed by the predecessor in title of the appellants the *locus in quo* was within high-water mark. We have, indeed, evidence to the contrary—namely, a certain terrier-survey of the property of Mr. Assheton Smith made in 1777 "by W. W. and W. J., land surveyors," which we ask to have admitted as evidence. Kekewich, J. rejected that document at the trial, but it was acknowledged to be what it purports to be, so that there is no need to prove that it was made by the persons alleged. On the face of it, it is a document of authority, and it comes from the estate muniment room. It may be admitted on the same grounds as the field books were admitted in

Mellor v. *Walmesley*, 93 L. T. Rep. 574; (1905) 2 Ch. 164.

[VAUGHAN WILLIAMS, L.J.—The field books in that case were contemporaneous documents made in performance of a duty. COZENS-HARDY, L.J.—Is every survey made for a landowner admissible?] If the surveyor who made it is dead, we submit that the document is admissible although its weight as evidence may be another matter altogether. [STIRLING, L.J.—That view does not seem to be in accordance with the decision in *Smith* v. *Blakey* (L. Rep. 2 Q. B. 326.] In the present case the survey was made on the instructions of the landowner by surveyors whose duty it was to make the same, and it is admissible upon the principle which was enunciated in *Price* v. *Earl Torrington* (1 Salk. 285; 2 Ld. Raym. 873; 2 Sm. L. Cas., 11th edit., p. 320) and *Mellor* v. *Walmesley* (*ubi sup.*). [VAUGHAN WILLIAMS, L.J.—With regard to *Mellor* v. *Walmesley* (*ubi sup.*), I perhaps ought to say that when the proof of the report for The Law Reports came to me to be perused, it was plain to me, from arguments that had been addressed to us in the subsequent case of *Mercer* v. *Denne* (93 L. T. Rep. 412; (1905) 2 Ch. 538), that it was possible that it might be supposed that we had decided the question there on the basis that the document tendered in evidence was the ultimate one, and I took care, by the addition of certain words, to make it clear that our decision was only on the field books. I say this because there may, perhaps, be a difference in the other reports of *Mellor* v. *Walmesley* (*ubi sup.*), though no very substantial difference. It was only an addition of a few words that I made to the report in The Law Reports to make it clear that our decision was only on the field books.] Again, the document now tendered may be admissible as evidence of reputation. What had to be ascertained by the survey was the boundary of the manor, and that is a question of public interest in the locality:

Hammond v. *Bradstreet*, 10 Ex. 390, at p. 396;
Smith v. *Lister*, 72 L. T. Rep. 20;
Read v. *Bishop of Lincoln*, 67 L. T. Rep. 128; (1892) A. C. 644, at pp. 647, 652.

But the question here is one which affects the whole public apart from locality. The public have certain rights in the sea, such as fishing and navigation. Therefore it is a matter of public interest where the limits of the sea are, and what is the boundary of the highway of the sea:

Reg. v. *Bedfordshire*, 4 E. & B. 541.

This survey is an original document, and the fact that the surveyors' initials only are added is a matter of no importance. It would make it no better if their names were given. [VAUGHAN WILLIAMS, L.J.—It has to be proved that the survey was made by competent persons. That cannot be proved from the document itself.] In *Read* v. *Bishop of Lincoln* (*ubi sup.*) pictures showing certain ceremonies were admitted, but it was not proved that the artist was competent. [VAUGHAN WILLIAMS, L.J. — Lord Halsbury there dealt with the documents as historical works. Historical documents are put in a separate class.] There is no special law as to historical documents. They are only admitted because they relate to matters of public interest. Pictures of the port of Carnarvon might be put in evidence to show what was looked upon as the local port by historians:

Crease v. *Barrett*, 1 Cr. M. & R. 919.

We also tender in evidence a plan made by one Mayston on information given by one Jones, which shows the high-water mark. It was not objected to in the court below, but the judge said it was of no use. It is entered in the order and the appellants rely upon it. Having regard to the leases of the property to prove the high-water mark in 1845, which are clearly admissible in evidence, and the admissions made, the onus is on the respondent to show that the property in question is within high water mark. Then we submit that if the boundary of the statutory port is high-water mark, the *locus in quo* is not within it. The statutory port is coterminous with the fiscal port before the date of the Act of 1793. The learned judge in the court below came to a wrong conclusion when he held that the place had become part of the harbour of Carnarvon because the sea had been let in. There are lock gates at

the entrance of the plaintiff's docks, wharves, and quays so that the sea can be excluded. A subject cannot enlarge a port:

Stuart Moore's Law of the Foreshore, 3rd edit., pp. 319, 325, 326.

That would be the result if the franchise be applicable as Kekewich, J. decided and tolls and dues are chargeable as claimed by the trustees of the harbour. The franchise of a port only extends so far as its limits as defined by statute or custom. It has never been decided that a private landowner who has constructed a dock on his own property for his own purposes has thereby made himself liable to wharfage and landing tolls and dues; and the Acts of 1793 and 1809 were not passed to meet such a case. Although perhaps a private landowner could not charge harbour dues in respect of his own dock, yet it is not unlawful for him to load and unload goods on his own land. And a customer of his could, it is submitted, send his ship to the dock to take away merchandise that he had bought from the landowner. As to a private landowner landing goods on his own land, see

Hale de Portibus Maris, part 2, c. 3, p. 52.

The subject was also touched upon in the judgment of Holroyd, J. in the case of *Blundell* v. *Catterall* (5 B. & Ald. 268, at p. 294), which judgment was favourably commented on by Vaughan Williams, L.J. in *Brinckman* v. *Matley* (91 L. T. Rep. 429; (1904) 2 Ch. 313). Our submission is that we are outside the limits of the fiscal port of Carnarvon. [VAUGHAN WILLIAMS, L.J.—That is to say, outside the limits of the port as established by the Acts of Parliament of 1793 and 1809.]

Warmington, K.C. and *R. M. Montgomery* (with them *Stewart-Smith*, K.C.) for the respondent.—The subject must be approached entirely distinct from any question of ownership of property. You must use the water and only the water that is in the port to get to a place that is supplied by the waters that are in the port. A man who cuts a channel in his own land, which he has a perfect right to do, and who uses the water of the Menai Straits, is loading goods within the limits of the port of Carnarvon, as those limits extend to all the water that is within the straits. The boundary of the port suggested by the appellants is high-water mark. But there is no definition of the word "port" in any decision or in any argument which does not show that it means water and adjacent land. It is not the water only, but it comprises also the land adjoining the water:

Hunter v. *Northern Marine Insurance Company Limited*, 13 App. Cas. 717, at p. 722.

There is no fixed line inland to show the limits of a port. Those limits have never been made definite, and how far a port extends inland is by no means ascertained. The definition of the port and the limits of the port given by the statutes in the present case does not draw any line to the landward side. [VAUGHAN WILLIAMS, L.J.—What, according to your definition, is the bank of a port? You are acquainted with the word "ripar"?] It is the line adjoining the waters of the port. But because there is a ripar it is not necessarily the limit. If it is, then docks, quays, and wharves are outside the limits of a port. As to the meaning of "adjacent," see

Mayor, &c, of Wellington v. *Mayor, &c., of Lower Hutt*, 91 L. T. Rep. 539; (1904) A. C. 773.

[VAUGHAN WILLIAMS, L.J.—We have not here the word "adjacent." It is only a term used by you *arguendo*, and a decision on the meaning of that word is only useful as showing what is the meaning of that word as used by you. Your suggestion that there is no land limit to a port is contrary to what is said in the case cited in Hale de Portibus Maris (*ubi sup.*). That case could not have arisen unless there was a land limit to a port.] It is, we submit, equally certain that that case could not have arisen unless it included the towns of the Cinque Ports. It is quite sufficient to show that there must be land forming part of a port. Then, as to the survey which has been tendered by the appellants, we submit that it is not admissible as evidence. [VAUGHAN WILLIAMS, L.J.—We shall not require to trouble you on that point.]

A. F. Peterson replied. *Cur. adv. vult.*

Dec. 20.—The following written judgments were delivered:—

VAUGHAN WILLIAMS, L.J.—The question in this case is whether the plaintiff, who owns on his private property docks which through the port of Dinorwic communicate with the Straits of Menai, is liable to pay to the trustees under the statutes 33 Geo. 3, c. cxxiii., and 49 Geo. 3, c. xxiv., any and what duties. The answer depends upon the construction of those Acts. I propose hereafter to deal with the question of what construction ought to be put upon these Acts of Parliament, having regard only to the words to be found within the four corners of those Acts. But I desire, before doing so, to deal with two points which were strongly relied on by Mr. Warmington. The first point is based upon the definition of the port of Carnarvon as a Customs port in a certificate of 1723 made by commissioners appointed under the statute 13 & 14 Car. 2, c. 11. It was argued that the word "port" in these Carnarvon Acts ought to be construed as meaning the port of Carnarvon as defined in the above-mentioned certificate. I cannot agree. The object of the statute of Charles II. and the objects of the Carnarvon Acts are wholly different. The statute of Charles II. is entitled "An Act for preventing frauds and regulating abuses in the Customs"; and it authorised the Crown by its commission out of the Court of Exchequer to assign and appoint all such further (that is, beyond those places assigned as ports for shipping or discharging goods on or out of vessels by commissions under the statute of the 1st Eliz.) places, ports, members, and creeks, as should be lawful for the landing and discharging, lading or shipping of goods within England and Wales, and provided for setting down and appointing the extents, bounds, and limits of every port, haven, or creek, and made it unlawful to load or discharge but only from and upon the places appointed. The commission recites that the "extents, bounds, and limits" of certain ports, including "Beaumaris, Carnarvon, and Pwllheli, to our port of Chester belonging" were not fully ascertained, and empowers the commissioners "t

set down, appoint, and settle the extents, bounds, and limits of the said ports and towns" and the places, quays, or wharves for landing and discharging, loading, and shipping goods within the said towns and ports "by sufficient metes, limits, and bounds, and utterly to prohibit . . . all other places within the said ports and towns from the privilege, right, and benefit of a place, quay, or port for loading or discharging any goods." And then the commissioners by their certificate appoint and settle the extents, bounds, and limits of the port of Carnarvon by the words following: "Wee doe hereby appoint, sett down, and settle the extents, bounds, and limits of the said port to be as followeth—(to witt) from the mouth of the river Maltraith in Anglesey and along the east side of the said river northward to the middle Carnarvon Bay southwardly seaward, and from thence to the river called Afon Wen, in Carnarvonshire, eastward from thence to the south side of the Swelly rocks on the river Menay northward, and all the said river southwardly." And the certificate proceeds to appoint "the several open place or places hereafter mentioned to be places, keys, or wharfes respectively for the landing and discharging, lading, or shipping of any goods, wares or merchandizes within the said port of Carnarvon," &c. [His Lordship read a further portion of the commission, and proceeded:] It will be observed that all these places for loading and unloading are in close proximity to Carnarvon town and castle, the whole space being bounded by the rivers Seoint and Cadmant and the river Menai, and by the town and castle of Carnarvon. I cannot think that the definition of the limits of the port of Carnarvon contained in this certificate of the 21st Nov. 1723, made under an Act for preventing frauds or regulating abuses in other customs, ought to be held to determine the meaning of the word "port," or the words "within the limits of the said port," in an Act passed some seventy years afterwards, in 1793, as appears by the title, for "enlarging, deepening, cleansing, improving, and regulating the harbour of Carnarvon, in the county of Carnarvon," especially as some parts of the Customs port are clearly outside the county of Carnarvon.

The second point made by Mr. Warmington was that these words, "limits of the port," had been recognised in Acts of Parliament and legal documents as having a technical meaning—that is to say, the same meaning that the words have in Acts of Parliament and commissions defining fiscal or Customs ports. It is true that in the case of *Kingston-upon-Hull Dock Company* v. *Browne* (2 B. & Ad. 43) Lord Tenterden, in construing the 44th section of the Hull Act in which the mention is not of the "port of Hull," as it is in the former sections, but of the "limits of the port of Hull," construed the words "limits of the port of Hull" as meaning something distinct from the words "port of Hull." He does not, however, so construe the words on the ground that such words have a technical meaning, or even a *primâ facie* technical meaning, but on the ground that the 44th section of that Act, which spoke of coasting vessels coming or going coastwise from or to any port or place in Great Britain to or from any place up the rivers Trent or Ouse within the limits of the port of Hull as now used, may have been intended to prevent frauds upon the revenue of the dock company by the discharge or receipt of goods in the river Humber; and that the meaning of the words "limits of the port of Hull" in such a section could be explained by the charter of the corporation of the Trinity House at Hull, wherein the words "limits and liberties" are used to denote the places whereat the King's Customers of Hull had authority to take any Custom by the name of primage. And Lord Tenterden, having stated this, held that, although this section was in the form of a proviso and ought, perhaps, in strict propriety to be considered as an exception from the 42nd section (that is, the section empowering the Hull Company to take rates), and, therefore, as an exception from the preceding section, yet held that this 44th section ought to be considered as introduced by way of caution and to prevent doubts and questions rather than as explanatory of or enlarging the sense in which the words "port of Kingston-upon-Hull" are to be understood in the 42nd section. I cannot think that this case is any authority for the proposition that the words "within the limits of the port" have ever acquired a recognised technical meaning as denoting a Customs port, and certainly not as an authority that the words "within the limits of the said port" can have such a meaning in an Act in which the said port is generally used in the sense of the local port, and not in the sense of a Customs port. I will now say something as to the construction of these Carnarvon Acts. There can be no doubt but that the word "port" is used throughout these Acts generally, as from from their titles one would expect to be the case, in the sense of a port situate on the Menai Straits with the town of Carnarvon near thereto. The only section in either Act in which it can be said that the word "port" is plainly used in a wider sense than the popular sense above mentioned is sect. 15 of the second Act giving power to remove the rocks at the Swellies "within the said port of Carnarvon," the Swellies being outside everything which would fall within the word "port" in its widest sense of local port. But I doubt whether by reason of what is contained in this section one ought to enlarge the meaning of the word "port"; for the word "port" must have been construed originally under the earlier Act, which makes no mention of the Swellies. It is remarkable that this section, which, it is argued, necessitates construing the word "port" in the sense of Customs port, does not use the words "limits of the port," but the word "port."

The real question to be decided is the construction of the words "limits of the said port" in sect. 16 of the earlier Act and sched. A. of the later Act—that is to say, in the parts of those Acts respectively authorising the taking of rates. Now, there is an undoubted change in the form of expression used in this part of these Acts from that used in the Acts generally. *Primâ facie*, there must be a reason for this change. I find it very difficult to suppose that the reason of the change was to include in the area within which the rates might be levied the whole area of the fiscal port extending from the Britannia Rock to Afon Wen, in the greater part of which the harbour trustees rendered no service whatever to those vessels loading or unloading. It seems more probable that the words within the "limits of the said port" were adopted in the charging sections for the purpose of including the port of Carnarvon in its widest local sense,

including, so far as the rates relate to loading or unloading, not only the harbour of Carnarvon, but also the shore-ground or strand in front of or adjoining the harbour and the approach thereto. It is to be observed that under both Acts there is a power to acquire land on shore-ground and strand; and the very fact of such enlargement being contemplated for the accommodation of those coming to the port to load or unload their vessels is in itself some reason for adopting the words "limits of the said port" instead of the word "port." I do not think it worth while to go through the section and schedule paragraph by paragraph to discuss the difficulties which it was suggested would arise on the words of the various paragraphs if one were to construe the "limits of the said port" as meaning fiscal port. I will only observe that one finds in sect. 5 of 49 Geo. 3, c. xxiv., a section authorising the levying of new rates to be paid by every person lading or unlading grain, goods, &c., "within the said harbour of Carnarvon" or "within the limits of the said port"—the rates mentioned in the second schedule of the Act marked "(B)"; and when one comes to sched. B the words are not rates and dues to be paid for lading, &c., goods, &c., "within the limits of the port of Carnarvon," but are in the port of Carnarvon. Upon this question of the meaning of the word "port" in these Acts of Parliament, I ought to mention that I cannot agree with the conclusion of Kekewich, J. that the words of sect. 8 of the Act of 33 Geo. 3, c. cxxiii., as to placing "buoys and beacons in proper places upon the bar and other banks and shores leading to and in the port of Carnarvon," necessitate construing "port" in that section as meaning Customs port. I do not agree, for I read the words, "buoys and beacons in proper places upon the bar, and other banks and shores leading to and in the port of Carnarvon," as meaning the bank that forms the bar, and other banks and shores "leading to and in the port of Carnarvon" as qualifying the word "bar."

Having thus dealt with what is to be found within the four corners of these Acts, I approach the construction of them, as Kekewich, J. did, according to the rule of Lord Tenterden in the case of *Kingston-upon-Hull Dock Company* v. *Browne* (2 B. & Ad. 43, at p. 58): That rule is this —"These rates are a tax on the subject, and it is a sound general rule that a tax shall not be considered to be imposed (or, at least, not for the benefit of a subject) without a plain declaration of the intent of the Legislature to impose it. And it is not to be expected generally that a tax or burthen will be imposed upon persons who do not in any degree participate in the benefits of the measure which the tax was intended to remunerate."

I find some difficulty myself in saying that the rates and duties imposed by these Acts are plainly imposed on those who load or unload at a port situate, as Port Dinorwic is, within the fiscal port of Carnarvon, but not within the port of Carnarvon in the sense of a harbour, or local port where ships can be accommodated in respect of loading and unloading. But I think that ships loading or unloading at Dinorwic may and do participate in the benefits of the works which the tax was intended to remunerate, at all events when they pass through the Menai Straits. But, notwithstanding my view as to the two points made by Mr. Warmington, which I dealt with at the beginning of my judgment, and my view that one cannot find within the four corners of the Act sufficient to say that the rates for loading and unloading within the "limits of the said port of Carnarvon" are plainly imposed on those who load or unload at Port Dinorwic, I think it has yet to be considered whether the construction of the Act is not affected by the evidence showing what has been the view taken and acted on by all persons concerned since this Act was first put into operation. Upon the question as I have stated it, there are two classes of evidence given in this case which are in my opinion admissible. First, we have the question arising, What is the port of Carnarvon? There is no definition in the Act, and I have already said I do not think that the definition in the certificate given under the commission issued by the Court of Exchequer under the powers of 13 & 14 Car. 2, c. xi., either determines or in any way affects this question of definition of the limits of the port. In the absence of any definition, it seems to me that evidence is admissible to show what was reputed amongst the officers administering the Acts 33 and 49 Geo. 3 in past times to be the port of Carnarvon. The evidence may not be of great weight unless coupled by the proof of acts done which could not have been done had not the limits of the port accorded with the reputation; still, as the question of the limits of the port within which the trustees of the harbour were accustomed to act is a question of fact of public interest, I think that evidence of public reputation as to those limits was admissible for what it was worth. Evidence was in fact given as to the acts done by the trustees under the powers of these Acts outside what, according to the widest possible meaning of "port" in its popular and local sense, could be said to have been done within the limits of the local port. It is true that none of these acts done in times gone by by the trustees or their officers were acts in the nature of collection of rates in respect of the loading or unloading of vessels outside the limits of the port of Carnarvon in its widest sense as a local port—as a port situate upon the river Menai—but were acts done for the purpose of rendering the navigation of vessels going to or coming from the port of Carnarvon more safe, and were principally acts done above or beyond the bar at the southern end of the river or straits on the south of Carnarvon. But there is one instance in which it was proved that the trustees for many years collected rates without opposition in respect of vessels loading and unloading outside what could be considered the limits of the local port of Carnarvon in its widest popular sense, and that was the port of Dinorwic itself. And, it is urged, this fact may not only be evidence of reputation, but also may be evidence of a *contemporaneu expositio* showing that the Acts have always been applied to a port in the position of Port Dinorwic —that is, far outside the limits of the local port.

On the whole, I think that the fact of the collection of these rates from people well able to resist an unjust imposition—which collection seems not only to have been a collection from Mr. Assheton-Smith and his predecessors, the owners of the Vaynol estates, but also a collection from vessels not owned by him which came into or went out of

Port Dinorwic to load or unload—does constitute such evidence. If this were a question of estoppel as between the trustees of the harbour and the owners of Vaynol, it would have no effect on the construction of the Act; but I do not so regard it. Of course, if the same thing had happened without objection at ports other than Dinorwic there can be no doubt that it would amount to a *contemporanea expositio*, or at all events to the evidence of the existence of facts raising a strong *primâ facie* ground for thinking that there must exist some legal ground on which those submitting to pay the rate could not resist. Lord Blackburn, in *Trustees of Clyde Navigation* v. *Laird* (8 App. Cas. 658, at p. 670) says: "There is only one other point on which I shall say anything. The trustees have ever since the passing of the Act of 1858 down to the commencement of this suit, a period of eighteen years, been in the habit of levying rates and dues on timber floated to yards on the upper part of the Clyde, and the timber merchants, an acute and wealthy body, by no means inclined to pay money gratuitously, or to shrink from litigation, have submitted and paid them. I think that raises a strong *primâ facie* ground for thinking that there must exist some legal ground on which they could not resist. And I think a court should be cautious and not decide unnecessarily that there is no such ground. If the Lord President means no more than this when he calls it '*contemporanea expositio* of the statutes which is almost irresistible,' I agree with him. I do not think he means that enjoyment, at least for any period short of that which gives rise to prescription, if founded on a mistaken construction of a statute, binds the court so as to prevent it from giving the true construction. If he did I should not agree with him, for I know of no authority, and am not aware of any principle for so saying." It is true that Lord Blackburn speaks of a practice existing ever since the passing of the Act, and there is no direct evidence that the practice of the collection of these rates has existed ever since the passing of the Act of 1793. But I should infer from the letters written by or on behalf of the late Mr. Assheton-Smith, when of full age and as a minor, that such had been the fact at all events ever since Dinorwic had been used as a port for the loading of slates; and there is no evidence before us to prove that this was not the case at the time of the passing of the Act. On the contrary, there is evidence in the books of the trustees put in by the defendants showing that these payments to the Harbour Trust of dues for slates go back as far as the 21st Nov. 1839; and the letter of the 22nd July 1874, written by Messrs. Dews and Bone, the agents of Mr. Assheton-Smith, states "that by the Acts of Parliament 33 Geo. 3 and 49 Geo. 3, the harbour trustees have always levied tolls on goods shipped and unshipped at Port Dinorwic without reference to the arrangement made between Her Majesty's Commissioners of Woods and Forests and Mr. Duff Assheton-Smith, and again, the amount hitherto paid by Mr. Duff Assheton-Smith has varied from 300*l.* to 400*l.* a year." I infer from the above statements, treating them merely as evidence in this action, and not as raising any estoppel, that the trustees have always levied tolls upon goods shipped and unshipped at Port Dinorwic, and ever since the passing of the Act. And I do not regard this statement as limited to vessels owned by or slates shipped by Mr. Assheton-Smith, and I think that we ought, in the light of this practice, to hold that the words "within the limits of the said port of Carnarvon" in the paragraphs relating to the loading and unloading of vessels within the limits of the said port—whether or not such words extend to the whole Customs port—extend at least to a port having an area which covers Port Dinorwic. I agree with Stirling, L.J. in his judgment, which I have had an opportunity of reading, as to the other point raised as to the port not extending to water more inland than high-water mark artificially connected with the sea. I think that this appeal ought to be dismissed with costs.

Stirling, L.J.—In this case I have, not without hesitation and doubt, arrived at the conclusion that the decision of Kekewich, J. ought to be affirmed. Two questions arise: The first is, What is the meaning of the word "port" as used in the sections of two Acts of Parliament—one 33 Geo. 3, c. cxxiii., the other 49 Geo. 3, c. xxiv. —which impose certain rates or duties in respect of ships or vessels loading or unloading within the limits of the port of Carnarvon? Does it mean the local port, whose limits are not very accurately defined, but include at most the harbour of Carnarvon and a mile or two of the immediately adjacent coast, or the fiscal port, whose limits have been strictly defined and extend over many miles of coast? I must admit that these Acts—particularly the earlier of the two—are so expressed as to give ample room for argument on either side. But it seems to me, after full consideration, that the latter is with sufficient certainty indicated as the true meaning. I agree with much of what is said in the judgment of Kekewich, J., and shall indicate briefly those matters which have chiefly weighed with me. The two statutes are *in pari materiâ*, and ought to be read together. The second, which followed the first at an interval of about sixteen years, may, I think, be properly used for the purpose of throwing light on the meaning of the first. It is in any view the more important for the present purposes, as it contains the enactments under which the rates and duties now leviable were imposed. Sect. 7 of that Act provides —reading it shortly—that "no . . . officer of the Customs whatsoever, belonging to the port of Carnarvon within the port of Chester"—that is unquestionably the fiscal port—"shall at any time . . . give or make out any cocket or other discharge . . . or permit any ship or other vessel to come in, or go out of, the said harbour, or from any landing place within the limits of the said port, until the master or owner, or other persons . . . shall produce a certificate . . . that the rates or duties by this Act granted are paid or secured to be paid." That section therefore casts on the Customs officers of the fiscal port, whenever or wherever acting in the collection of the public revenue, the duty of seeing at the same time that the rates and duties imposed by these private Acts are paid or secured. The limits within which the Custom House officers exercise jurisdiction are those of the fiscal port. It seems to me a strong indication that the limits within which the rates or duties become payable were intended to be

regarded as the same. Again, sect. 15 of the same Act empowers the trustees to remove "all, every, or any of the rocks at the Swellies, or in any other part of the said straits" of Menai "within the said port of Carnarvon, for the more safe passage of ships and vessels to and from the said harbour, and through the said straits." The "rocks at the Swellies," here referred to as being "within the said port of Carnarvon," lie within the limits of the fiscal port, but far outside those of the local port of Carnarvon. It is said that the expression "limits of the port" does not occur in that section, but I am unable to attach any weight to this circumstance. I may point out that by sect. 5 it is enacted that "there shall be paid by every person whomsoever who shall lade or unlade or import or export any . . . article, matter, or thing whatsoever within the said harbour of Carnarvon, or within the limits of the said port . . . any sum or sums of money, not exceeding the several rates and duties hereinafter mentioned and contained in the second schedule hereunto annexed marked (B)." When the schedule is referred to, it is found to be headed "rates and dues to be paid for landing and shipping of goods, wares, and merchandize, in the port of Carnarvon," the word "limits" being omitted. This position appears to me to be confirmed by the observation that the trustees appointed by the Act are charged with many duties besides those imposed by sect. 15 of the Act outside the limits of the local port; as, for example, the laying and fixing of buoys and beacons upon the bar (first Act, sect. 8), and the erection of a lighthouse at Llandwyn Point (sect. 9); and that rates and duties are imposed in respect of ships (whether belonging to foreign or British subjects) which pass through the Menai Straits (lying without the local port), even although they do not load or unload within the limits of the port.

I agree with Kekewich, J. in thinking that the performance of those duties confers benefits which are participated in by the appellants, and which the duties imposed by the Acts were intended to remunerate. The second question is of a different kind. Docks and quays have since the passing of the later of the Acts mentioned been constructed by the predecessors in title of the appellants on lands belonging to them situate at some distance inland from the extreme high-water mark at the times of the passing of these Acts. The docks are connected with the sea by a short canal and lock, by which at high water ships can enter and go out to and from the dock from and to the sea. It is contended that the docks and quays so constructed are not within the "limits of the port," however wide those may be. Much stress was laid on the fact that the land on which these new docks were erected was the property of the appellants' predecessor in title, who constructed them. It would seem that in some circumstances this might be a material consideration. Lord Hale, in his treatise De Portibus Maris, cap. 3 (Harg. Law Tracts, vol. 1, p. 53), says: "Any man might bring and unlade his own private goods, which are not customable, in his own private ship or vessel upon his own land, as fish taken by Englishmen; for this was no accroachment at common law, and fish are excepted out of the statute of 1 Eliz. c. 11." This statement of the law may still be perfectly accurate with respect to land within a port held simply in right of the Crown, or under a title arising by prescription, or under a royal charter. But we have here to deal with a case in which duties are claimed under statutes which impose duties in respect of goods laden or unladen "within the limits of the port." I do not think that the owner of land abutting on the harbour of Carnarvon (and therefore within the limits of the port in the narrowest sense) could escape from the duties so chargeable on his non-customable goods laden or unladen upon that land on his own private vessel. The language of the Acts seems to me to afford no ground for such an exemption. Nor, as it seems to me, could such an owner escape if the ship were laden or unladen, not in the harbour itself, but on a dock constructed on the land at some distance from the harbour, connected, nevertheless, with it by a canal or lock such as was made use of by the predecessor in title of the present appellants. If the owner had removed the soil of his land, so as to bring land in immediate contact with the sea, which had ever before been separated from it by a wide interval, it seems to me that he would by his own act have enlarged the limits of the port; and what has been actually done appears to be in substance the same thing. On this part of the case no authority was cited by counsel on either side, nor has any been subsequently discovered. I will only add that tolls and dues in respect of ships laden and unladen at Port Dinorwic were paid by the appellants' predecessor in title, without dispute, for a long period and down to a time shortly before the bringing of this action. This circumstance, though it may not preclude the appellants from questioning the right to levy the tolls and dues, yet (as is pointed out by Lord Blackburn in *Trustees of Clyde Navigation* v. *Laird*, 8 App. Cas. 658, at p. 670) ought to render the court cautious in holding that such a right does not exist. In these circumstances I think that the appeal fails and ought to be dismissed.

Cozens-Hardy, L.J.—The question which arises for decision in this appeal turns upon the construction of two ill-drawn and obscure Acts of Parliament passed in 1793 and 1809. The late Mr. Assheton-Smith built on his own land certain docks at Port Dinorwic, which is within the limits of the fiscal port of Carnarvon as defined in 1723 and 1844. Port Dinorwic is about four miles north of Carnarvon on the east side of the Menai Straits and a little to the south of the Swellies Rocks, which are the northern boundary of the fiscal port of Carnarvon. The trustees of Carnarvon Harbour assert that Port Dinorwic is within the limits of the port of Carnarvon referred to in the Acts of 1793 and 1809, and that the statutory rates or duties imposed by the said Acts are payable on goods loaded or unloaded on or from vessels at Port Dinorwic. It is proved and admitted that these rates and duties have been paid without protest for very many years, and I think the proper inference is that they have been so paid ever since the Acts came into operation. This is a fact which must not be overlooked, though I do not think the doctrine *contemporanea expositio* can properly be applied in construing Acts which are comparatively modern. The appellants contend that the words "port of Carnarvon" are used in the Acts in the sense of

the popular and commercial port which is either identical with the harbour of Carnarvon, or at the utmost includes in addition only a small area of the sea adjacent to the harbour. I think it is impossible to deny that the word "port" is used sometimes in the larger sense and sometimes in the narrower sense, and I have felt great difficulty in arriving at a satisfactory conclusion as to the meaning of the word in the rating or charging sections.

I do not propose to go through the Acts in detail. But I approach the subject having regard, first, to the language used, wherever it is clear; and, secondly, to the question whether any benefits are conferred upon Port Dinorwic as consideration for the rates and duties. Sect. 16 of the Act of 1793—which for the present purpose is identical with sched. A of the Act of 1809—is the charging section. It uses throughout the words "within the limits of the said port," a phrase which is apt to describe the fiscal port which has known defined limits, but which is not a natural phrase to describe the commercial or popular port of Carnarvon, the limits of which are undefined and unascertained. This view is strongly supported by sect. 7 of the Act of 1809, a section which is in aid of the charging section. Its reference to the fiscal port is unambiguous. It imposes upon the officers of the fiscal port the duty of preventing any ship coming from (*inter alia*) "any landing place within the limits of the said port"—words which precisely hit Port Dinorwic—until a certificate has been produced that the rates or duties granted by the Act have been paid or secured to be paid. Upon the whole, I think the construction of the charging section contended for by the trustees is the more natural and reasonable construction. But can it be said that any benefits are conferred upon Port Dinorwic, or upon any place within the limits of the fiscal port except Carnarvon? I think this question must be answered in favour of the trustees In so far as vessels approach Port Dinorwic from the south they get the benefit (1) of the scouring of the bar, (2) of the buoys in the Straits right up to Dinorwic, (3) of the light-house at Llandwyn Point. In so far as vessels approach Port Dinorwic from the north they get the benefit, (4) of the blasting or removing of the rocks at the Swellies, and (5) to a lesser extent of the buoys or beacons placed to the north of Dinorwic. Moreover, the Acts themselves seem to assert that there is a benefit not confined to vessels using the harbour of Carnarvon, for there are passing tolls payable by vessels going through the straits without touching at any landing place. It is doubtless true that Carnarvon reaps larger benefits than Port Dinorwic; but I do not think equality of benefits can be essential. The result is that in my opinion the judgment of Kekewich, J. on this part of the case was correct. A second and subordinate point was raised by the appellants. It was argued that, even assuming that tolls are payable in respect of vessels loading or unloading at Port Dinorwic, in so far as Port Dinorwic is within the limits of the fiscal port of Carnarvon as defined in 1793 and 1809, such limits do not extend to a dock or quay subsequently constructed by the predecessor in title of the appellants on his own land beyond the line of high water in 1793 and 1809. Upon consideration, I think this argument cannot prevail. It is clear that exemption cannot be claimed simply on the ground that goods are loaded or unloaded by the appellants' predecessor in title on his own land adjacent to the sea. And if by artificial means, such as the construction of a dock, the line of high tide is carried further inland, I think the limits of the fiscal port must follow such line. All land adjacent to the sea must be in some fiscal port, and I cannot suggest any port, except Carnarvon, within which the Port Dinorwic docks can be situate. In other words, I think the limits of the fiscal port of Carnarvon must be the present high-water mark. I may add that I am not satisfied that the appellants have adduced sufficient evidence that high-water mark in 1809 did not extend to the present dock and quay, but in the view which I take this is not material. I agree with Kekewich, J.'s judgment on both points, and think the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Hasties*, agents for *Carter, Vincent*, and *Co.*, Carnarvon.

Solicitors for the respondent, *Rooke* and *Sons*, agents for *C. A. Jones*, Carnarvon.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

COMMERCIAL COURT.

Nov. 3, 6, *and* 23, 1905.

(Before CHANNELL, J.)

COMPANIA NAVIERA VASCONGADA *v.* CHURCHILL AND SIM.

COMPANIA NAVIERA VASCONGADA *v.* BURTON AND CO. (*a*)

Bill of lading—Misstatement—"Shipped in good order and condition"—"Quality and measure unknown"—Indorsee and shipowner—Estoppel—Master binding owners—Duty of master—Harter Act 1893 *U.S.*

The words "shipped in good order and condition" in a bill of lading are not words of contract in the sense of a promise, but are in the nature of an affirmation of fact. Such statement is within the master's authority and binds the shipowner.

Where goods are shipped in apparent damaged condition, and the bill of lading states that they are "shipped in good order and condition," though the incorrect statement cannot be sued upon directly as a breach of contract, the shipowner, who is bound by the master so signing the bills of lading, is estopped from denying the condition of the goods so stated if, on the strength of such statement, the indorsee of the bill of lading has acted to his prejudice. The cause of action is based on estoppel and not on contract. This is so whether the Harter Act is incorporated or not.

The addition of the words "quality and measure unknown" in the bill of lading do not in effect strike out the words "good order and condition."

"Condition" refers to external and apparent condition; "quality" to that which is not

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

usually apparent, at any rate, to an unskilled person.

A master of a ship is expected to notice the apparent condition, though not the quality, of goods shipped on his vessel.

Though a charter-party provides a form of the bill of lading to be used which contains the words "shipped in good order and condition" and "quality and measure unknown," the master is not bound to make an untrue statement in the bills of lading.

Where an indorsee, who has acted on the strength of such an untrue statement in the bill of lading, has taken delivery of damaged goods not in accordance with his contract with the shippers, a foreign solvent firm, and has obtained an award against them in respect of the depreciation of the goods, it is not necessary for the indorsee to sue on the award before suing the shipowner.

CONSOLIDATED actions tried in the Commercial Court, before Channell, J., sitting without a jury.

The plaintiffs' claim was for 793*l.* 14*s.* 10*d.*, against Churchill and Sim, and for 107*l.* 13*s.* 4*d.* against Burton and Co., being in each case amount due for freight and dock dues.

The plaintiffs were the owners of the vessel *Virgen de Lourdes*.

The defendants Churchill and Sim were indorsees of two bills of lading, dated Port Arthur, Texas, the 12th Jan. 1905, incorporating the terms of a charter-party, dated New Orleans, Louisiana, the 9th Nov. 1904.

The defendants Burton and Co. were indorsees of a bill of lading, dated the 12th Jan. 1905, incorporating the terms of the same charter-party.

The property in the bills of lading passed respectively to the two defendants.

The bills of lading were for the carriage of timber from Port Arthur, Texas, to London at a specified rate of freight on the said vessel.

The cargo was carried under the bills of lading to the Surrey Commercial Dock, and delivered to the defendants respectively. Both defendants paid a portion of the freightment and charges, and refused to pay the balance.

The defendants respectively admitted liability for freight, but claimed to set off the amounts due to them by the plaintiffs under their counter-claim.

By the counter-claim the defendants respectively alleged that the timber, sawn pitch pine, was delivered in bad condition and oil-stained, whereby the goods were damaged, and the marks and brands were obliterated and undistinguishable.

The defendants alleged that in the bills of lading the plaintiffs, the shipowners, by their agent, the master of the ship *Virgen de Lourdes*, stated that the goods were shipped in good order and condition, with certain brands and marks, and were to be delivered in the like good order and condition in London.

In breach of that the goods were delivered in a damaged condition.

The goods at the time of shipment were in fact in apparent damaged condition. On the goods arriving the marks could not be distinguished, and some delay and expense was caused.

The matter was finally submitted to arbitration, when an award was made against the shippers, who were in America, but no steps had been taken to get that award satisfied. There was no evidence that the shippers were insolvent.

By a contract dated the 26th Nov. 1904, Messrs. Reeves Powell and Co. Limited agreed to sell certain timber to the defendants

> For shipment January-February 1905. . . . Sellers guarantee that the wood shall be shipped fresh and merchantable, and equal to the average of the season's shipments, from Port Arthur, Texas, where the shipment is to be made. . . . Payment of amount of invoice (after deducting freight . . .) to be by cash less 2 per cent. discount on presenting the invoice, bill of lading, and policy of insurance. . . .

The bill of lading was as follows:

> Shipped in good order and condition by Reeves-Powell and Company Limited in and upon the . . . steamship . . . *Virgen de Loudres* . . . now lying in Port Arthur, and bound for London, England, *viâ* other landing ports as per charter, dated New Orleans, La., the 9th Nov. 1904, 701 pieces sawn pitch pine timber . . . (branded R. P., marked Y. with red paint) . . . and to be delivered in the like good order and condition at the aforesaid port of London, England . . . unto order of shippers or their assigns, he or they paying freight for the same as per charter-party, dated the 9th Nov. 1904, all the terms and exceptions contained in which charter are herewith incorporated and form part hereof . . . This bill of lading is subject to all the terms and provisions of and to the exemptions from liability contained in the Act of Congress of the United States . . . approved the 13th day of Feb. 1893 . . . dated in Port Arthur, Texas, the 12th Jan. 1905. Quality and measure unknown.

By the charter-party which was dated New Orleans, the 9th Nov. 1904, it was agreed between the owners of the *Virgen de Lourdes* and Reeves Powell and Co. Limited, that the vessel should take a cargo of (*inter alia*) sawn pitch pine to Holland, completing at one port on the east or west coast of the United Kingdom. Clause 6 provided that:

> The bills of lading shall be prepared by the shippers of the cargo on the form indorsed on this charter, and shall be signed by the master quality and measure unknown, freight and all conditions, clauses, and exceptions as per this charter.
>
> Clause 19. The master shall sign for the number of pieces shipped, and the owner shall be responsible for the number of pieces so signed for by the master or his duly authorised agent, fraud, clerical, and other obvious errors excepted. . . .

On the back of the charter-party was a printed form of a bill of lading, which contained the following clauses: "Shipped in good order and condition." "To be delivered in the like good order and condition." And at the foot were the words, "quality and measure unknown."

The Act of Congress of the United States (13th Feb. 1893), known as the Harter Act, s. 4, provides:

> That it shall be the duty of the owner or owners, masters, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and

apparent order and condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *primâ facie* evidence of the receipt of the merchandise therein described.

J. A. Hamilton, K.C. and *Chaytor* for the defendants.—(1) On the terms of the bills of lading there was a contract to deliver the timber in good order and condition, and that has been broken, for which breach the defendants can claim damages:

Leduc v. *Ward*, 6 Asp. Mar. Law Cas. 290 (1888); 58 L. T. Rep. 908; 20 Q. B. Div. 475.

(2) The shipowner having signed the bills of lading as referring to timber shipped in good order and condition is estopped from denying that condition. On the strength of which statement the defendants by taking the bills of lading as a good delivery under the contracts had acted to their prejudice. Persons into whose hands the bills of lading might come were intended to act on that statement, and in fact did so act:

Grant v. *Norway*, 20 L. J. 93, C. P.; 10 C. B. 665;
Howard v. *Tucker*, 1 B. & A. 712;
Cox v. *Bruce*, 6 Asp. Mar. Law Cas. 152 (1886); 57 L. T. Rep. 128; 18 Q. B. Div. 147;
Grafton Sear v. *Wingate*, 85 Mass. Rep. 103, 3rd Allen.

(3) The Harter Act, U.S.A. 1893, s. 4, imposed an obligation on the owners, master, or agent of a vessel to state on bills of lading the apparent order and condition of the goods shipped. The condition of the goods was apparent, yet they were described as in "good order and condition." The incorporation of that Act into the bills of lading creates a contractual duty on the shipowners to the defendants to state truly the apparent order and condition. There has been a breach of that duty, and damage has flowed therefrom. (4) The defendants were not obliged to proceed against the shippers under the award before they could bring the present action. The defendants have a good cause of action.

Scrutton, K.C. and *Dawson Miller* for the plaintiffs.—(1) The damage was caused to the timber prior to the timber coming on board. The timber was loaded from the water, and there was some oil floating on the water. (2) The words "quality and measure unknown" on the bill of lading strike out the words "good order and condition":

Prosperino v. *Palasso*, 2 Asp. Mar. Law Cas. 158 (1873); 29 L. T. Rep. 622;
The Ida, 2 Asp. Mar. Law Cas. 551 (1875); 32 L. T. Rep. 541.

(3) If the master made an honest mistake as to whether the timber was in good condition that would throw no liability on the shipowner:

Craig and Rose v. *Delargy*, 6 Ret. 4 Sessions Cases, 1269; 16 Sc. L. Rep. 751;
Cox v. *Bruce* (*ubi sup.*).

(4) There was no cause of action. If the statement be untrue, then (1) as to contract the shipper cannot sue on the bill of lading, as he caused the injury himself, and, as the indorsee only has the rights which the shipper has, the indorsee cannot sue:

Cox v. *Bruce* (*ubi sup.*);
Craig and Rose v. *Delargy* (*ubi sup.*).

(2) As to estoppel there are documents in which untruths sometimes appear which are acted upon and intended to be acted upon which do not amount to an estoppel—viz., a Lloyd's certificate. There is no duty other than the contractual rights by indorsement, between shipowner and indorsee, and for estoppel duty is necessary;

Le Lievre v. *Gould*, 68 L. T. Rep. 626; (1893) 1 Q. B. 491;
Thiodon v. *Tindall*, 7 Asp. Mar. Law Cas. 76 (1891); 65 L. T. Rep. 343; 60 L. J. 526, Q. B.;
Braginton v. *Chapman*, 60 L. J. 526, Q. B., note.

(5) As to the incorporation of the Harter Act 1893, sect. 4 imposes an obligation to make certain statements on the bill of lading, but the latter part of the section provides that such amounts only to *primâ facie* evidence—that is, the shipowner can contradict those statements. (6) The defendants having an award against the shippers, they ought to prosecute that award before suing the plaintiffs; they have suffered no damage, as they have an award against a solvent firm. The following cases were also referred to:

Parsons v. *New Zealand Shipping Company Limited*, 6 Com. Cas. 41;
Jackson v. *Union Marine Insurance Company Limited*, 2 Asp. Mar. Law Cas. 435 (1874); 31 L. T. Rep. 789; L. Rep. 10 C. P. 125.

Cur. adv. vult.

Nov. 23.—CHANNELL, J.—The actions were brought to recover the freight on three parcels of timber carried under three bills of lading, the defendants Churchill and Sim being the indorsees of two bills of lading and the defendants John Burton and Co. of the third. The facts as to all three parcels were the same. The actions were consolidated, and the freight being admitted subject to counter-claims, the only question in dispute arose on the counter-claims. The bills of lading stated in the common form that the timber was "shipped in good order and condition." It is alleged that it had been damaged before the shipment, and the question principally argued was as to what remedy, if any, the indorsee of the bill of lading had against the shipowner under such circumstances. It is surprising to find that a question so likely to arise has not been settled long ago, but it seems not to have been, and I, therefore, took time to consider the authorities. There are other questions in the case which it will be convenient to deal with first, as if they are decided in favour of the plaintiffs the main question does not arise. The timber on its arrival was found to be badly stained and saturated with petroleum, and there is no doubt that it became so stained whilst it was being brought alongside for shipment, or when alongside ready for shipment, but before it was taken on board. The plaintiffs contended that, notwithstanding the staining, the timber could properly be described as shipped in good order and condition, because they said the petroleum would not necessarily damage it, and for some purposes, such as that of its being used for piles, it was as good as if not so stained and saturated. It was, however, clear on the evidence that the selling value of the timber was seriously depreciated, and it had not been intended for piles. In my opinion, not only was there damage in fact, but it was damage of such a character that it must have been apparent to anyone. It was in fact noticed at the time of ship-

ment. The mate made note of it in his log and says that he drew the captain's attention to it. The captain, whose evidence was taken some time after the mate had given his account and after it was admitted by everyone that the damage could not have been done on board, denies the mate's statement and endeavours to make out that he formed the opinion at the time that there was no damage. In the face of the other evidence I cannot accept the captain's account. In my opinion it was a misstatement to say that the timber was shipped in good order and condition, and if necessary I should be prepared to find that it was a negligent misstatement. It is next said that this statement was qualified or neutralised by the words coming lower down:—"Quality and measure unknown." For this Mr. Scrutton quoted *The Ida* (2 Asp. Mar. Law Cas. 551 (1875); 32 L. T. Rep. 541) and *Craig and Rose* v. *Delargy* (16 Sc. L. Rep. 751), where somewhat similar words were held to qualify what would otherwise have been an admission. It seems to me that while in reference to some things and to some defects in them "condition" and "quality" may mean the same thing, yet that they do not either necessarily or even usually do so. I think that "condition" refers to external and apparent condition, and "quality" to something which is usually not apparent, at all events to an unskilled person. I think a captain is expected to notice the apparent condition of the goods though not the quality. He may qualify or (except perhaps when the Harter Act applies) erase the words "good order and condition"; but if he leaves them in he does not, in my opinion, get rid of the admission as to condition (meaning thereby apparent condition) by saying that the quality is unknown. It is probably unnecessary for him to protect himself as regards quality, which it is not his business to know anything about, except perhaps when the description of the goods set out in the bill of lading contains words importing a statement as to the quality.

Next it was said that in this case the charter-party obliged the captain to sign bills of lading in the form indorsed, and that this form contained the words "good order and condition," and that, the terms of the charter-party being incorporated in the bill of lading, the indorsee of the bill of lading ought to have known that the captain was only signing that which he was bound by the charter-party to sign. I do not, however, think that the captain was bound by the charter-party to sign an untrue statement in the bill of lading. He was, in my opinion, at liberty to qualify the words according to the truth, without departing from the form. Moreover, the Harter Act was also incorporated, and by that he is bound to state in the bill of lading the apparent order and condition. The next question is whether the captain in making that statement as to good order and condition was acting within the scope of his authority so as to bind his owners, or whether his making an untrue statement on this point can be said to be outside his authority, as the signing of a bill of lading for things not on board has been held to be. On this I think that, even when the Harter Act does not apply, the statement is within his authority, and, whatever its effect may be, it binds the owner and not merely the master personally. In *Cox* v. *Bruce* (6 Asp. Mar. Law Cas. 152 (1886); 57 L. T. Rep. 128; 18 Q. B. Div. 147), one of the cases in which *Grant* v. *Norway* (10 C. B. 665) was acted on, Lord Esher, M.R. says that that case itself shows that the captain had "authority to bind his owners with regard to the weight, condition, and value of the goods under certain circumstances," and he appears to draw the same distinction which I have drawn between quality and condition. Further, when the Harter Act applies, as it seems to do here from the manner in which the bill of lading is made subject to its terms and provisions, the liability of the owner appears to be concluded by the fourth section.

As my view on all these preliminary points is in favour of the defendants, it becomes necessary to consider what remedy the defendants have against the shipowner arising from the misstatement as to the apparent condition of the goods at the time of shipment. The defendants put their case alternatively either as a claim on the contract contained in the bill of lading, or by way of estoppel. First, as to the suggested breach of contract. No doubt by the Bills of Lading Act the indorsee to whom the property has passed becomes a party to the contract made originally between the shipper and shipowner and evidenced by the bill of lading. But, as has been pointed out in more than one case, the contract must be construed in the same way between the original parties and the substituted parties; and it is necessary to see exactly what the original contract is. It seems to me that the contract is to deliver the goods in the same condition as that in which they are shipped, coupled with an acknowledgment that the condition at the time of shipment was good. The words "shipped in good order and condition" are not words of contract in the sense of a promise or undertaking. The words are an affirmation of fact, or perhaps rather in the nature of an assent by the captain to an affirmation of fact which the shipper may be supposed to make as to his own goods. So far, therefore, as the words of the bill of lading, apart from the incorporation of the Harter Act, are concerned, I see no contract that the condition of the goods is correctly described. Sect. 4 of the Harter Act makes it the duty of the captain to insert in the bill of lading a statement as to the condition of the goods, and I agree that this means that he is to make a true statement; but I have a difficulty in seeing that the clause that the bill of lading is to be "subject to all the terms and provisions and to the exemptions from liability contained in" the Harter Act imports a contract that the statement as to the condition of the goods is true. I think, therefore, though not without some doubt so far as the effect of the incorporation of the Harter Act is concerned, that the cause of action must be based on estoppel, and not on breach of contract.

It seems to me, however, that the case does come within the recognised rules as to estoppel. The statement, as I have pointed out, is one of fact. If not exactly intended to be acted on, it must be known that it would probably be acted on. Bills of lading are transferable, and the object of the shipper in asking for the insertion of the statement that the goods are in good condition at the time of shipment is clearly rather to have evidence to offer to his transferee than for his own direct benefit. The advantage of what is

known as a clean bill of lading is obvious, and I think it would be idle for a master of a ship to say that he did not contemplate a purchaser of the goods acting on the statement that the goods were shipped in good condition. In England there appears no direct authority, but I think there are passages in several judgments in accordance with my view and none to the contrary. In America this question has been considered in *Sear* v. *Wingate* (85 Mass. 103, 3rd Allen); there is what seems a well-reasoned judgment as to the estoppel between the indorsee of a bill of lading on the one hand and the master and the shipowner on the other, and the rule is laid down that there is such an estoppel between the indorsee and the master as to statements in the bill of lading so far as they relate to matters which are, or ought to be, in the master's knowledge, and that the owners are estopped in the same way by such statements if they are within the scope of the master's authority. Passages to the above effect from that judgment are quoted with approval in Parsons on Shipping and in the Scotch case, *Craig and Rose* v. *Delargy* (16 Sc. L. Rep. 751). Lord Shand quotes the passage from Parsons, and says: "That passage from a writer of eminence on this subject undoubtedly gives weight to the argument of the pursuers in this matter (that is, the argument that there was an estoppel), but I find that, with the exception of a case which is referred to in support of the concluding words of the passage, all the authorities referred to are American." He goes on to say: "I do not think it is necessary here to decide the general question as to the effect of a representation in the bill of lading, though, if it did arise, I must say that the American law seems to me to be rested on reasonable grounds." There is, therefore, the authority of Lord Shand's opinion on the question I am deciding. As the estoppel arises on a direct statement of fact which is incorrect, I do not consider that the question of negligence really arises, but, as I have already said, I should be prepared, if necessary, on the facts of this case to find the statement to be negligent, provided, of course, that there is a duty towards the indorsee to take care. As to this duty, although in my view the incorrect statement cannot be sued on directly as a breach of contract, yet I think the transfer of the contract to the indorsee does create a privity between the indorsee and shipowner, and this gets rid of the doctrine of *Le Lievre* v. *Gould* (68 L. T. Rep. 626; (1893) 1 Q. B. 491) and the other cases in which it has been held that a duty arising solely out of contract is only a duty towards parties to the contract. It was suggested that the words at the end of sect. 4 of the Harter Act prevent any estoppel, by saying that the statement is to be *primâ facie* evidence. I think not, because it is not said that it is only to be *primâ facie* evidence, and it is consistent with the words of the section that, upon something further happening—viz., the acting upon it—it may become conclusive, and also because what is said in the section is that the statement is to be *primâ facie* evidence "of the receipt of the merchandise therein described." The object of these words, or, at all events, one object of them, appears to be to preserve the doctrine of *Grant* v. *Norway* (*ubi sup.*), and Mr. Newton Crane, who was called before me as an expert in American law to prove the Harter Act, said that *Grant* v. *Norway* is still recognised as law in America since the Harter Act. In order to make the statement in the bill of lading binding as an estoppel it is, of course, necessary that it should have been acted on to the prejudice of the person so acting. The defendants here allege that they are prejudiced because, on the faith of the statement that the timber was in good condition when shipped, they accepted the bills of lading as a good tender under a contract for clean timber, and paid their vendors the full contract price; and they further say that, although they have got an award of the umpire on an arbitration under the contract between them and their vendors for 572*l.* 12*s.* as the difference between the value of the damaged timber delivered and that which they ought to have had, yet that this sum has not been paid them. The vendors have not become insolvent, but they are a foreign firm, and the defendants have not as yet thought fit to sue them on the award. It was suggested on the part of the plaintiffs that the defendants were really making this counter-claim in the interest of the shippers and by arrangement with them; but this is denied, and I cannot hold it to be proved. It is, however, pretty clear that the defendants have not been as active in pressing their claim against the shippers as they probably would have been if they had not got this claim against the shipowner, and they probably have been influenced by the fact that the recovery from the shippers of the amount of the award would embarrass them in recovering, even if it did not, on the correspondence which has taken place, preclude them from recovering, the warehouse rent and the expenses included in their claim in the present action, but not included in the award.

When money has been paid away to a person who becomes insolvent, as has generally happened in the reported cases as to estoppel, there is, of course, no difficulty as to the person claiming the estoppel proving that his position has been altered. Where, however, there is no insolvency and there is a legal right to get the money back, the damage by the payment is not so clear. In *Carr* v. *London and North-Western Railway Company* (31 L. T. Rep. 785 (1875); L. Rep. 10 C. P. 307), a leading case on estoppel, Lord Esher says: "Neither the payment of the warehouse rent nor of the invoice price can be relied upon as damage resulting from the conduct relied upon to support an estoppel to deny the possession of the goods, because either damage can be rectified without the intervention of such an estoppel; there is no consideration for either payment; both were made under a mistake of facts." I am not sure that I understand the exact meaning of the words "without the intervention of such an estoppel," but the passage appears to mean that in the opinion of that learned judge a payment which can be recovered back because it was made under a mistake is not such an alteration of the position of the person making it as would establish an estoppel If that were so there would, I think, be few estoppels, practically none except where insolvency had intervened, for where there is a misstatement of a fact such as would possibly create an estoppel, the acting on it must always be under a mistake of fact. I think, however, that the learned judge must be considered to have been referring to the facts of the case before him,

where apparently there would not have been the slightest difficulty in getting the money back, and that it cannot be truly said as a general proposition that a person cannot be prejudiced by having made a payment which he has a legal right to get back from the person to whom he paid it, unless it is shown that such person is insolvent. It appears to me that the parting with the money, and consequently the being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the legal right to get it back, may amount to an acting to the payer's prejudice sufficient to establish an estoppel against the person in reliance upon whose statement he has made the payment. If, however, the pecuniary amount of the prejudice has to be ascertained for the purpose of assessing the damage, there is an obvious difficulty. In the present case I am prepared to hold that the defendants did act to their prejudice on the statement so as to create an estoppel, but, if the damage recoverable by the defendants against the plaintiffs is the damage they have sustained by paying the shippers, I should have the greatest difficulty on the evidence before me in assessing the amount. The doctrine of estoppel, however, is that the person estopped is precluded from denying in the same transaction as that in which the estoppel arises the truth of the statement acted on. I think, therefore, I have to say that the plaintiffs, not being able to deny that the goods were in good condition at the time of shipment, must pay the damage which was on delivery found to be done to the goods. This is the part of the case on which I have entertained most doubt. It hardly seems just that the plaintiffs should pay this damage when the defendants have a right to get it, and may even now get it, from the shippers, who are the persons who really ought to pay it, as the goods were at their risk when the damage was done. I do not, however, find any authority for the proposition that, when a person is estopped from denying a statement of fact by reason of another having suffered damage by acting on his statement, the only damage recoverable is the damage so arising; and, on the contrary, I do find that a decision apparently to that effect by Cave, J. was reversed in the Court of Appeal in *Henderson* v. *Williams* (72 L. T. Rep. 98; (1895) 1 Q. B. 521). See particularly the judgment of Smith, L.J. which appears to overrule the judgment of Denman, J. in *Carr* v. *London and North-Western Railway Company*. Assuming the doctrine of estoppel to apply, I see no logical answer to the defendants' contention that they can recover the damage to the goods, though I think it would be more satisfactory if the damages could in such a case be confined to those actually caused by acting on the erroneous statement.

The assessment of the amount at 572*l.* 12*s.* is, of course, not binding as such between the plaintiffs and defendants, but the umpire was called as a witness before me, and I accept his assessment as correct, and give the defendants the 572*l.* 12*s.* It may be that the plaintiffs, if they pay this sum, may be able to bring themselves within the doctrine that when two persons are each liable to a third in respect of the same matter, and the one on whom, as between the two, the burden ought not to rest has to pay he may recover it against the other: (see *Moule* v. *Garrett*, L. Rep. 5 Ex. 132; and in the Exchequer Chamber, 26 L. T. Rep. 367; L. Rep. 7 Ex. 101, and cases there quoted). I see, however, considerable difficulty about this, and no such question is before me. I refer to it only as a possible way in which an apparent injustice may be obviated. It remains to deal with the other heads of damage claimed in the counterclaims. The expenses of the award were not paid by the defendants, and therefore, of course, are not recoverable, and it was said they were only claimed by inadvertence. The next claim, 8*l.* 8*s.*, is a small one, but was the subject of considerable argument. The marks on the timber, though stated in the bills of lading (of course, from the information of the shipper), had in fact been obliterated by the petroleum. The captain in his evidence states that in consequence of this the lots of timber to which the separate bills of lading related were distinguished in the ship when loaded by ropes dividing them. They were, however, not delivered as separate parcels, but were delivered overboard in the Surrey Docks, leaving the dock company to separate them as best they could. This, of course, it was impossible to do accurately, as the marks were gone. After a considerable delay it was agreed between the consignees that some one should apportion the cargo between them, using the specification of length and the dock company's measurement books, but, of course, allotting to one party or the other logs corresponding to the description without any certainty that they were really his logs. The expense of this was 8*l.* 8*s.*, which is accordingly claimed as damage for not delivering to each consignee the lots of timber in his bill or bills of lading. The answer of the plaintiffs to this claim is that it is always the custom in the Surrey Docks so to deliver, and that the dock company for the consignees and at their expense always does the sorting. The sorting which the dock company so does is, however, sorting out according to marks, and the practice assumes that the timber, though delivered mixed, is in a state in which it can be identified. It may be that consignees by adopting the practice prevailing in the Surrey Docks do assent to their goods being delivered mixed, but they do not in my opinion assent to their being so mixed that they cannot be sorted. It seems to me, therefore, quite clear that the plaintiffs never made the delivery which they ought to the bill of lading holders of the timber in their bills. They had, according to the captain's evidence, at one time the means of doing so, but they themselves mixed the timber, knowing that, there were no marks by which it could be separated again. I think, therefore, that the 8*l.* 8*s.* is recoverable. The next item is warehouse rent from the time of the arrival of the ship to the date when the timber was ultimately divided by agreement as above mentioned, from the 1st March to the 9th June, over three months. This delay was, in my opinion, quite unnecessary. The defendants account for it by saying that they never had a cargo in such a condition, and really did not know what to do with it. They were during this time getting their claim against the shippers dealt with by the arbitrators. Some delay was, I think, necessarily caused by the state in which the timber was delivered, and by its being mixed, but it might have been viewed, valued, and apportioned much sooner than it was. I think

it would be reasonable to allow warehouse rent for one month as damage resulting from the plaintiffs' failure to deliver the separate parcels. A point was made for the plaintiffs that the sums claimed were not really paid for rent, but that an inclusive charge was made by the dock company for various services, which included six months' warehousing free. It appeared, however, I think, that indirectly the warehousing was paid, and that the cost to the consignees must be taken to be increased by the breaches of contract to the extent of one month's warehouse rent. The defendants also claim interest for the sum paid on the money paid for the timber, on the ground that they were prevented during this time from dealing with the timber by sale or otherwise, and so got no benefit from the money they had paid. I think this is a legitimate claim, but, of course, only for a month, which I have already said was, in my opinion, a sufficient time to have cleared up the difficulties for which I hold the plaintiffs responsible. These figures appear to give Churchill and Sim about 522*l.* on their counter-claim and Burton and Co. about 150*l.* on theirs. But the warehouse rent and the interest for a month must be calculated exactly by the parties. The defendants will, of course, have the costs of their counter-claim, and the plaintiffs, I suppose, will be entitled to the costs of the action to the time when the freight was formally admitted, which, I suppose, was in the defence.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 7, 8, *and* 14, 1905.

(Before BARGRAVE DEANE, J., assisted by two of the Elder Brethren of the Trinity House.)

THE ASSAYE. (*a*)

*Compulsory pilotage—Trinity House Out-port district—Isle of Wight and Southampton districts — "Pilotage district" — Vessel passing through a pilotage district—*48 *Geo.* 3, *c.* 104, *ss.* 20, 77—52 *Geo.* 3, *c.* 39, *ss.* 20, 23, 32—6 *Geo.* 4, *c.* 125, *s.* 5—*Merchant Shipping Act* 1854 (17 *&* 18 *Vict. c.* 104), *ss.* 331, 333, 337, 340, 349, 353, 368, 369, 370, 376, 379, *sub-s.* 6—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 605, 622 — *The Solent — Narrow channel*

The steamship N. Y. *while on a voyage from New York to Southampton,* via *Cherbourg, came into collision, off Sconce Point in the Solent, with the steamship* A., *which was proceeding from Southampton to Bombay. In the damage suits instituted by the owners of the two vessels, both vessels were held to blame for the collision, but the fault in each case was held to be that of the pilot, who was alleged to be compulsorily in charge. The owners of the* A. *contended that the* N. Y. *was exempt from compulsory pilotage because she was proceeding from Cherbourg to Southampton, and at the time of the collision was only passing through the pilotage district of the Isle of Wight, and so came within sect.* 605 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

Held, that the N. Y. *was in charge of a pilot by compulsion of law, for the waterway from the sea to Southampton was, for the purposes of compulsory pilotage, one district only, although the Trinity House for the purpose of examining and controlling the pilots had from time to time divided the district among different sets of sub-commissioners at Portsmouth, Cowes, and Southampton, and although the limits of the pilots' licences had been varied and certain exclusive rights had been given to the Southampton pilots.*

The Solent is a narrow channel within the meaning of art. 25 *of the Regulations for Preventing Collisions.*

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *New York;* the defendants and counter-claimants were the owners of the steamship *Assaye.*

The *New York* is a twin-screw steamship of 10,799 tons gross register, and, whilst on a voyage from New York to Southampton, *viâ* Cherbourg, with a cargo and passengers, was proceeding up the Solent in charge of a duly licensed Trinity House Isle of Wight pilot, on a course of E.N.E. magnetic, making about eleven and a half knots through the water, when those on board her sighted the *Assaye* about a mile and a half off and about ahead, and, although they ported their helm and manœuvred for her, a collision occurred off Sconce Point.

The collision occurred about 1.20 p.m. on the 20th March 1904, the weather being hazy, the wind a moderate breeze from the south-west, and the tide ebb running about four knots an hour.

The *Assaye* is a twin-screw steamship of 7377 tons gross register, owned by the Peninsular and Oriental Steam Navigation Company, and at the time of the collision was on a voyage from Southampton to Bombay with cargo, passengers, and troops, in charge of a duly licensed Trinity House Southampton pilot on a course of W. ½ S. magnetic, making about twelve knots.

Both vessels sustained damage, and on the 21st March 1904 the owners of the *New York* issued a writ against the owners of the *Assaye,* and on the 7th April delivered their statement of claim.

On the 11th April the defendants, the owners of the *Assaye,* delivered a defence and counter-claim.

The plaintiffs charged the defendants with improperly starboarding their helm, with neglecting to keep on their starboard hand side of the fairway, and with failing to slacken their speed or stop and reverse in due time or at all. The defendants charged the plaintiffs with improperly porting and attempting to cross ahead of the *Assaye,* instead of passing starboard to starboard; with failing to signify their course by whistle signals; and with failing to slacken speed or stop and reverse their engines.

Both the plaintiffs and the defendants alleged, in the alternative, that if the collision was caused or contributed to by the negligence of any one on board their steamship (which was denied) the same was solely the negligence of the pilot who

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

was duly qualified and in charge of the vessel at the time and place of collision by compulsion of law.

The case was heard by the late President (Sir F. H. Jeune), sitting with two of the Elder Brethren of the Trinity House, on the 16th, 18th, and 19th April 1904, and on the 2nd May 1904 the late President delivered judgment. He held that the Solent was a narrow channel and a part of the sea to which art. 25 of the Regulations for Preventing Collisions at Sea applied, and that both vessels were to blame, but that the fault in each case was that of the pilot alone. The question as to whether pilotage was compulsory for either or both vessels was reserved.

On the 14th July the case came before Sir F. H. Jeune for the question of compulsory pilotage to be argued. Counsel for the owners of the *Assaye* objected to the Elder Brethren of the Trinity House being present to assist the judge, as the argument to be addressed to the court involved a review of the acts of the corporation of the Trinity House of Deptford Strond.

The President (Sir F. H. Jeune) stated that the reason he desired to have the assistance of the Elder Brethren was that the court might obtain information as to what had been done by the Trinity House.

It was admitted by counsel on behalf of the owners of the *New York* that the *Assaye* was in charge of a compulsory pilot, and the hearing was then adjourned.

The matter again came before the court on the 10th Dec. 1902, when Mr. Keigwin, chief clerk in the Pilotage Department of the Trinity House, was called and examined and produced the Trinity House records relating to the licensing of pilots at Portsmouth, Cowes, and Southampton, the minute books of the Trinity House, and the pilotage returns to which reference is made, and the material portions of which appear in the judgment.

Owing to the resignation of the late President (Sir F. H. Jeune), the question of compulsory pilotage had to be reargued, and the arguments were heard by Bargrave Deane, J. on the 7th and 8th July 1905.

Pickford, K.C., *Aspinall*, K.C. and *Walter S. Glynn* for the plaintiffs, the owners of the *New York*.—The *New York* was at the time of the collision in charge of a compulsory pilot. The contention of the owners of the *Assaye* is that the *New York* was passing through "a pilotage district" on a voyage between two places, "both situate out of that district" and so was exempt from compulsory pilotage as coming within sect. 605, sub-sect. 1, of the Merchant Shipping Act 1894. The pilotage district which they say she was passing through is the Isle of Wight district, and the two places she was voyaging between are Cherbourg and Southampton. The limits of the district of Southampton are now said to be "from a line drawn from Lepe Buoy to Lee Point, into Southampton and from Southampton to sea," the limits of the district of the Isle of Wight are now said to be from "Peverell to the Owers, excepting within the Poole and Southampton districts." It is true that these are the limits of sub-commissioners' districts, but they are not necessarily pilotage districts. It is necessary to inquire into the meaning of the phrase "pilotage district," for, if there are two pilotage districts, the contention may be a good one, subject, however, to the effect of sub-sect. 2 of sect. 605 of the Merchant Shipping Act 1894, which provides that the exemption of sect. 605 shall not apply to ships loading or discharging at any place situate within the district, or at any place above the district, on the same river or its tributaries. The answer to the defendant's contention is that there is only one pilotage district, and the Isle of Wight and Southampton districts are not pilotage districts within the meaning of sect. 605 of the Merchant Shipping Act 1894; they are only subdivisions of one pilotage district which was created in 1809, and which extended from Peverell to the Owers and included the present Isle of Wight and Southampton districts. The word district has in the various Acts of Parliament which deal with the matter been used in various senses, but the report of the visit of the committee of the Trinity House to Portsmouth in 1843 and the notice in the *London Gazette* of the 23rd April 1844 show that the original pilotage district remained unaltered, although pilots were examined by different sub-commissioners appointed for different places in the original pilotage district. After the Merchant Shipping Act of 1854 was passed the Trinity House had no power to extend an existing pilotage district except with the consent of Her Majesty in Council, but they had power to change the limits of the sub-commissioners' districts in the original pilotage districts, and have done it when the better administration of a district required it. It was done in 1868, when the Cowes and Portsmouth district and the Southampton district were made one, and called the Isle of Wight district, and again in 1875, when the Isle of Wight district was split into the Southampton district and Isle of Wight, Cowes, and Portsmouth district, sub-commissioners being appointed for each district. Sect. 605 of the Merchant Shipping Act only applies to and exempts a vessel passing through a pilotage district when she is on a voyage to a distant port unconnected with the district:

> *General Steam Navigation Company* v. *British Colonial Steam Navigation Company*, 20 L. T. Rep. 581; 3 Mar. Law Cas. O. S. 237; L. Rep. 4 Ex. 238;
>
> *The Charlton*, 73 L. T. Rep. 49; 8 Asp. Mar. Law Cas. 29 (1895).

The *New York* also comes within sub-sect. 2 of sect. 605 of the Merchant Shipping Act 1894, for she was going to discharge at Southampton, a place situate within the district—that is, inside the Isle of Wight district, and Southampton is situate above the Isle of Wight district on the tributaries of the Solent:

> *The Mercedes de Larrinaga*, 90 L. T. Rep. 520; 9 Asp. Mar. Law Cas. 571; (1904) P. 215.

Scrutton, K.C. and *L. Batten*, K.C. for the owners of the *Assaye*.—The *New York* is not within sub-sect. 2 of sect. 605 of the Merchant Shipping Act 1894, unless "within" means shut in by or unless the Solent is a river. The Trinity House have created new districts in the Isle of Wight district and the Southampton district. The limits of the licence of the pilot on

the *New York* did not include the Southampton district, and the *New York* was in fact proceeding on a voyage from a place outside the Isle of Wight district — namely Cherbourg—to Southampton, which was also outside the district, and so the *New York* was within sect. 605, subsect. 1, of the Merchant Shipping Act 1894. A pilotage district is any area in which the Trinity House has appointed sub-commissioners to examine pilots. Sect. 369 of the Merchant Shipping Act 1854 does not really touch the creation of new districts in what has already been a district, it only deals with the extension of an existing district, and is intended to prevent the Trinity House from bringing places into a compulsory pilotage area, which had not previously been in one. The creation of the two districts—the Isle of Wight district and Southampton district—was therefore not *ultra vires*, for pilotage had been compulsory on each of them when they formed part of the original pilotage district.

Pickford, K.C. in reply.

July 14.—BARGRAVE DEANE, J.—The question is whether at the time of the collision, which occurred between the *New York* and the *Assaye* in the Solent, off Sconce Point, at about 1.30 p.m. on the 20th March in last year, either or both ships were subject to compulsory pilotage. The *New York* is a steamship of 10,799 tons gross register, and was on a voyage from Cherbourg, in France, to Southampton, in charge of a Trinity House pilot. The *Assaye* is a steamship of 7377 tons gross, and was on a voyage from Southampton to Queenstown, in Ireland. She also was in charge of a Trinity House pilot. The collision action for the damage was tried before the late President some time ago, and he found both vessels to blame, the blame in each case attaching to the pilot in charge of each ship; so that if the pilotage was in either case compulsory, the owners of that ship will escape liability for the damage resulting from the collision.

It is necessary that I should go back some little way into the history of compulsory pilotage so far as it concerns this case. The first Act of Parliament to be dealt with is the Act of 1808 (48 Geo. 3, c. 104). Under sect. 20 of that Act the corporation of the Trinity House of Deptford Strond, known as the Trinity House, had power to appoint sub-commissioners to examine and report to the Trinity House as to the capacity of those who sought pilotage licences; but that Act, by sect. 77, was only to be in force for four years. One of the difficulties in this case arises from the use of the word "district" in the various Acts of Parliament. Sect. 20 of the Act of 1808 says that it shall be lawful for the said corporation of the Trinity House of Deptford Strond, and they are hereby required to appoint from time to time, as often and for such periods as they, in their discretion, shall think fit at such ports or places in England as they may think requisite (except within certain other districts which are excepted), proper and competent persons, not to exceed five or be less than three at each port or place for which any such appointment shall be made, the persons so to be appointed to be called sub-commissioners of pilotage. The words there are "ports or places." In accordance with the powers conferred by that section the authorities of the Trinity House did appoint a certain number of persons, and on the 19th Jan. 1809, published in the *London Gazette* the following notice: "Pursuant to the directions of an Act passed in the forty-eighth year of the reign of his Present Majesty, intituled 'An Act for the better regulation of pilots and of the pilotage of ships and vessels navigating the British seas,' the corporation of Trinity House of Deptford Strond have appointed licensed pilots at Portsmouth and Cowes, in the Isle of Wight, and for the harbours, channels, and coasts within that district." The word is singular, "district," and, therefore, the original district which was made at that time by the Trinity House authorities was the district of "Portsmouth and Cowes, in the Isle of Wight, and for the harbours, channels, and coasts within that district." Then, in the *Gazette*, they also published the names of the pilots appointed at Portsmouth, and the notice says that they are "Licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight, and in and out of St. Helens, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Christchurch, Yarmouth, Lymington, and the Needles, and to and from each of these ports and places." So that a district was created known as the Portsmouth and Isle of Wight district, which includes all the ports and harbours for the purpose of this case between Peverell, westward, and the Owers Lightship, eastward. I need not trouble to read the specific licences granted to other persons of less jurisdiction than that which I have read. They are appointed for limited pilotage within that one big district. That was the state of things in 1809, but it is right that I should read the notice, as it refers to Cowes besides Portsmouth. The notice says: "The names of the pilots appointed at Cowes are as follows." Then follow the names of the pilots, and they are "licensed to take charge of ships to and from the Owers, eastward, without the Isle of Wight to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight and in and out of St. Helens, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles, and Christchurch, and to and from each of those ports or places." So that a district appears to have been created with two sets of sub-commissioners, who are to examine and issue certificates to pilots for the purpose of their being licensed by the Trinity House within that big district; and it is important to see that all those sub-commissioners are appointed at two places—namely, at Portsmouth and at Cowes, the district is one, with two divisions in which the sub-commissioners are appointed only for the examination of fit and competent persons to act as pilots. The next observation I have to make is this, that at this time, apparently, a book was started by the Trinity House authorities, which has been put in. On page 5 there are the names of the sub-commissioners appointed for Cowes, and at the top is put "Definition of limits"; that is to say, the limits within which the examination by the sub-commissioners is to be taken, and that is practically in the same words as I have just read from the notice in the *Gazette*. The appoint-

ments on page 5 filling up vacancies go down to Sept. 1860. It may be important to notice that. Then, on pages 53 and 54 are similar entries under the head of "Portsmouth: Definition of limits." The limits are exactly the same as in the Cowes limits. Then there are the names of five gentlemen appointed, as there were at Cowes, and of those appointed subsequently, and the record goes down to the 24th May 1866. Those are the last dates on which appointments were made. I shall have to refer to this book later; but apparently there were consecutive appointments to those two places—Cowes and Portsmouth—down to 1860 in the one case and 1866 in the other. Therefore, the Trinity House records show continuous appointments of sub-commissioners at those two places for the purpose of the examination of persons who wished to be licensed as pilots by the Trinity House within the Portsmouth and Isle of Wight district. In 1812 the Act of 52 Geo. 3, c. 39, by sect. 20 re-enacted, in identical words, sect. 20 of the original Act which I have just read. Sect. 23 of that Act makes pilotage compulsory within those limits, and sect. 32 introduces for the first time the word "districts" into the Act of Parliament. That section says: "Nothing in this Act shall extend or be construed to extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or Acts of Parliament to the pilots of the Trinity House of the town of Kingston-upon-Hull, or the Trinity House of Newcastle-upon-Tyne, or to give any authority to the corporation of the Trinity House of Deptford Strond, within any ports or districts having separate jurisdiction in matters of pilotage." I think in that particular section the word "districts" applies not to the district within which pilotage is made compulsory, or is in operation, but to the districts of those three sets of persons—the Trinity House of the town of Kingston-upon-Hull, the Trinity House of Newcastle-upon-Tyne, and the Trinity House of Deptford Strond. It seems to me that the word "districts" there introduced does not refer to the district into which we are inquiring, but means in that section the district of the pilotage authority—that is to say, the general jurisdiction of those three corporations, and in this case the Trinity House, not the port for which sub-commissioners are appointed under the Act. Then comes the Act of 1825 (6 Geo. 4, c. 125). It repeals and re-enacts portions of the Act 52 Geo. 3. Sect. 5 of the Act repeats, in identical words, sect. 20 of the two previous Acts to which I have referred. So things went on down to 1843, and on the 5th Dec. of that year apparently the people of Southampton, which was a growing port, thought that it was advisable that their young men should be able to be examined before sub-commissioners at Southampton for the purpose of obtaining pilotage licences. Accordingly a visit was paid to Southampton by a committee of the Trinity House, and a document has been put in with reference to that visit entitled "Extract from a report of a visit to Portsmouth, Cowes, and Southampton," dated the 5th Dec. 1843. The committee proceeded to visit Portsmouth, Cowes, and Southampton on business connected with the pilotage establishments of those ports. "The committee were here (Southampton) waited upon by the sub-commissioners of pilotage—namely, Mr. Estwick, Captain Harington, and Mr. Spain, with whom the subject of a separate sub-commission for the port of Southampton was discussed at considerable length." Then the report speaks of the complaints that had been made, and the committee considered that the rare occurrence of complaints was "attributable rather to the inconvenience to which parties having cause for dissatisfaction are at present subject from the absence of all proximate authority than to the uniform good conduct of the pilots."

The report concluded: "Your committee are induced to recommend to the court"—that is, the court of the Trinity House—"that a sub-commission of pilotage should be established at Southampton, and such regulations framed for the conduct of the service thereat as may be deemed necessary." Accordingly, on the 23rd April 1844 there is published in the *London Gazette*, by the authority of the Trinity House in London, a notice in form similar to that which I have already read as having been published in 1809. It was in these terms: "Pursuant to Act of Parliament, passed in the forty-eighth year of the reign of His late Majesty King George III., intituled 'An Act for the better regulation of pilots, and of the pilotage of ships and vessels navigating the British seas,' the corporation of Trinity House of Deptford Strond, shortly after the passing of the said Act, licensed pilots for Portsmouth, and for Cowes in the Isle of Wight, and the harbours, channels, and coasts within the district called 'the Portsmouth and Cowes district'"—the word "district" is singular throughout—"the limits of which were described, and the names of the pilots so licensed were set forth in the notice of such licences thereupon published as directed by the said Act; and other pilots having been licensed by the said corporation for the said district, as vacancies have occurred or occasion required, the names of the pilots now licensed for such district, and the limits within which they are respectively licensed to act, are hereinafter set forth; and pursuant to an Act passed in the sixth year of the reign of His late Majesty King George IV., intituled 'An Act for the amendment of the law respecting pilots and pilotage, and also for the better preservation of floating lights, buoys, and beacons,' the said corporation of Trinity House have lately licensed pilots for the port of Southampton and the coasts near thereto, and the names of such pilots, and the limits within which they are licensed to act, are hereinafter set forth." Then it goes on to give the names of the pilots and their district, and the word "limits" is used—"limits of their licences." The limits are: Portsmouth pilots, "to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight (except the harbours of Chichester and Langstone), and into and out of St. Helens, Spithead, Portsmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to the regulation hereinafter mentioned), Cowes Road and Harbour, Yarmouth, Lymington, and the Needles, and to and from each of those ports and places." Then there are other persons mentioned whose jurisdiction is more limited, and the notice proceeds: "The names of the Cowes pilots and the limits of

their licences are as follows . . . to and from the Owers, eastward, without the Isle of Wight, to Peverell, westward, to and from those limits to all places and ports within the Isle of Wight, and into and out of St. Helens, Spithead, Portsmouth Harbour, Stokes Bay, the Motherbank, the Southampton Water (subject to the regulation hereinafter mentioned), Cowes Road and Harbour, Yarmouth, Lymington, the Needles, Christchurch, and to and from each of those ports and places."

Then come the names of the Southampton pilots, and the limits of their licences are as follows: ". . . from Cowes Road, Stokes Bay, Motherbank, or St. Helens to Southampton, and from Southampton through the several channels and passages to sea." Then comes the regulation to which I have referred: "Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water to sea, unless there shall not be any Southampton pilot ready to take charge of her. Southampton pilots may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot, when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed such line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings"—that would be Southampton Water; and that shows that it was thought advisable that this district should have a third set of sub-commissioners at Southampton, and that the persons examined by the sub-commissioners at Southampton, and to whom licences were to be granted by the Trinity House—because the sub-commissioners had no power to grant licenses—had a privilege. They had this privilege, that they might conduct a vessel from Southampton to sea, but they might not conduct a vessel into Southampton, except from a line drawn from Eaglehurst to the North-West Bramble Buoy; but if there was not a Southampton pilot available at the line drawn between those two points, then the pilot who had brought her up to that point was at liberty to conduct her into Southampton Water. That was the state of things in 1844. In May 1853 there was in contemplation a new Merchant Shipping Act—the Act of 1854—and with a view to the preparation of that Act a return was called for from the Trinity House by the House of Commons. A return was made on the 9th May 1853 by the Trinity House to the House of Commons. On page 14 of that return, at the bottom of the page, is the following: "Cowes and Portsmouth districts"—in the plural—"Definition of limits—From the Owers, within and without the Isle of Wight, to Peverell, and *vice versâ*, and to and from, and into and out of, all ports and places within those limits." Then follows a note which is not very material.

On page 16, under the same heading, "Cowes and Portsmouth districts," there appears this: "Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water to sea, unless there shall not be any Southampton pilot ready to take charge of her," so that the rights of Portsmouth and Cowes pilots are preserved if there is no Southampton pilot at Southampton ready to take charge, for the Cowes and Portsmouth pilots may then take the vessel from Southampton to sea. Southampton pilots "may supersede in the charge of any vessel bound to Southampton any Portsmouth pilot or Cowes pilot when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy, but after she has passed that line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings." Therefore a Cowes or Portsmouth pilot may take a vessel into Southampton if there is no Southampton pilot at the line from Eaglehurst to the North-West Bramble Buoy. To this extent they are still able to take charge of a vessel from the Needles to Southampton, and then there is this further provision: "Any Portsmouth or Cowes pilot who shall take charge of a vessel at any of the anchorages within the Isle of Wight, for the purpose of conducting her to Southampton, such pilot not having brought her in from sea, shall be entitled to one-third of the Southampton rate of pilotage if superseded by a Southampton pilot"—that is, at the point in question. Then I also find for the first time, on page 38 of that return: "Southampton district—Definition of limits—From Cowes Roads, Stokes Bay, the Motherbank, and Spithead, to all ports and places within the Southampton Water, and from all ports and places within the Southampton Water to sea." Then again follow the regulations I have already referred to, namely, that Portsmouth and Cowes pilots respectively are not to take charge of any vessel from Southampton or any part of the Southampton Water to sea, unless there shall not be any Southampton pilot ready to take charge. On the other hand, Southampton pilots may supersede any Portsmouth pilot or Cowes pilot in charge of any vessel bound to Southampton when such vessel shall arrive at a line to be drawn from Eaglehurst to the North-West Bramble Buoy; but after she has passed that line the Portsmouth or Cowes pilot having her in charge shall not be supersedable, but may conduct her to her moorings.

That was the state of things in 1853, before the Merchant Shipping Act of 1854 was passed. Now we come to the Merchant Shipping Act 1854 (17 & 18 Vict. c. 104). By sect. 331, "Every pilotage authority"—in this case the corporation of the Trinity House of Deptford Strond—"shall retain all powers and jurisdiction which it now lawfully possesses so far as the same are consistent with the provisions of this Act." By sect. 337, "Every pilotage authority shall deliver periodically to the Board of Trade, in such form and at such times as such board requires, returns of the following particulars with regard to pilotage within the port or district under the jurisdiction of such authority." That word "district" clearly applies in that section to the whole district under the corporation of the Trinity House of Deptford Strond. The particulars to be given are as to the regulations in force, the names and ages of all pilots or apprentices, the service for which each pilot or apprentice is licensed, the rates of pilotage, the total amount received for pilotage, and the receipts and expenditure. Sect. 340 gives power to the corporation of the Trinity House to issue pilotage certificates to masters and mates within their district. Sect. 349 is of importance, because it uses the

word "limits" as apart from "district." It runs: "Every qualified pilot on his appointment shall receive a licence, containing his name and usual place of abode, together with a description of his person, and a specification of the limits within which he is qualified to act." Then follow provisions as to registration of the licence. By sect. 353: "Subject to any alteration to be made by any pilotage authority in pursuance of the power hereinbefore in that behalf given, the employment of pilots shall continue to be compulsory in all districts in which the same was by law compulsory immediately before the time when this Act comes into operation; and all exemptions from compulsory pilotage then existing within such districts shall also continue in force." The section simply continues compulsory pilotage. By sect. 368: "The Trinity House may, in exercise of the general power hereinbefore given to all pilotage authorities of doing certain things in relation to pilotage matters, alter such of the provisions hereinafter contained as are expressed to be subject to alteration by them in the same manner and to the same extent as they might have altered the same if such provisions had been contained in any previous Act of Parliament instead of in this Act." Sect. 369 says: "The Trinity House shall continue to appoint sub-commissioners, not being more than five nor less than three in number, for the purpose of examining pilots in all districts" (plural) "in which they have been used to make such appointments"—that must refer to the sub-districts, not to the whole of the district within the authority of the Trinity House, but to the special districts with which they are dealing in respect of this particular provision—"and may, with the consent of Her Majesty in Council, but not otherwise, appoint like sub-commissioners for any other district in which no particular provision is made by any Act of Parliament or charter for the appointment of pilots; but no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House shall be extended, except with such consent as aforesaid, and no sub-commissioners so appointed shall be deemed to be pilotage authorities within the meaning of this Act." That is a very complicated section, because there is to be found in it the word "district" used in two senses. "District" in one part of the section refers to the whole district of the Trinity House of Deptford Strond, and the other is the district of the sub-commissioners. The district of the sub-commissioners, as we know, had nothing to do with licences, but only with examination; and, therefore, as far as I am able to read that section, it does not affect the question of the pilotage district. It only has to deal with the sub-commissioners' district for the purpose of examination. Sect. 370 deals with what the pilotage authority's districts are. It speaks of the Trinity House having out-port districts. That with which we are dealing is one. Sect. 376 is the compulsory pilotage section: "Subject to any alteration to be made by the Trinity House, and to the exemptions hereinafter contained, the pilotage districts of the Trinity House within which the employment of pilots is compulsory are the London district and the Trinity House outport districts." Then comes a section which, for present purposes, is of importance—namely, sect. 379. By sub-sect. 6: "Ships passing through the limits of any pilotage district on their voyage between two places, both situate out of such limits, and not being bound to any place within such limits nor anchoring therein," shall be exempted from compulsory pilotage in the Trinity House out-port districts. That is the first instance in these provisions of this exemption that I have been able to discover, but which is very strongly relied upon by those who suggest that in the particular case of the *New York* there was no compulsory pilotage. On the 11th Aug. 1855 a return was made pursuant to the Act of 16 and 17 Vict. c. 129. That return, at pages 30-32, under the heading of "Cowes and Portsmouth Districts"—the word is plural—repeats the regulations I have already read, and gives the names of a long list of pilots and also the limits of their licences. The words are not "limits of district" but "limits of licence." Then on page 73 of the same return will be found "Southampton District: Definition of Limits," and the same particulars and regulations. So that we have, after the Act of 1854, a return showing that the same regulations were applicable as had been applicable before that Act was passed. On the 21st April 1868 there is this: "Extract from the Wardens' (of the Trinity House) minutes: A reference from the board was considered upon the subject of the proposed consolidation of the pilotage districts" (plural) "of Cowes, Portsmouth, and Southampton into one district. It was, after deliberation, resolved to recommend to the court that the sub-commissioners at Cowes and Portsmouth be abolished, and that one sub-commission of five members be formed at Southampton, of which the collectors at Cowes, Portsmouth, and Southampton shall be members for the management of the three districts, with the ultimate view of amalgamating the whole into one district." That was confirmed by a court minute of the 5th May 1868. It will, therefore, be seen that the Trinity House at that time, having started with a district of Cowes and Portsmouth and having subsequently created a sub-division of that one district at Southampton, found it advisable that that should be altered, and that there should be only one district, Portsmouth and Cowes district including Southampton Water, which we find was called the Isle of Wight district. That was carried out by the Trinity House by having a fresh page in their sub-commissioners' book, to which I have already referred. On page 27 of that book there is a new entry: "Isle of Wight district: Definition of limits. To and from the Owers, eastward, without the Isle of Wight to Peverell, westward. To and from those limits to all places and ports within the Isle of Wight and in and out of St. Helen's, Spithead, Portsmouth Harbour, Stokes Bay, Motherbank, Southampton Water, Cowes Road and Harbour, Yarmouth, Lymington, the Needles, and Christchurch, and to and from each of those ports and places." That page begins with the 23rd July 1868 and goes down to the 13th June 1873. So that the resolution of 1868 was carried into effect, and the pilots had jurisdiction apparently over the whole of that district as one district. In 1875 a further alteration was made: "Extract from the wardens' minutes, dated the 12th Feb. 1875.—The report of the visiting committee to the Isle of Wight district was read and the recommendation therein having been discussed, it was agreed to recommend to the board:

That the Isle of Wight district be for the future divided into two—one to be called the 'Southampton' and the other the 'Isle of Wight' district; that the limits of Southampton district be from a line drawn from the Lepe Buoy to Lee Point into Southampton, and from Southampton to the sea; that the limits of Isle of Wight district be from Peverell to the Owers, excepting within the Poole and Southampton districts." That was confirmed by a minute of the 2nd March 1875; and we find a new page entered in the sub-commissioners' book. On p. 11 there is this entry: "Isle of Wight district, Cowes and Portsmouth.—Definition of limits: From Peverell to the Owers (excepting within the Poole and Southampton districts)." And then commissioners are appointed for the Cowes and Portsmouth districts, which continued from 1875, on p. 81, down to the 30th Oct. 1903, when the last entry occurs. On p. 12 we have: "Southampton.—Definition of limits: From a line drawn from Lepe Buoy to Lee Point, into Southampton, and from Southampton to sea." And commissioners are appointed, three not five, from the 24th Feb. 1875 (p. 96), the last entry being on the 27th June 1904.

Things have so continued without alteration from that date, and the question that is raised before me is this: The *Assaye*, the outward-bound vessel, started from Southampton, and she was bound out to sea. She was in charge of a pilot, who had a licence to take that vessel from Southampton to sea, and that was compulsory; therefore, she was under compulsory pilotage. The *New York* was a vessel which had come from America touching at Cherbourg, and was on her way from that port to Southampton. She was boarded by a pilot, who was licensed to take charge of vessels from Peverell to the Owers, excepting within the Poole and Southampton districts. He was licensed for the spot at which the collision took place. Therefore the position was this: That the pilot was licensed to take the vessel as far as where the Southampton district begins—that is, to a line drawn from Lepe Buoy to Lee Point. That was within the original district of the Trinity House of Deptford Strond, from the original date I have given, 1809. The question is whether the *New York* comes within the words of sect. 605 of the Merchant Shipping Act 1894: "The master and owner of any ship passing through any pilotage district in the United Kingdom on a voyage between two places both situate out of that district, shall be exempted from any obligation to employ a pilot in that district or to pay pilotage rates when not employing a pilot within that district."

Now the word "district" is the whole point. Has that district which was originally started in 1809 ceased to be the district within the meaning of this section? As I read the section and the regulations and the various reports, the Trinity House have never altered the district—this district from Peverell to the Owers. What they have altered are the limits of the pilots' licences. They have varied from time to time the limits within which various pilots shall have power to navigate ships under their compulsory powers, and there is a section in one of the Acts—sect. 369 of the Act of 1854—which says that "no pilotage district already under the authority of any sub-commissioners appointed by the Trinity House shall be extended, except with" the consent of Her Majesty in Council. It is very puzzling to know exactly what that means; but my view is that the Trinity House of Deptford Strond, having originally got this one district—the Cowes and Portsmouth district, which included Southampton Water—have never altered that district. They have made sub-districts in it, but the one district has never been altered—that is, the district from the Owers lightship, eastward, to Peverell, westward. Although, for purposes of internal convenience, they have made regulations from time to time varying the jurisdiction of the sub-commissioners who are to examine pilots, and although they have made different arrangements as to the licences—that is to say, the extent to which any particular person may hold a licence—still one district remains as the pilotage district in that particular part of England under the authority of the Trinity House of Deptford Strond. I do not think that this particular exemption section renders a vessel free from compulsory pilotage if she is coming from a port outside that district into Southampton. I think she is still within the district of the Isle of Wight, of which Portsmouth and Southampton originally consisted, and that she was under compulsory pilotage in the Solent, as being a part of the original district, which has never really been altered—that is to say, there is only one district although it has been subdivided from time to time for convenience. For these reasons I think the *New York* was also subject to the law of compulsory pilotage, and that the judgment of the late President saying that these two pilots were the persons who were to blame for this collision, is to be read as meaning that the vessels were exempted in consequence of their being under compulsory pilotage—that is to say, the pleas of compulsory pilotage raised by both sides will be upheld, and there will be no costs on either side.

Solicitors for the plaintiffs, the owners of the *New York*, *Thomas Cooper* and *Co.* for *Hill, Dickinson*, and *Co.*, Liverpool.

Solicitors for the defendants, the owners of the *Assaye*, *Freshfields*.

Dec. 7, 8, *and* 9, 1905.

(Before Sir GORELL BARNES, President, sitting with two of the Elder Brethren.)

THE CLAN CUMMING. (*a*)

Collision—Suez Canal—Lights—Duty of vessel proceeding to the southward to tie up—Duty on vessel proceeding to the northward to approach with caution—Rules for the Navigation of the Suez Canal, arts. 3, 7, 8, *sub-ss.* 3, 4, 7, 8, 10, *and signal* 11.

The steamship C. *was proceeding through the Suez Canal from Port Said to Suez. When in the neighbourhood of the seventh mile-post, those on the* C. *sighted the navigation lights of the* C. C. *approaching from the southward. It was admittedly the practice in that part of the canal for steamships navigating to the southward to tie up to permit vessels proceeding to the northward to pass them, and the* C. *therefore drew in to the bank. Those on the* C. *extinguished their navigating lights and exhibited the lights*

required by signal No. 11 *of the Suez Canal Rules. The* C. *was being tied up when she was run into and damaged by the* C. C., *a steamship proceeding from the southward to the northward from Suez to Port Said. Those on the* C. C. *alleged that they had the right of way, and that the* C. *had kept on too long and had proceeded too fast.*

Held, that though the north-going steamer, the C. C., *had the right of way, yet there was a duty on her to keep herself under such command that, in the event of her coming up to a steamship which had to tie up for her sooner than was expected, she could, by stopping or going astern, avoid running into the steamship which had to give way, and that, as the* C. *was stopped at the time of the collision, she was not to blame.*

ACTION of damage by collision.

The plaintiffs were the owners of the steamship *Chatham*, and her master and crew claiming for the loss of their effects, and the defendants and counter-claimants were the owners of the steamship *Clan Cumming*.

The collision between the two vessels occurred about 8 p.m on the 5th Sept. 1905 close to the tenth mile-post in the Suez Canal, the wind at the time being a light breeze from the north, the weather fine and clear, with a current setting to the south with a force of about a mile an hour.

The case made by the plaintiffs was that shortly after 7 p.m. on the 5th Sept. 1905 the *Chatham*, a steel screw steamship of 2174 tons gross and 1352 tons net register, fitted with triple expansion engines of 160 horse-power nominal, and manned by a crew of twenty-five hands all told, was in the Suez Canal in the course of a voyage from London and the Elbe to Bangkok and Yokohama with a cargo consisting of superphosphate, pig iron, coke, dynamite, and detonators.

The *Chatham*, which was in charge of a duly licensed Suez Canal pilot, was heading to the southward, and was lying moored near the seventh mile-post against the east or Asiatic side of the canal, where she had been tied up for the purpose of allowing two steamships which were coming northward to pass her. In these circumstances those on board the *Chatham* observed distant about eight or ten miles and bearing about right ahead the searchlight of a steamship coming northward, which subsequently proved to be the *Clan Cumming*.

When the two steamships referred to above had passed, the *Chatham* was unmoored and proceeded. Her regulation masthead and side lights for a steamship under way, and a stern light as well as a searchlight as required by the regulations for the navigation of the canal, were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. The *Clan Cumming* approached, and after a time, when the two vessels were about one and a half miles distant from each other, measures were taken for the purpose of tying up the *Chatham* to the posts on the Asiatic bank of the canal to allow the *Clan Cumming* to pass.

The engines of the *Chatham*, which had been working for some time at half speed, were put to slow and dead slow and afterwards stopped, and her way was run off and she was brought as close as possible to the Asiatic side. Her starboard anchor was dropped and her engines reversed full speed astern, and the lines were ordered ashore and were being passed into the boat.

The searchlight, which had some time previously been split up by the insertion of a dark sector, had been, when the headway was off the ship, shut off and an arc light exhibited.

The *Clan Cumming*, which was at this time from a quarter to half a mile away, continued to approach at a high speed with her green light open on the starboard bow of the *Chatham*, but when only a short distance away the *Clan Cumming* opened her red light and shut in her green light, causing imminent danger of collision, and coming on fast, though at the last moment sounding three short blasts on her whistle, with her stem struck the bluff of the starboard bow of the *Chatham* a violent blow, cutting right into her forecastle.

The force of the collision broke down the bulkhead of the *Chatham*, causing the lamp which was attached to it to fall and set the contents of the forecastle on fire. The forehold was afterwards flooded to prevent the fire from spreading to the explosives which were stowed there, and the vessel became submerged.

The *Chatham* was subsequently blown up by the orders and under the directions of the canal authorities, and with her cargo and crew's effects was totally lost. The plaintiffs contended that the loss of the *Chatham* and her crew's effects was occasioned by the collision or was consequent on it, and that they were entitled to recover in respect thereof.

The plaintiffs charged the defendants with keeping a bad look-out; with failing to keep clear of the *Chatham*, which was being moored; with improperly attempting to pass her before she had moored and had exhibited the signal permitting the *Clan Cumming* to pass; with proceeding at an excessive speed; with failing to stop or reverse their engines; and with improperly porting.

The case made by the defendants was that shortly after 7 p.m. on the 5th Sept. the *Clan Cumming*, a steel screw steamship of 4808 tons gross and 3108 tons net register, fitted with engines of 413 horse-power nominal, and manned by a crew of seventy-nine hands all told, was, whilst on a voyage from Chillagongirá, Colombo, to London, laden with a general cargo, in the Suez Canal, nearing the long siding at twenty-four kilomètres from Port Said. The *Clan Cumming*, which was in charge of a duly licensed Suez Canal pilot, was proceeding through the canal to Port Said at the usual canal speed of about five miles per hour. Her regulation lights for a steamship under way, including the additional optional masthead light and an electric searchlight over the bow about 6ft. below the top of the stem, in accordance with the requirements of the regulations for the navigation of the Suez Canal, were being duly exhibited, and were burning brightly, and a good look-out was being kept on board of her. In these circumstances those on board the *Clan Cumming* observed ahead the searchlight of a steamship which proved to be the *Chatham*, indicating that she was under way. The distance of the light could not be accurately estimated, but it was several miles distant. The *Clan Cumming* proceeded on, and at about 7.30 p.m. a long warning blast was sounded on her steam whistle, and about a quarter of an hour later, as the searchlight of the *Chatham*

continued to be visible, this signal was repeated. About five minutes later, as the *Chatham* continued to approach, her searchlight remaining visible, the engines of the *Clan Cumming* were put to half speed, and shortly afterwards to slow, and after another short interval they were stopped. Almost immediately afterwards the engines of the *Clan Cumming* were put full speed astern, and three short blasts were sounded on her steam whistle, which signal was several times repeated, and the helm was put hard-a-starboard; but the *Chatham*, which was heard to let go her starboard anchor and to sound a blast on her steam whistle, and was seen to extinguish her searchlight, bringing her hull and under-way lights into clear view, although the port anchor of the *Clan Cumming* was let go and held on to, came on with considerable headway with her cable running out and with the bluff of her starboard bow struck the stem of the *Clan Cumming*, doing her considerable damage.

The defendants charged the plaintiffs with keeping a bad look-out; with improperly getting under way after seeing the searchlight of the *Clan Cumming*; with failing to bring up in due time to allow the *Clan Cumming* to pass; with failing to use a proper electric searchlight; with failing to sound their whistle when approaching another vessel; with proceeding at an excessive speed; and with neglecting to let go their anchors.

The defendants also denied that the loss of the *Chatham* and her crew's effects subsequently to the collision was occasioned by the collision, or was consequent upon it, and alleged that the plaintiffs were not entitled to recover damages in respect thereof.

It was agreed that in the part of the canal in question it was the practice for vessels navigating to the southward to tie up to permit vessels going north to pass them.

The following are the Suez Canal regulations which were referred to during the course of the trial:

3. The maximum speed of all ships passing through the canal is fixed at ten kilomètres, equal to five and one-third nautical miles per hour.

7. All ships ready to enter the canal must have their yards braced forward, their jib-booms run in, and their boats swinging inboard. In addition to their two bow anchors they must carry at the stern, ready for letting go at the request of the pilot, a strong kedge with a stout hawser bent on sufficient to hold the ship.

8. (3) All steamers, tugs included, must blow their whistles when approaching the curves of the canal, also when approaching in either direction boats or lighters, dredgers, or any craft afloat. They must stop when the channel is not clear, and pass at reduced speed all sidings, stone or earth work yards; they must also slacken speed and have their two bow anchors ready for letting go when passing vessels made fast or under way, hopper barges, dredgers, or any other craft. (4) Whenever a collision appears probable, no ship must hesitate to run aground and thus avoid the collision. The expenses consequent upon grounding under these circumstances shall be defrayed by the ship in fault. (7) Steamers intending to go through the canal at night must first satisfy the agents of the company in Port Said or Port Thewfik that they are provided—1. With an electric searchlight or searchlights showing the channel 1200 mètres ahead, and so constructed as to admit of rapid splitting up of the beam of rays into two separate segments with a dark sector in the middle. 2. With electric lights powerful enough to light up a circular area of about 200 mètres diameter around the ship. The agents of the company will decide whether the apparatus fulfil the requirement of the regulations so that ships provided with them may, without inconvenience, be authorised to navigate the canal at night. Night transit may, however, be suspended in case of failure or want of power in the lights. (8) While navigating by night-time, ships must carry their usual lights and have a man on the look-out forward. Whenever a vessel navigating by night has made fast, whether in a siding or in the canal, she must, thereupon, at once extinguish her searchlight or searchlights, and lights above stated, as well as her course lights. All ships navigating at night in the Great Bitter Lakes between the North and South Lights must extinguish their searchlight or searchlights. Any ship coming into Port Said at night from the south must extinguish her searchlight or searchlights when making the curve from the canal into the harbour. (10) Whenever a ship makes fast, enters a siding, or gets aground, the captain must give immediate notice thereof by means of the signals specified in the appendix to these regulations.

In the appendix "signals between ships under way" are set out, and among them appears the following:

No. 11. Pennant at half-mast. I am moored; you can pass.

At night a white light at the stern, as well as two white lights on the free side of the channel, at the level of the gunwale, in such manner as to divide the length of the ship into three nearly equal parts.

Laing, K.C., *Scrutton*, K.C., and *H. C. S. Dumas* for the plaintiffs.

Pickford, K.C., *Aspinall*, K.C., and *R. H. Balloch* for the defendants.

During the course of the case *The R. L. Alston* (48 L. T. Rep. 469; 5 Asp. Mar. Law Cas. 43 (1882); 8 P. Div. 5) was referred to for the purpose of showing that the speed per hour in art. 3 meant the speed per hour over the ground, and *The Skipsea* (93 L. T. Rep. 181; 10 Asp. Mar. Law Cas. 91; (1905) P. 32) was referred to as an illustration of the duty which may be cast on a vessel having the right of way.

Dec. 9.—THE PRESIDENT.—This was a case of collision between the steamship *Chatham* and the steamship *Clan Cumming*, in the Suez Canal, which occurred on the 5th Sept. 1905. The *Chatham* was a steel screw steamship of 2174 tons gross, and she was bound on a voyage from London and the Elbe to Bangkok and Yokohama, with a cargo consisting of superphosphate, pig iron, coke, dynamite, and detonators. The *Clan Cumming* is a larger steamer of 4808 tons gross register, and was bound on a voyage from the East to London, laden with a general cargo. These two vessels met in collision at a point in the Suez Canal which is about 9·9 miles from Port Said, and the result was disastrous, because the *Chatham* was struck on her starboard bow and cut into nearly up to her windlass, and forced over with her bows on the Asiatic side, while her stern swung towards the African side. Although I am not now dealing with the question of consequential damage, I think she afterwards had to be blown up, and that gave rise to a very interesting occurrence. The other vessel is said to have been injured, but nothing specific has been put forward with regard to that damage. Now, in order to understand the matter, one must see how

it was that these vessels were approaching one another. According to the practice in that part of the Suez Canal—apparently it is not quite the same further down—a vessel proceeding to the southward has to tie up to the posts on the Asiatic side of the canal whenever it is necessary for a vessel coming in the opposite direction to pass her, and the vessel which is passing to the northward then approaches the spot where the vessel going to the southward is tied up, and should, of course, slacken speed so as to pass in the proper way; and then, when she has passed, the southward-going vessel, which has tied up, can proceed. There are certain regulations about the lights which the vessels have to carry and about the lights which are to be shown, and the way in which they are to be dealt with by the vessel which is tying up, so as to show what she is doing. According to the 7th sub-section of art. 8 steamers intending to go through the canal at night must have "an electric searchlight or searchlights showing the channel 1200 mètres ahead, and so constructed as to admit of rapid splitting up of the beam of rays into two separate segments with a dark sector in the middle." As I understand, the object of that is that the light which is there mentioned can be used so as to show ahead and on the two banks of the canal, and, if a vessel is approaching, the dark sector can be put in, so as to cut off the light from immediately forward, leaving it still showing on the banks. The consequence is that the vessel approaching is not so much dazzled by the light as she would be if it were showing forward. Then steamers are also required to have "electric lights powerful enough to light up a circular area of about 200 mètres diameter round the ship." That light is called an arc light, and apparently is used when they are practically entering the siding to tie up. As soon as they are stationary they put out the searchlights and the arc lights, and the rules prescribe what lights are to be shown when the vessel is tied up. Sub-sect. 8 of art. 8 says: "While navigating by night-time, ships must carry their usual lights and have a man on the look-out forward. Whenever a vessel navigating by night has made fast, whether in a siding or in the canal, she must, thereupon, at once extinguish her searchlight or searchlights, and lights above stated (arc lights), as well as her course lights." Then there is sub-sect. 10 of art. 8, which provides that: "Whenever a ship makes fast, enters a siding, or gets aground, the captain must give immediate notice thereof by means of the signals specified in the appendix to the regulations." Then on p. 50 of the regulations there is signal 11, which is applicable to the present case. The page is headed "Signals between ships under way," and there is a signal, a pennant at half-mast, which means: "I am moored; you can move on." That, of course, is for the daytime, but at night the note says that signal "is replaced by a white light at the stem, a white light at the stern, as well as two white lights on the free side of the channel, at the level of the gunwale, in such manner as to divide the length of the ship into three nearly equal parts." Therefore by the time the ship is in position to be passed, her search and arc lights and course lights are out and are replaced by the white lights I have just referred to, showing she can be safely and properly passed. Until that time has come she cannot be safely passed, because, having regard to the narrow character of the canal, until she is well into the bank—I am dealing with a part where there is no siding—the other vessel cannot safely pass her. What is the result, then, of the way in which vessels must pass each other in this part of the canal? From what I have stated it is shown that the vessel going south must carry the brilliant lights up to the time she gets to the siding; they must then be extinguished and the white lights put up in place, and that amounts to a signal that the other vessel coming towards her can safely pass. I think she, in doing that, if she is aware of the approach of another vessel, must act reasonably. She is proceeding to the southward and meeting another vessel coming to the northward, and she must act reasonably by slowing down and stopping the engines and going to the siding at a proper and sufficient time to enable the ship approaching her properly to act for her, and, by slowing down, to pass when the proper signals have been given. On the other hand, the vessel proceeding to the northward must watch what is happening ahead of her, and, as long as the navigation lights are up, she cannot pass. She must wait until the white lights to which I have referred, and which are mentioned on p. 50 of the regulations as signal 11, are exhibited. Therefore she must watch and see that she does not get too near the other ship, and for that reason must, if necessary, act reasonably by slackening speed so as to have herself properly in hand by the time she approaches the place where the other ship is about to make fast. I think, and the Elder Brethren think strongly upon this point, that, having regard to the impossibility of being certain at what distance the southward-going vessel is from the northward-going vessel, because of the impossibility at night of judging of the exact distance of vessels by their lights—a difficulty which is well known to vessels at sea, and which is increased, probably, in the Suez Canal by the brilliancy of the lights which are carried—the steamer going to the north should get herself well in hand, so as to be completely prepared to deal with any eventualities she may meet with; in other words, of finding herself too close to a ship going into a siding, and which may turn out to be stationary by the time she gets to her. She should hold herself in a position to pull up without running into the other ship.

There is very little dispute between counsel as to what I have said so far, but each side complains that the other acted in this case unreasonably, and so we proceed to see what the facts are that we have to determine. According to the evidence of the plaintiffs' vessel, she had proceeded southward and tied up on two occasions before coming to the particular spot of the collision. On the first occasion one steamer, and on the second occasion two steamers passed her, and this is the course she seems to have taken on the two preceding occasions. On the first of those occasions she had been going full speed ahead. At 5.30 p.m. she went half speed, and at 6 p.m. she went slow. There is another order of slow five minutes afterwards, but whether it was for dead slow or was mere emphasis of the slowing order I do not know. At 6.8 p.m. she went full astern, at 6.10 p.m. she was stopped, at 6.11 p.m. she moved for a short moment ahead, and finally she stopped at

6.12 p.m. From the time of slowing until she was in her tied-up position twelve minutes had elapsed, but ten minutes only elapsed from the time of going slow until the first order to stop. On the second occasion this is what took place. Having remained in that first tying-up place until about 6.28 p.m., she went full ahead again at that time. At 6.35 p.m. the engines were put at half speed, at 6.40 p.m. they were put to slow, and at 6.42 p.m. to dead slow, at 6.45 p.m. stopped, at 6.47 p.m. full astern, at 6.49 stopped, at 6.50 slow ahead, and at 6.52 stopped, so that from the slowing at 6.40 until the first stop five minutes elapsed, and from the slow at 6.40 p.m. until the final stop nine minutes. Then comes the occasion which leads to the present trouble. At 7.16 p m. an order was given to stand by, at 7.19 p.m. full ahead (at that time she first saw the *Clan Cumming*), at 7.30 p.m. half ahead, and four minutes after—namely, at 7.34—she went slow. At 7.36 p.m. an order was given to go dead slow, and at 7.37 dead slow was again ordered. The orders then were stop at 7.38, full astern 7.40 p.m., and stop 7.43 p.m., when the collision happened. Nine minutes elapsed between the time when she first slowed and the final stop, and thirteen minutes from the time when she went at half speed, which is very much what had been done on the two previous occasions. That, I think, is the record which the log shows, and which is substantially in accordance with the evidence given on the part of the plaintiffs. Now, the plaintiffs contend that they had by the time this collision occurred stopped so as to be stationary, not merely by the current, which was running one knot at least, but stationary by the bank. That is their contention, and they say that that is supported by these facts. First of all, the arc light had been lighted, but the searchlight had been extinguished, according to the plaintiffs' vessel, from two to three minutes before the collision. That is entirely disputed by the defendants, but I do find this statement in the statement of the pilot of the defendants' ship, whose evidence has been read as taken at Port Said in the form of a statement, which is as follows: "On the question of the consul if seven minutes before the collision the *Chatham* had put out her electric lights, the witness replied that this happened two or three minutes before the collision." It may be that was exaggerated, but at any rate it is clear that they had been put out some substantial time before the collision actually happened; and, if that is the case, it would go to show that the vessel had become practically stationary at the point where she was proposing to tie up. Then there are these other matters, which do not seem to be much in conflict: First of all, the boat which was to take a rope from the *Chatham* to a position on the shore had had the rope put into it and had proceeded to row towards the bank. Secondly, the anchor of the *Chatham* had been dropped; on the plaintiffs' side it is said dropped and checked at fifteen fathoms, and then allowed to run slowly afterwards to allow the head to ease towards the bank. On the other side it is said the cable was continuously running out. I think the plaintiffs are more likely to be correct on that point than the defendants. Finally, it is said the vessel had a slight angle towards the bank at the time of the collision, and also that the *Clan Cumming* had angled across more, a couple of points or so, probably in reversing her engines, at the time that the blow was struck. All these matters, together with the evidence in the case, lead me to the conclusion that the *Chatham* had in fact become a stationary ship by the bank at the time when this collision happened, and that she had acted for the *Clan Cumming* very much in the same way as she had acted for the three preceding vessels on the two preceding occasions that it had been necessary to tie up at the bank. That being so, I think the rest of the case follows almost as a matter of course. I do not think it does so entirely, because a point which was pressed by counsel for the defendants has to be considered. These facts follow: There was a violent collision, as is shown by the extent to which the *Clan Cumming* cut into the *Chatham*; the *Chatham* at the time was angling towards the bank, and the other vessel angling more; and certain statements were made in the course of the evidence of the defendants. The master of the defendants' vessel said that the vessels were fully a ship's length apart when the engines of the defendants' ship were reversed, but when the defendants reversed their engines they had two or three knots way on, and were half a length apart when the light went out. I think, having found what I have already stated, and having regard to the evidence which has been given in the case, that the *Clan Cumming* still had considerable way on at the time when she came in contact with the *Chatham*, and that this is what did the damage to the *Chatham*. Upon this point the question comes to be whether the defendants acted reasonably in what they had done in this case. With regard to that, I find in the preliminary act of the defendants this statement: "About 7.30 p.m. a long warning blast was sounded on the steam whistle of the *Clan Cumming*"—possibly that was too far off to be heard; it probably shows they were aware they had to take action not to approach this vessel if there was any danger in doing so—"and about a quarter of an hour later, as the searchlight of the *Chatham* continued to be visible, this signal was repeated. About five minutes later, as the *Chatham* continued to approach, her searchlight still remaining visible, the engines of the *Clan Cumming* were put to half speed and shortly afterwards to slow, and after another short interval were stopped. Almost immediately afterwards the engines were put full speed astern, three short blasts were sounded on the steam whistle, which signal was repeated several times, and the helm was put hard-a-starboard, and shortly afterwards the port anchor was let go and held on to." Turning from that statement to the engineer's log book kept on the *Clan Cumming*, I find an entry which shows that the engines were put full speed astern within four minutes after the time when they were put to half speed. Taking these matters into consideration, and taking them as probably stating this matter as well as it can be done, in the opinion of myself and the Elder Brethren, who are much more competent to judge of this kind of point than I am, the defendants did not act reasonably in approaching the *Chatham*, having regard to the indications which they had ahead of them at that time. On this particular point I am glad to find I have the assistance of one of the Elder Brethren who has had large experience of the navigation of the Suez

Canal. If one looks at what was happening on both these ships, I think it is true that both of them were originally going faster than the rule of the Suez Canal, which is five miles per hour, seems to allow. I suppose, though one cannot assume it entirely, that that was a rule originally meant to provide that ships should not go so fast as to do injury to the canal banks. They were both going faster than that. They were not going at anything of the character of high speed, though faster than the rule allows, and, if one has to decide which of these two ships was going the faster, the conclusion, I think, is in favour of the view that the defendants' vessel was going the faster of the two. That is borne out by evidence given partly from the plaintiffs' side and partly from the defendants' pilot as to what was the relative position of the two vessels at the time when they were passing the signal stations. On the plaintiffs' side it is said that when they passed the Ras-el-Ech station they learned that the approaching vessel had passed the signal station at twenty-four kilomètres five minutes before. The evidence from the defendants contained in the pilot's statement is as follows: "I was at the twelve and one-tenth mile, time 7.20 p.m., when I saw a red light being shown at the station fourteen millimètres, which indicated that a steamer passed on the opposite side of the canal." Then he proceeds to describe what happened, and substantially the effect of his evidence seems to accord with what I have said was given by the plaintiffs. If that is worked out, it rather tends to show that the greater speed was on the *Clan Cumming*. Therefore it may be said that each of these vessels was going faster than is allowed by the rules; but I do not think that makes any difference so far as the plaintiffs are concerned, in this case, and for this reason: they had for a time gone full speed, according to the entry in the log which I have read, but they had taken off that full speed at 7.30 p.m., thirteen minutes before this collision happened. At 7.30 p.m. they had gone half speed, and at 7.34 slow; and, when one recollects the answers which were given to the counsel for the plaintiffs by the captain of the defendants' ship, they will show, I think, that this point really makes no difference to the position of the plaintiffs. What he said was this: "It is very difficult to judge the distance. I had no idea how far off the ships were when I put the engines half speed astern." That emphasises what I have said about the necessity for care in approaching an object the distance off of which is unascertained. In this, I am not speaking so much against the captain, because, as he has said, the ship was really in the hands of the pilot, who was, of course, the person who ought to be best able to judge. It emphasises what I have already said about the necessity for care in approaching a vessel the distance off of which is unascertained, when, if the facts are as I have said, you find that afterwards you are going at such a speed that, when you get to that ship, she having reduced her speed some time before, you strike her. That is not keeping your ship under such control that you can deal with such eventualities as you find you have to deal with when you get to the ship which, up to that time, has been exhibiting to you her searchlight and navigation lights—in other words, telling you you must not come on yet. I have given this case the best consideration I can, on account of the magnitude of it, but I take the view that the blame for this collision rests solely with the *Clan Cumming*. That is also the view of those who in this class of case are far more competent to form an opinion than I am, the Elder Brethren. The result must be that the *Clan Cumming* is found alone to blame for the collision. That leaves a question as to the consequential damages. As to that, I should think the facts cannot be much in dispute, and that they might go to the registrar in the usual way.

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

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

Tuesday, Aug. 8, 1905.

(Before Sir GORELL BARNES, P. and BARGRAVE DEANE, J., assisted by two of the Elder Brethren of the Trinity House.)

THE BROOMFIELD. (*a*)

Collision—Steam vessel lying-to—Crossing rule—Duty of steam vessel when lying-to to keep out of the way—Regulations for the Prevention of Collisions at Sea 1897, *art.* 19.

The L., *a steam trawler, was lying-to heading to the N. with engines stopped, waiting for the tide, when she was run into and damaged by the steamship* B., *which was proceeding on a course of W.* ½ *S. magnetic. Those on the* B. *saw the masthead and green lights of the* L. *on their port bow, and kept their course and speed until just before the collision, when they slowed, stopped, and reversed their engines. Those on the* L. *did nothing.*

Held, that art. 19 *of the Collision Regulations applied, and that the* L. *was alone to blame for the collision, as it was her duty to keep out of the way.*

The Helvetia (3 *Asp. Mar. Law Cas.* 43) *explained.*

APPEAL by the defendants from a judgment of the County Court judge of the County Court of Glamorganshire, holden at Cardiff, in an action brought by the owners of the steam trawler *Lucania* against the owners of the steamship *Broomfield*, to recover the damage sustained by them by reason of a collision between the two vessels, which occurred in the Bristol Channel, off Bull Point, about 10 p.m., on the 7th Sept. 1904.

The case made by the plaintiffs was that the *Lucania*, a steam trawler of 73 tons net register, with a cargo of fish on board, bound for Cardiff, was on the 7th Sept. 1904, between 9 p.m. and 10 p.m., lying off Bull Point, in the Bristol Channel, heading about North. Her engines had been stopped, and she was lying waiting for the tide, when the steamship *Broomfield*, outward bound from Barry with a cargo of coal, collided with her. The bluff of the *Lucania's* starboard bow struck the bluff of the *Broomfield's* port bow a heavy blow.

The night was clear, with fine weather and little wind, and the *Lucania's* regulation lights were burning brightly.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

Those on the *Lucania* charged the *Broomfield* with not passing under her stern, with not stopping her engines, and with improperly porting.

The case made by the defendants was that the *Broomfield*, a steamship of 1526 tons net register, was on the 7th Sept. proceeding down the Bristol Channel on a voyage to Rio Janeiro. About 9.30 p.m., the weather at the time being fine and clear, the wind blowing a fresh breeze from the south-west, the *Broomfield* was on a course of W. ½ S. magnetic with her regulation lights exhibited and burning brightly, when those on board her saw the masthead and green lights of the *Lucania* about two miles off, and about three points on the port bow.

The *Broomfield* kept her course, and shortly afterwards those on board her saw that the lights of the *Lucania* were gradually closing in on the port bow, and the engineers of the *Broomfield* were warned by telegraph to stand by. When the *Lucania* was between two and three ships' lengths away the *Broomfield* engines were put to slow, and were then stopped, and reversed full speed astern, and three short blasts were given on the *Broomfield's* whistle, and immediately before the collision the *Broomfield's* helm was put hard-a-port, but the collision occurred, the bluff of the *Broomfield's* port bow colliding with the starboard side of the *Lucania* abreast of her starboard fore rigging.

Those on the *Broomfield* charged those on the *Lucania* with neglecting to port their helm and with attempting to cross ahead of the *Broomfield*.

The learned County Court judge found that the *Broomfield* was alone to blame for the collision, saying he was bound to do so on the authority of *The Helvetia* (*ubi sup.*).

The owners of the *Broomfield* appealed.

The material parts of the Collision Regulations which were referred to on the hearing of the appeal were the following:

Preliminary. A vessel is "under way" within the meaning of these rules when she is not at anchor, or made fast to the shore or aground.

19. When two steam vessels are crossing, so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

The following sections of the Merchant Shipping Acts 1862 and 1894 were also referred to:—

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

Sect. 29. If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulation necessary.

Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

Sect. 419 (4). Where, in a case of collision, it is proved to the court before which the case is tried that any of the Collision Regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

Laing, K.C. and *Balloch* for the appellants, the owners of the *Broomfield*.—The decision of the learned County Court judge is wrong; the position of the vessels is such that the crossing rule, art. 19, applies. It was the duty of the *Lucania* to keep out of the way, and the *Broomfield* was bound to keep her course until she saw that the *Lucania* could not by her action alone prevent a collision. At that moment the *Broomfield* stopped and reversed her engines. The *Lucania* was "under way" within the meaning of the preliminary article, and could and ought to have given way and gone under the stern of the *Broomfield*. It is said that the case of *The Helvetia* (*ubi sup*.) shows that the *Lucania* is not to blame, but the facts in that case are different, the vessel lying-to in that case having her fires drawn. That case was also decided before the Merchant Shipping Act 1894 was passed, and the rule as to the statutory presumption of fault was not the same as it is now.

Aspinall, K.C. and *Noad* for the respondents, the owners of the *Lucania*.—The *Broomfield* is to blame for the collision. The *Lucania* was stationary, and those on the *Broomfield* saw her three points on their port bow two miles off; if that is correct, they must on the headings of the two vessels, if they had kept their course, have passed clear of the *Lucania* without either vessel doing anything. The fact that the collision happened shows that the *Broomfield* did not keep her course and speed, and she therefore broke art. 21 of the Collision Regulations, and is to blame for doing so.

THE PRESIDENT.—In this case the plaintiffs are the owners of the steam trawler *Lucania*, and the defendants are the owners of the steamship *Broomfield*. The trawler appears to have been lying with her head more or less to the north off Bull Point, and had her navigation lights up. It is said that her helm was lashed a-starboard, and she was waiting for the tide. The *Broomfield* was bound down the Bristol Channel, and the collision took place by the *Broomfield* running into the *Lucania*. The case presented on the evidence by the witnesses from the *Lucania* was that the *Broomfield* came down channel showing her masthead and green lights to the other vessel. If that were right, there would be no danger of any collision at all. The *Broomfield's* case is that she was coming down channel having the *Lucania* on her port bow, though I think the evidence may possibly exaggerate the bearing, and that she took the *Lucania* to be a vessel under way and kept her course until almost the end; and then, finding the *Lucania* could not alone keep out of the way, she took action by slowing, stopping, and reversing her engines, and at the last moment porting, but failed to clear her. The question then arises what are the true facts, and, when they are found, what rules apply. I think, and the Elder Brethren agree in this view, on the nature of the accident that the vessels must have been slightly crossing. It is an absolutely unintelligible and almost absurd point to suggest that the *Broomfield* was coming down channel with the *Lucania's* green light showing on the *Broomfield's* starboard side, and that she, being bound down channel, would have any reason or desire to port and run into the *Lucania*. Therefore that set of facts is not, I think, the true view to

take. The true view is that the vessels were slightly crossing, and the *Lucania* was being helped forward by the S.W. wind which prevailed, which produced a certain amount of crossing on her part. When the facts are found in that way, you have a case of two steamers crossing, and the only question which it becomes necessary to consider is whether art. 19 applies. It is said the trawler was not bound to keep out of the way, because she was more or less stationary; and the case of *The Helvetia* (*ubi sup.*) is cited in support of that proposition. Apart from *The Helvetia*, it is perfectly clear that these were both steam vessels under steam, and that they were crossing so as to involve risk of collision; and it was the duty of the *Lucania* to keep out of the way, and the duty of the *Broomfield* to keep her course and speed. Then, with regard to *The Helvetia*, that was a case which, as counsel for the appellants has pointed out, was decided as far back as 1868 under the provisions then existing; and it appears to be a case in which a steam-tug was not under steam in the strict sense at all, but was lying-to with sail up, and was perfectly visible to those on *The Helvetia*, it being daylight. The *Helvetia*, through some carelessness, ran into the tug. That case is easily distinguishable from the present case, and has no application to it. In my opinion, this appeal must be allowed, and judgment will be entered for the defendants, the owners of the *Broomfield*, with costs here and below.

BARGRAVE DEANE, J.—I agree.

Solicitors for the appellants, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Solicitors for the respondents, *Downing* and *Handcock*.

Monday, Oct. 30, 1905.

(Before Sir GORELL BARNES, President.)

THE INDRA. (*a*)

Practice—Transfer of action from County Court to High Court—County Court (*Admiralty Jurisdiction*) *Act* 1868 (31 *&* 32 *Vict. c.* 71), *s.* 6 *—Admiralty Court Rules* 1859, *rr.* 138-143—*Supreme Court of Judicature Act* 1873 (36 *&* 37 *Vict. c.* 66), *s.* 39—*Rules of the Supreme Court* 1883, *Order LIV., r.* 1.

A wages suit having been instituted in the County Court of Lancashire holden at Liverpool sitting in Admiralty, the defendants, in accordance with sect. 6 *of the County Court* (*Admiralty Jurisdiction*) *Act* 1868 (31 *&* 32 *Vict. c.* 71), *moved the High Court of Admiralty that the action should be transferred to the High Court.*

The application to the High Court was made by motion in court.

Held, that the transfer would be made, but that the proper method of asking for a transfer from the County Court to the High Court under sect. 6 *of the County Court* (*Admiralty Jurisdiction*) *Act* 1868 *was by way of summons in chambers.*

MOTION to transfer a wages suit instituted in the County Court of Lancashire holden at Liverpool.

It appeared that certain seamen employed on the steamship *Indra* had instituted proceedings against the owners of that vessel for wages and for damages for breach of agreement. The owners of the *Indra* thereupon moved the High Court that one of the suits should be transferred from the County Court to the High Court on the ground that the action was a test case brought in respect of a voyage made to Japan which was alleged to involve the crew in a war risk. Other similar suits were pending in the County Court.

The application was made by motion under sect. 6 of the County Courts (Admiralty Jurisdiction) Act 1868 (31 & 32 Vict. c. 71), which is as follows:

Sect. 6. The High Court of Admiralty of England, on motion by any party to an Admiralty cause pending in a County Court, may, if it shall think fit, with previous notice to the other party, transfer the cause to the High Court of Admiralty, and may order security for costs, or impose such other terms as to the court may seem fit.

The rules of court in force on the passing of the County Courts (Admiralty Jurisdiction) Act 1868 are printed in Coote's Admiralty Practice, p. 171, and those in force in respect of motions appear on p. 187, and are as follows:

138. Motions may be made to the judge either in court or in chambers.

139. Notice of motion, together with the proofs, if any, in support thereof, shall be filed in the registry three days at least before the hearing of the motion.

140. A copy of the notice of motion, and of the proofs, if any, shall be served on the adverse proctor before the originals are filed.

141. No motion shall be made to the judge in court save by counsel, or by a party conducting his cause in person.

142. Proctors may be heard on any motion before the judge in chambers.

143. Counsel also may be heard on any motion before the judge in chambers, if notice thereof has been given to the adverse proctor two days at least before the hearing of the motion.

Sect. 39 of the Judicature Act 1873 (36 & 37 Vict. c. 66) enacts that

Any judge of the High Court may, subject to any rules of court, exercise in court or in chambers all or any part of the jurisdiction by this Act vested in the High Court, in all such causes and matters, and in all proceedings in any causes or matters, as before the passing of this Act might have been heard in court or in chambers respectively, by a single judge of any of the courts whose jurisdiction is hereby transferred to the High Court, or as may be directed or authorised to be so heard by any rules of court to be hereafter made. In all such cases, any judge sitting in court shall be deemed to constitute a court.

The rules of court which now govern the High Court of Admiralty are the Rules of the Supreme Court 1883, and Order LIV., r. 1, of those rules is as follows:

Every application at chambers not made *ex parte* shall be made by summons.

A. Adair Roche, for the defendants, in support of the motion.—The plaintiffs are ready to consent to the transfer, but they are not represented. The order for transfer might, however, be made subject to the consent of the plaintiffs being filed. [The PRESIDENT.—Why is this order for transfer asked for by motion? It could be obtained by a summons in chambers.] The order for transfer is asked for by motion because sect. 6 of the County Courts (Admiralty Jurisdiction) Act 1868 is still in force and directs that it should be

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

done by motion. [The PRESIDENT.—When that statute came into force, motions as well as summonses might be heard in chambers in Admiralty matters.] The costs in this case will not be increased by the transfer being asked for by motion.

The PRESIDENT.—I shall make the order for transfer subject to the written consent of the plaintiffs being produced and filed. The order ought to have been asked for by summons which, in accordance with the present practice, would have been heard in chambers. I shall make no order as to costs.

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

Oct. 30 *and Nov.* 9, 1905.

(Before (Sir GORELL BARNES, President.)

THE MARPESSA. (*a*)

Collision—Damage to dredger owned by public authority — Pecuniary loss — Demurrage — Measure of damage.

A sand pump dredger, the G. B. C., *owned by the Mersey Docks and Harbour Board, was run into and injured by the* M. *The owners of the* M. *admitted liability for* 90 *per cent. of the assessed claim of the owners of the* G. B. C. *The repairs to the dredger took nine days to execute, and on the hearing of the reference the owners of the dredger claimed demurrage at the rate of* 102*l.* 9*s.* 5*d. a day. That figure was arrived at by assuming that the loss to the plaintiffs was at least equivalent to the expenditure on the* G. B. C. *for maintenance, working expenses, and sums to cover insurance, depreciation, and owners' profits. The owners of the* G. B. C. *were responsible for the upkeep of the harbour, and derived their funds from rates, but were not entitled to distribute profits. There was no proof of any direct pecuniary loss. The district registrar allowed the owners of the* G. B. C. 315*l. in respect of demurrage, being* 35*l. a day. This sum was arrived at on the principles laid down in* The Greta Holme (77 *L. T. Rep.* 231; 8 *Asp. Mar. Law Cas.* 317; (1897) *A. C.* 596).

The owners of the G. B. C. *appealed.*

Held (affirming the decision of the registrar), that, even assuming that the benefit derived by working the G. B. C. *was to be treated as equivalent to the expenditure made on her, the loss to her owners caused by the delay was to be measured by the out-of-pocket expenses, which the owners were compelled to incur during that period, in spite of the stoppage of the work, and by the depreciation and loss of interest which were running on during the period of delay, such depreciation and interest to be calculated on the capital value of the* G. B. C. *at the time of the accident.*

Since affirmed on appeal.

MOTION in objection to the report of the district registrar at Liverpool.

The appellants were the Mersey Dock and Harbour Board, the owners of the suction dredger *G. B. Crow*; the respondents were the owners of the steamship *Marpessa*.

The claim arose out of a collision which occurred between the *G. B. Crow* and the *Marpessa* on the 6th Oct. 1904, when the *G. B. Crow* was sheltering from the weather in the river Mersey.

The damage action which was brought by the owners of the *G. B. Crow* against the owners of the *Marpessa* was settled on the terms that the owners of the *Marpessa* should pay 90 per cent. of the damage sustained by the owners of the *G. B. Crow*, the amount of the damage to be assessed by the registrar and merchants.

The *G. B. Crow*, a suction dredger built in 1895 at a cost of 56,700*l.*, was designed for and employed in dredging operations at the bar and sea channels at the mouth of the Mersey in Liverpool Bay. She was one of the three largest dredgers in Europe, the other two being also owned by the plaintiffs, was capable of carrying 3000 tons of sand to the dumping grounds, and of dredging to a depth of 55ft. Her average output was 12,800 tons a day. She worked continuously night and day throughout the year except Sundays, Christmas Day, and Good Friday, but was occasionally prevented from working by bad weather.

The following were the particulars of the claim filed by the plaintiffs, with the amounts allowed by the registrar:

No. of Item.	Particulars of Item	Amount Claimed. £	s.	d.	Amount Allowed. £	s.	d.
1.	Warping vessel in and out of dock	2	6	6	2	6	6
2.	Labour regulating graving dock, docking and undocking ship, and clearing graving dock	26	2	4	26	2	4
3.	Graving dock rates	37	0	0	37	0	0
4.	Pitch pine blocks from board's store	7	12	11	7	12	11
5.	Carting	2	2	9	2	2	9
6.	Messrs. Graysons for repairs	236	0	0	236	0	0
7.	Waiting to coal, eighteen men for three hours ...	2	14	0	2	14	0
8.	Superintendence and general charges	10	10	0	10	10	0
9.	Mr. Potter, survey fees ...	10	10	0	10	10	0
10.	Lloyd's survey fees ...	4	14	0	4	14	0
11.	Demurrage, nine days at 104*l.* per day	936	0	0	315	0	0
		1275	12	6	654	12	6
	90 per cent....	£1148	1	3	£589	3	3

Together with interest on 589*l.* 3*s.* 3*d.* at 4 per cent. per annum from the 1st Nov. 1904 to the date of payment.

The defendants at the reference agreed to all the items except the eleventh, which at the reference the plaintiffs reduced to 102*l.* 9*s.* 5*d.* per day, or 922*l.* 4*s.* 9*d.*

There was no dispute as to the number of days for which the defendants were liable for demurrage, but they objected to the rate charged.

On the hearing of the reference the engineer to the dock board was called as a witness, and stated that "the services of these dredgers are indispensable to the port in order to maintain its present condition. To replace them we have to do the best we can in the way of hire, or the alternative would be for the port to suffer prejudice and damage."

It also appeared that in 1901 the dock board had hired a sand pump suction dredger, called the *Laga*, valued at 13,000*l.*, capable of carrying only

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

650 tons, which was equivalent to an output of 2750 tons per day for 232 working days, to replace one of the board's own vessels.

The board paid 85*l.* a week for the hire of the *Laga*, and further paid for insurance, 591*l.* 15*s.* 1*d*; repairs, 1338*l.* 4*s.* 11*d.*; wages, 1409*l.* 0*s.* 8*d.*; supplies, 941*l.* 16*s.* 5*d*; and superintendence, 276*l.* 13*s.* 7*d.*; in all 4557*l.* 10*s.* 8*d.*, or, exclusive of the charge for hire, 19*l.* 12*s.* 10*d.* per day, representing an owners' profit per week of 67*l.* 10*s.*, or 27 per cent. per annum on the value of the vessel, after allowing for depreciation at the rate of 7 per cent. on 13,000*l.*, or 17*l.* 10*s* per week.

If the same calculations were made with regard to the *G. B. Crow*, the rate per working day was as follows: (1) Insurance, 3*l.* 7*s.* (less 1*s.* rebate); (2) repairs, 10*l.* 2*s.* 4*d.*; (3) wages, 14*l.* 2*s.* 4*d*; supplies, 17*l.* 6*s.* 3*d.*; (5) depreciation (7 per cent. on 56,700*l.*), 12*l.* 12*s.* 3*d.*; (6) owners' profit (25 per cent. of 56,700*l.*), 45*l.* 0*s.* 7*d.*; (7) superintendence and general charges of engineers' department (7½ per cent. on total cost of repairs, wages, and supplies), included in (2), (3), and (4); total, 102*l.* 9*s.* 5*d.*

The engineer also stated that he could not tell whether any vessel suffered any detriment from the fact that the *G. B. Crow* was laid up for nine days, and said that "the harbour authorities could only suffer through the vessels," but the way he measured the damage was "that the board considered it desirable to build such dredgers in the interests of the port. They considered it desirable to maintain these dredgers constantly working year in and year out, and if they are deprived of their services they are deprived of the advantage which the use of the dredgers brings them.

He also stated that the working expenses, depreciation, and owners' profit represented the current value of the vessel, because, unless that expenditure was incurred, "the port would revert to the condition of 1890, when we only had 10ft. of water on the bar at low-water springs, whereas now there are with slight variations 27ft. By the fact of incurring this expenditure we have produced this improvement in the port, and therefore its value to the port must be at least the expenditure which has been incurred in producing it."

In respect of the claim for demurrage, the district registrar allowed the sum of 315*l.*, or 35*l.* per day, and in his report, dated the 15th July 1905, gave the following reasons for doing so:

The only item in the claim which was disputed was No. 11, and the dispute resolved itself into the question of the principle on which demurrage should be calculated. The plaintiffs in the claim as filed charged 104*l.* per day for demurrage, but at the reference they reduced this amount to 102*l.* 9*s.* 5*d.* There was no dispute as to the number of days for which the defendants were liable to pay demurrage. Counsel for the plaintiffs contended that the value per day of the vessel to the plaintiffs was the amount which they considered it proper to expend on her for maintenance and working expenses in addition to sums to cover insurance, depreciation, and owners' profits, and the engineer to the dock board was called to prove these amounts. A statement had been prepared showing the annual cost for the past nine years under the following heads—namely, insurance, repairs, wages, supplies, depreciation, and expenses of engineers' department, together with a charge to represent owners' profits. The amount claimed by the dock board—102*l.* 9*s.* 5*d.*—represented the average expenditure per day, during that period, in maintaining and working this vessel, including a charge of 25 per cent. for owners' profits. The figures of expenditure were not seriously disputed by the defendants, but they contended that the principle was wrong, and that, in addition to the amount to be allowed for standing expenses, as distinguished from working expenses—namely, insurance, wages, and a sum to cover depreciation—the plaintiffs were not entitled to anything further except owners' profits, which they contended were, in this case, covered by interest on the present value and some amount to represent general damage, and, in support of their contention, relied on the judgment of Lord Herschell in *The Greta Holme*. On the question of general damages, counsel for the defendants contended that the plaintiffs were only entitled to a nominal amount, as the plaintiffs were deprived of the use of their vessel for only nine days, and the engineer in his evidence admitted that he could not point to any injury or inconvenience occasioned by the loss of the services of the vessel. I am of opinion that the principle contended for by the dock board is not one that should be adopted; and, furthermore, I think that the claim of 25 per cent. for owners' profits, calculated on the original outlay, is excessive. In arriving at the amount to be allowed, the merchants and I considered that, in view of the fact that according to the engineer's figures a sum of 33,735*l.* is standing to the depreciation account of this vessel, which originally cost 56,700*l.*, the plaintiffs are only entitled to a percentage calculated on the depreciated value, in which we have included 9427*l.* expended last year, and not charged under the head of repairs in the engineer's statement. Furthermore, the plaintiffs are paying not more than 4 per cent. on their outlay, and the merchants and I are of opinion that 7 per cent., calculated on the depreciated value as above, is a proper allowance to make to cover establishment charges, owners' profits, and general damage. In addition to this, we have allowed the standing expenses substantially on the basis of the engineer's figures, and we consider that 35*l.* per day is a proper allowance to cover the whole of the plaintiffs' loss, which sum would include any supplies consumed whilst the vessel was under repair.

On the 19th July 1905 the solicitors for the plaintiffs served a notice of objection to the report of the registrar in respect to the allowance made on item 11 of the claim; on the 27th July the solicitors for both plaintiffs and defendants agreed to the objections being heard on motion, instead of on petition; and on the 31st July the plaintiffs' solicitors served a notice of motion on the defendants' solicitors.

In consequence of a request of both the appellants and respondents that the registrar should state how he arrived at the figure of 35*l.*, the amount per day he had allowed for demurrage, the registrar on the 26th Oct. 1905 issued a further report, in which he stated that

The plaintiffs based their claim solely upon the principle stated in my former report, that the value per day of the vessel to them was what they "thought worth while" to spend upon her. Their evidence was practically limited to a justification of this principle, and corrobation and explanation of the figures contained in the statement of working expenses prepared by their engineer. The merchants and I, being of opinion that the principle was wrong, dealt with the engineer's figures on the lines indicated by Lord Herschell in the case of *The Greta Holme* (1897) A. C. pp. 604 and 605.) In the absence of evidence of the actual expenses incurred by the plaintiffs during the time the vessel was laid up, the merchants and I could only deal with the figures contained in the engineer's statement in order to arrive

at the amount to be allowed. The various heads of claim put forward in the engineer's statement were allowed as follows: (1) Insurance, 3*l.* 7*s.*; (3) wages, 14*l.* 2*s.*; (4) supplies, 5*l.* 3*s.*; (5) depreciation, 6*l.* 4*s.*; (6) owners' profits (4 per cent.), general damage, and establishment charges (3 per cent.), 6*l.* 4*s.*—making in all, 35*l.* With regard to item (4), supplies, the merchants considered 5*l.* 3*s.* per day to be largely in excess of what would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries. No allowance has been made in respect of repairs, item (2) of the engineer's statement, as the defendants were paying for the repairs rendered necessary by the collision; and with regard to item (7), which would in ordinary course be included under the item of repairs, superintendence and other general charges were admitted by the defendants, and have been allowed as separate items in the claim.

Aspinall, K.C. and *Leslie Scott* for the appellants. — The allowance of 35*l.* per day is inadequate; that amount does not represent the loss to the plaintiffs caused by their being deprived of their dredger. The proper measure of that loss is that contended for by the plaintiffs on the hearing of the reference. The registrar was wrong in disregarding the evidence given as to the cost of hiring a vessel to replace the *G. B. Crow*; such evidence should be accepted:

The Greta Holme, 77 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A. C. 596, at p. 605.

That case also shows that, even although the owners are not out of pocket in any particular sum, they are entitled to recover substantial damages. The value of a vessel at any given time, where there is no market in which her value can be ascertained, is her value to her owners:

The Harmonides, 87 L. T. Rep. 448; 9 Asp. Mar. Law Cas. 354; (1903) P. 1.

The question of the damage caused by the loss of the use of such a vessel should be dealt with in the same way, and it is therefore right to ascertain the loss by ascertaining the amounts spent by her owners to enable her to perform a day's work. The interest on the original capital invested in any plant is to be taken into account in arriving at the cost of using it:

The Harrington, 59 L. T. Rep. 72; 6 Asp. Mar. Law Cas. 282 (1888); 13 P. Div. 48.

And the capital to be considered is the capital when the plant is purchased:

The Greta Holme (*ubi sup.*).

Pickford, K.C. and *Greer* for the respondents. —The principle on which the appellants base their claim is wrong. The expenditure incurred to do the work done by the dredger is no test of the loss caused to the plaintiffs by being deprived of its use. The evidence given does not show that the appellants have suffered any loss per day by being deprived of this dredger, much less 102*l.* 9*s.* 5*d.*; the respondents are, however, content to adopt the sum of 315*l.*, arrived at by the registrar. The figures given by the engineer as to the cost of the supplies and wages are speculative; there is no evidence that any sum was expended during the repair. The original cost of the plant is not the proper basis on which to base a calculation to arrive at a loss caused by being deprived of the plant after it has depreciated. The present value of the plant is the factor to be considered. In this case the vessel originally cost 56,700*l.*, but 33,735*l.* is standing to the depreciation account of the vessel; so the amount now invested in the plant is so much less.

Cur. adv. vult.

Nov. 9.—The PRESIDENT.—This was a motion in objection to the report of the district registrar at Liverpool dated the 13th July 1905, upon a reference in an action brought by the Mersey Docks and Harbour Board, owners of the sand pump dredger *G. B. Crow*, as plaintiffs, against the owners of the steamship *Marpessa*, defendants, so far as the same awards the sum of 315*l.*, or 35*l.* per day, to the plaintiffs in respect of item No. 11 in the particulars of the plaintiffs' claim, and finds that the plaintiffs should bear the costs of the reference. The claim arose out of a collision between the dredger *G. B. Crow*, belonging to the plaintiffs, and the steamship *Marpessa* in the river Mersey in Oct. 1904. The defendants admitted liability to the extent of 90 per cent. of the plaintiffs' claim, to be assessed in the usual way. The only item in the claim which was disputed was No. 11, and the dispute resolved itself into a question of the principle upon which demurrage for the detention of the dredger should be calculated. The claim for demurrage was for nine days at 104*l.* per day, making in all 936*l.*, of which the district registrar has allowed 315*l.* The *G. B. Crow* is a suction dredger employed in dredging operations at the bar at the entrance to the river Mersey, and is a valuable vessel for the purpose. She is one of the three largest dredgers in Europe, the other two being also owned by the plaintiffs. On the occasion of the collision the dredger was sheltering from the weather, but would have been set to work again immediately after the weather moderated. This dredger was built in the year 1895, and, according to the evidence, her life would have been about fifteen years, so that she had about five or six years' more work in her. In consequence of the collision she was delayed nine days undergoing repairs, and her use to the plaintiffs was lost during that time, unless any part of the period would have been affected by her being prevented from being used by the weather. The contention on behalf of the plaintiffs was that the value of the dredger to the plaintiffs at the time in question was the amount which they considered it proper to expend on her for maintenance and working expenses, in addition to sums to cover insurance, depreciation, and "owners' profit," and upon this basis the actual claim presented at the reference amounted to 102*l.* 9*s.* 5*d.* per day. The contention on the part of the defendants was that the principle upon which the plaintiffs' claim was put forward was wrong, and that the claim ought to have been based upon the principle indicated in the House of Lords in the case of *The Greta Holme* (*ubi sup.*). In that case, owing to a collision with a ship, a steam dredger belonging to the present plaintiffs was injured, and the owners were deprived of the use of it for some weeks, and the dredging works were delayed. A claim was made for 1500*l.*, being a sum calculated at the rate of 100*l.* per week for the fifteen weeks during which the dredger was under repair and could not be used for any purpose by her owners, and 91*l.* 8*s.* 6*d.* as an allowance for a period of sixteen days during which she could only be used as a hopper barge. The registrar reported against both those items of claim, and

his report was sustained by the President of the Probate Division, whose decision was affirmed by the Court of Appeal, but the decision was reversed by the House of Lords as to these items of damage, and a sum of 500*l.* was fixed upon by the learned Lords in the House of Lords.

The broad contention on the part of the defendants in that case was that the plaintiffs could recover no damages for the loss of the use of the dredger; but the learned Lords held that the plaintiffs were entitled to recover damages, and perhaps the nearest indication of the principle upon which these damages should be assessed is to be found in the judgment of Lord Herschell, at p. 605, where he says: "How can they the less be entitled to damages because instead of hiring the dredger they invested their money in its purchase? The money so invested was out of their pockets, and they were deprived of the use of the dredger, to obtain which they had sacrificed the interest on the moneys spent on its purchase. A sum equivalent to this at least they must surely be entitled to, but I think they are also entitled to general damages in respect of the delay and prejudice caused to them in carrying out the works intrusted to them. It is true those damages cannot be measured by any scale, but that would be equally true in a case of damages in respect of the deprivation of an individual of a chattel which he had purchased for the purposes of comfort, and not profit." The district registrar has considered that the basis upon which the plaintiffs in the present case have put forward their claim is erroneous, and has, in substance, based the allowance which he has made to the plaintiffs upon the principle indicated by Lord Herschell and the other learned Law Lords in the case of *The Greta Holme* (*ubi sup.*), and has allowed the plaintiffs demurrage at the rate of 35*l.* a day—that is to say, for the nine days the sum of 315*l.* Prior to the decision of the House of Lords in *The Greta Holme* (*ubi sup.*), it had been held that damages for detention in such a case as the present could not be recovered, but that decision overruled this view. The case was primarily concerned with that broad question, and in the judgments there is not much to be found indicating any very precise method of ascertaining damages. The passage above quoted from Lord Herschell's judgment seems to come nearest to doing so. Now, the method contended for by the plaintiffs was expressed by their counsel before the district registrar thus:—He said (p. 23 of the record): "If the board consider it worth their while to incur all the expenditure which they have to incur for the sake of the benefit which they derive, surely the benefit they derive is valued by the amount of the expenditure they incur, and the damage to them through the loss of service is similarly calculated." And further on (p. 24) he argued that the plaintiffs were entitled "to see what the dock board thought worth while to spend upon the vessel, because the vessel must be worth to the dock board at least not less than the amount they have thought it worth while to spend on keeping her up, and the measure of what they thought it worth while to spend on keeping her up is given by the working expenses, including superintendence. general charges of the engineers' department, and, in effect, depreciation." The same method was contended for by counsel before me.

The defendants, on the other hand, maintained that the report allowed sufficient damages and that nothing more was proved. The whole difficulty in this case arises from the practical impossibility of proving what is the actual loss sustained by the plaintiffs in such circumstances as those in question. No evidence was forthcoming of the exact monetary effect upon the plaintiffs' position of the work being done by dredging, or of any definite loss caused by the delay; indeed, such evidence would naturally be very difficult to give with certainty, and Mr. Lyster, the engineer, the principal witness for the plaintiffs, appears to have admitted that he could not point to any definite injury or inconvenience occasioned by the loss of the services of the vessel. It is, however, clear that the dredging operations must have the effect of improving the navigation, of preventing the channels from silting up, of deepening the channels, and thereby permitting vessels to navigate them at times of tide at which they could not otherwise leave or enter, and generally of increasing the facilities and capacities of the port. The plaintiffs' counsel therefore asked the court to make the assumption that the benefit which is derived by the plaintiffs from these operations must be at least equivalent to the expenditure upon them which the board considered it worth their while to make; in other words, that the benefit was measured by the expenditure, and that the loss of benefit would be measured by the expenditure which would have produced it. The basis for making this assumption was not rested upon any evidence of statistics or calculations of increased dues or other benefits to be derived, or of any materials which the board may have had before them when deciding to incur and continue their expenditure, but was practically rested on argument and the assumption that it must be so, because the board consider it so. It is probably not unreasonable to suppose that the board are not likely, as a matter of business and good sense, to spend more on dredging than will result in producing an equivalent benefit to them, but I shall point out later that this assumption is of a very vague and ambiguous character, and, moreover, it must not be forgotten that the net or real benefit derived is only the excess of the benefit produced over the expenditure which produced it. Even if the assumption aforesaid be made it is clear that, if the work should be stopped, while on the one hand the benefit produced by it being done is lost, or perhaps only retarded, on the other hand the expenditure is to a certain extent saved. I think that counsel for the plaintiffs in their arguments omitted to give full weight to this latter consideration, and also failed to notice the difference between expenditure which does not cease on an accident happening and expenditure which does. To take an illustration, if the dredger had been sunk and totally lost by this collision it seems to me clear that the plaintiffs could only recover from the wrongdoer the value of the vessel at the time of the loss, whereas the plaintiffs' counsel contended that they could not only recover in such a case the vessel's value, but in addition the loss equivalent to the whole of the expenditure which would have been incurred by them from the time of the collision up to the time when they could have replaced her by some other vessel competent

to do her work. Upon the assumption aforesaid the benefit to be derived is to be treated as equivalent to the expenditure, but when a vessel is lost the wrongdoer in paying her value replaces at once the capital, which then remains invested in the vessel, and all expenditure from that moment ceases, so that, while on the one hand the benefit of continued working is lost, any further expenditure equivalent to the benefit is entirely saved. And here, one may ask, why should damages for delay be charged on a greater value than the value which would be considered in case of total loss? Again, if a vessel or other property of a certain value is used for business purposes the cost of gaining any benefit by its use is measured by the outgoing current expenditure, together with depreciation upon the property and interest upon the value of the property. If the only benefit to be produced by working the property is to be equivalent to the expenditure, then it is obvious that by a cessation of the work the current expenditure would stop (except so far as is necessary to keep the property in safety), while on the other hand the depreciation, (except so far as affected by the vessel or property being laid up) and the interest on capital continue to run on.

In my opinion, in a case like the present the out-of-pocket expenses which the owner is compelled to incur, notwithstanding the stoppage, and the depreciation and loss of interest on capital, measure his loss by the delay, assuming, of course, that the benefit derived by working is only to be treated as equivalent to the expenditure. Applying this reasoning to the present case, and for the moment making the main assumption asked for by the plaintiffs, it follows that by the delay in question they lost the actual cost for insurance, wages, general charges, &c., properly chargeable against the dredger during the delay, and the depreciation and loss of interest on capital for that time; the registrar has given them an allowance for these, and the only question really seems to be whether it is enough. No evidence was given before him, as I understand, as to the actual out-of-pocket cost, but he has taken certain figures from a table of averages given by the plaintiffs, and has probably exceeded the real cost. He has apparently based his allowance for depreciation and interest on the value of the vessel at the time of the delay.

I think the only really serious question in the case is whether he has allowed sufficient under these last two heads. This turns upon whether the vessel's value at the time of the loss ought to be regarded as her value based upon the original amount of capital invested in her; and here comes in a difficulty, arising from the vagueness and ambiguity of the assumption which the plaintiffs ask the court to make. The plaintiffs start by asking the court to make the assumption that the benefit derived in the year 1904 by the working of the dredger is exactly the same as the benefit derived in the first year, when the vessel was new, because they contend that, as the dredger, although depreciated in value, is doing as good work now as she was when first built, the benefit they are deriving from her now is to be taken to be equivalent to the benefit which they derived from her when she was first built. They say that the benefit when she was first built, if measured by the expenditure, must be considered having regard to the original value of the vessel, and so, taking actual working expenses as being about the same on the average, they wish to charge, as expenditure in 1904, the annual average working expenses and also depreciation, and interest, or "owners' profits," as they call it, on practically the original cost of the vessel. When the whole claim is resting on hypothesis and assumption I fail to see why the court should make any such assumption, especially as all the plaintiffs can really say is that the board think it worth while to make certain expenditure, and it ought logically to follow from that, that the inquiry should be what expenditure was the board making in the year 1904. The plaintiffs, however, then say, "at any rate, it should be assumed" (though again I say there is no evidence to support the assumption) "that the benefit is measured by the actual expenditure from time to time, and then the benefit for the year 1904 should be measured by the expenditure incurred in that year." The plaintiffs then, to support their claim, are driven to contend that the expenditure for the year 1904 is the same as the expenditure for the first year of her working, and they treat the value of the vessel as not diminishing and base their claim upon some book-keeping figures. It appears to me that if the expenditure is to be considered as at the time in question their argument is wholly unsound, because if the matter is looked at from the ordinary point of view of business accounts, in keeping such accounts when a vessel is being worked for the purpose of producing profits it is usual to charge the profits first with depreciation, and secondly with interest on the capital before arriving at any net profit. If there is no profit then the depreciation and loss of interest are clear loss; if the profit is equivalent to them then there is no net profit because these losses exhaust the profit obtained. But assuming that there are profits obtained equivalent to them when the depreciation and interest are charged against these profits (observe, it is only the excess, if any, which should be divided as profits), the sum charged for depreciation and interest is money in hand, which can be utilised in any other business manner, leaving the capital in the vessel merely the depreciated value of the vessel. So in this case the plaintiffs treat themselves as year after year making a benefit out of the working of their dredger equivalent to the expenditure upon her, and if they do so, they have to write off each year so much for depreciation and charge the depreciation and interest against the benefit received, so that they must be treated as having that amount in hand, just as an owner of a ship, having charged his profit and loss account with depreciation and interest, has the amount in hand if he has made enough profit to cover the sum.

The expenditure, therefore, for the last year of the dredger's working prior to the accident would be out-of-pocket expenses, the depreciation on her then value, and the interest on the capital remaining as representing her depreciated value. In the course of the evidence the vessel's depreciated value appears to have been worked out by figures (record, p. 15), showing a result of some 33,300*l*., but as she would have become useless and obsolete, according to the evidence, in about five years more, it would seem to me that her real value to the plaintiffs was considerably less,

and that upon some fair actual value the registrar must have based the figures for depreciation and loss of interest. It appears to me unreasonable to ask the court to act upon the large assumption which the plaintiffs require to be made. It omits to take into account the chapter of accidents; it omits to take into account the possibility that a mere trifling delay of a few days will not substantially affect the ultimate operation of the works, and it leaves out of sight the fact that no real evidence was given as to the exact benefit derived from the works, and the time at which that benefit will be received, or of any actual loss; and it seems to me, on the whole, reasonable to consider that where the damages are not really proved the court is at liberty to assess them by awarding to the plaintiffs sufficient to compensate them for their actual out-of-pocket expenses, depreciation upon the vessel, and loss of interest upon the capital. The very wide claim made by the plaintiffs, as shown in their statement of working expenses, gives the benefit derived by them for "owners' profits" as 25 per cent. on the original value of the ship, though if they are obtaining from their work a benefit equivalent to their expenditure, ordinary depreciation, and interest on capital, if charged annually, would replace the capital and interest; and if this claim which they make were to be considered as a fair measure they would be in a position to supply themselves with a new dredger practically every few years out of profits. With regard to the evidence about other dredgers, that is of very little use in the present case, as it does not appear to have been suggested that the board ever really contemplated hiring a dredger in place of the *G. B. Crow*.

I do not think that the point decided in *The Harrington* (*ubi sup.*) and the similar point in the case of *The Greta Holme* in the Court of Appeal (1896, P. 192) have any real bearing upon the present question, and in reading the judgments in those cases it is not at all clear to me whether the effect of annually charging interest and depreciation against profits was fully considered. I may also observe that in the passage above quoted from Lord Herschell's judgment, where he refers to interest on the money spent in the purchase of the dredger, I do not believe he had present to his mind any question of depreciation, otherwise he would have noticed that the money remaining invested in the dredger is arrived at by the depreciation being written off out of the profits of previous years. I am not quite clear how the figure allowed for depreciation by the district registrar has been arrived at, but I take it that he has based it on the value to the plaintiffs of the vessel at the time of the delay, which I am informed is in accordance with the practice in the principal registry, and it may be open to question whether for the very short delay there was any substantial deterioration, as the vessel was laid up. The depreciation is rather theoretical than real. He appears to have given more than the actual figures would probably show for out-of-pocket expenses. The item for insurance is taken from the plaintiffs' tables (record, p. 36), where the rate would seem to be given as if she were insured on the original value of the dredger instead of on her value at the time of the accident. The item for wages is also taken from the same tables, and is the average cost of the wages when the vessel is at work, and is evidently not the actual wages paid while she was laid up, and when she was laid up the men appear to have been employed on other useful work, so that their labour was not lost. The item for supplies is stated to be largely in excess of what the merchants considered would have been expended in supplies to a vessel in dock, but a liberal allowance has been made to cover superintendence and sundries. I notice, however, that a charge for superintendence and other general charges has been made and allowed in an undisputed item of the claim (No. 8). It may perhaps be said that depreciation ought to be calculated on the original cost, as the plaintiffs by their tables appear to spread the total depreciation from the original value to nil over the estimated life of the dredger; but, in my opinion, this is unsound in principle. The plaintiffs, for their book-keeping purposes, spread the depreciation equally over the whole period, but this does not affect the question of what real depreciation is caused by the defendants to a vessel of the value which the vessel had at the time of the disaster when once that value has been arrived at. Even if this point were conceded it would only add 5*l.* or 6*l.* a day to the amount allowed; but if the amounts allowed for insurance, wages, and supplies should be reduced by more than this addition—which I think on the evidence ought in all probability to be the case—then this point is unimportant. I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them. Looking at this case broadly, the plaintiffs, without any evidence of distinct money loss, are seeking to recover for the loss of the use of the dredger at a rate which, leaving entirely out of consideration the insurance and other actual out-of-pocket expenses, would amount in one year to nearly, if not quite, the value of their dredger, and unless the court is to embark upon a sea of assumptions and possibilities, I conceive that, applying the principles in the case of *The Greta Holme* (*ubi sup.*), a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damage, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation. The motion must be dismissed with costs.

Solicitor for the appellants (plaintiffs), *W. C. Thorne*, Liverpool.

Solicitors for the respondents (defendants), *Hill, Dickinson*, and *Co.*, Liverpool.

Dec. 4, 5, *and* 21, 1905.

(Before BARGRAVE DEANE, J.)

THE HOPPER No. 66. (*a*)

Collision—Limitation of liability—Right of charterer by demise to limit—"Owners"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504.

Sir J. J. Limited hired from the owners the steam Hopper No. 66 *for eighteen months upon terms which amounted to a demise of the hopper to Sir J. J. Limited.*

While the hopper was still on hire, and while being navigated by the servants of Sir J. J. Limited, she collided with and sank the steamship B. *The owners of the* B. *and her master and crew then brought an action* in personam *against Sir J. J. Limited to recover damages caused by negligence, and in that action recovered judgment, the* Hopper No. 66 *being held alone to blame.*

The charterers of the Hopper No. 66 (*Sir J. J. Limited*) *then instituted proceedings as "owners" of the* Hopper No. 66 *claiming to limit their liability under sects.* 503 *and* 504 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

Held, that charterers by demise are not "owners" within the meaning of sect. 503 *of the Merchant Shipping Act* 1894, *and therefore have not the right to limit their liability in respect of loss or damage caused by the improper navigation of the chartered ship by their servants.*

ACTION of limitation of liability.

The plaintiffs were Sir John Jackson Limited, and the defendants were William Ernest Rowland, the owner of the steamship *Blanche*, and her master and crew, suing for the loss of their clothes and effects; the owners of the cargo lately laden on board the *Blanche*, and all and every person or persons whomsoever claiming, or being entitled to claim, in respect of loss or damage to the *Blanche*, or to any goods or merchandise or other things whatsoever on board her.

On the 9th June 1903 Sir John Jackson Limited entered into an agreement with the London and Tilbury Lighterage, Contracting, and Dredging Company Limited, in which the former were described as charterers and the latter as owners of the *Hopper No.* 66, whereby it was agreed that the owners were to let and the charterers were to hire the *Hopper No.* 66 for a minimum period of eighteen months, with the option of keeping it for a further period.

The amount of the hire was to be 160*l.* a month, but if the hopper was kept on hire for more than two and a half years a rebate was to be allowed.

Par. 8 of the agreement was as follows:

The captain and crew to be appointed and paid by the charterers, with the exception of the engineer, who is to be appointed by the owners, but shall be paid by and at charterers' usual rate—viz., 2*l.* 5*s.* per week of six days, with extra payment for nights and Sundays—and he shall be deemed to be the servant of the charterers. Should he prove incapable, untrustworthy, or unsatisfactory to the charterers, the charterers shall give notice to the owners, who will appoint a substitute.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The charterers also agreed to keep the hopper, her hull, machinery, gear, and appurtenances in good working order at their own expense, and agreed by par. 14 that

The charterers at their own expense on behalf of the owners shall insure, and during the hiring shall keep insured, the said vessel and gear and appurtenances at Lloyd's or other suitable office to owners' satisfaction to the extent of 8500*l.* against total and (or) constructive total loss, with the running-down clause in full, and against all other risks, and deposit such policy (duly indorsed) with the owners as collateral security; but in all cases the charterers to be responsible in every way to the owners. And, further, the charterers shall keep the owners fully indemnified against all claims, losses, or liabilities of whatsoever nature or kind in consequence of any collision, accident, casualty, or otherwise, which may happen to or be caused by the said hopper, or to or by the men employed in connection therewith.

On the 30th Nov. 1904, while the agreement was in force, the *Hopper No.* 66, while proceeding from Langton Dock, Liverpool, to sea with a load of excavations, ran into and sank the steamship *Blanche*, bound from Fleetwood to Liverpool with a cargo of gravel.

In consequence of the collision the *Blanche* and her cargo were lost, and seven of her crew lost their lives by drowning or exposure.

The *Hopper No.* 66 was so badly damaged that she was brought into the Mersey and beached.

On the 1st Dec. 1904 a writ was issued on behalf of the owner, master, and crew of the *Blanche* against the owners of the *Hopper No.* 66, and a writ was also issued in which the owner of the *Blanche* was defendant and the plaintiffs purported to be the owners of the *Hopper No.* 66.

It was then ascertained that the *Hopper No.* 66 was demised by charter to Sir John Jackson Limited, and an order was made by consent amending both writs.

The first writ when amended appeared as being on behalf of the owner, master, and crew of the *Blanche* against Sir John Jackson Limited, and to that writ Sir John Jackson Limited appeared and counter-claimed for the damage sustained by the hopper.

On the 24th July 1905 judgment was delivered in that action, and the *Hopper No.* 66 was found alone to blame. The damages were referred to the registrar and merchants.

Actions were commenced in the King's Bench Division on the 4th Aug. 1905 against Sir John Jackson Limited claiming damages for personal injuries and loss of life arising out of the collision.

Those actions, of which there were six, were set down for trial at the Liverpool Assizes, and were ultimately settled on the 2nd Dec. 1905 for sums amounting to 2600*l.* with costs.

On the 17th Nov. Sir John Jackson Limited issued a writ in this action claiming to limit their liability in respect of the collision.

On the 21st Nov. they delivered a statement of claim which contained the following:

1. The plaintiffs were before and at the time of the collision hereinafter mentioned the owners of the steam *Hopper No.* 66.

2. Alternatively by an agreement dated the 9th June 1903, made between the London and Tilbury Lighterage, Contracting, and Dredging Company Limited,

as owners of the steam *Hopper No.* 66, and the plaintiffs, the said steam *Hopper No.* 66 was demised to the plaintiffs for a minimum period of eighteen months from the said date, and the plaintiffs by the terms of the said agreement, which was in force at the time of the said collision, had the sole possession, control, and management of the said hopper and were the temporary owners thereof, and owners within the meaning of the Merchant Shipping Act 1894, sects. 503 and 504.

The claim then proceeded to state the facts as to the collision, and admitted it was caused by the negligent navigation of the hopper, but alleged it was without the actual fault or privity of the plaintiffs. The plaintiffs also alleged that the gross tonnage of the steam hopper was 413·82 tons; that the claims in respect of the loss of the *Blanche* would exceed the aggregate of 8*l.* per ton on the gross tonnage; and that they were willing to pay into court the sum of 3310*l.* 11*s.* 2*d.*, the aggregate amount of 8*l.* a ton on the gross tonnage of the hopper, together with interest thereon from the date of the collision until payment, and to give bail for such further sum as the court should direct not exceeding the sum of 2896*l.* 14*s.* 10*d.*, being the aggregate amount of 7*l.* per ton on the gross tonnage and interest as aforesaid. The prayer of the statement of claim was in the usual form, and claimed a declaration that the plaintiffs were not answerable in damages in respect of loss of life or personal injury beyond 15*l.* per ton, or in respect of damage to property beyond 8*l.* per ton, and that on payment into court of 3310*l.* 11*s.* 2*d.*, with interest, and on giving security for the further sum of 2896*l.* 14*s.* 10*d.*, and interest thereon, all further proceedings in the actions brought against them should be stayed.

On the 22nd Nov. 1905 the defendants delivered a defence denying that the plaintiffs were at any material time the owners of the *Hopper No.* 66. They also did not admit the agreement, or that the collision occurred without the privity of the owners, and submitted that the plaintiffs were not entitled to a stay of the loss of life or personal injury claims.

The plaintiffs delivered a reply joining issue on the 23rd Nov. 1905, and on the same day gave notice of trial for the 4th Dec. 1905, and the case was heard on that and the following day.

The following are the material parts of the sects. 503 and 504 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60):

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 . . . (*c*) where any loss of life or personal injury is caused to any person carried in any other vessel by reason of the improper navigation of the ship; (*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, (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, an aggregate amount not exceeding fifteen pounds for each ton of their ship's tonnage; and, (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.

Sect. 504. Where any liability is alleged to have been incurred by the owner of a British or foreign ship in respect of loss of life, personal injury, or loss of or damage to vessels or goods, and several claims are made or apprehended in respect of that liability, then the owner may apply in England . . . to the High Court . . . and that court may determine the amount of the owner's liability, and may distribute that amount rateably among the several claimants, and may stay any proceedings pending in any other court in relation to the same matter, and may proceed in such manner and subject to such regulations as to making persons interested parties to the proceedings, and as to the exclusion of any claimants who do not come in within a certain time, and as to requiring security from the owner, and as to payment of any costs as the court thinks just.

Dec. 4 *and* 5.—*Pickford*, K.C. and *Dawson Miller* for the plaintiffs, Sir John Jackson Limited.—The agreement of the 9th June 1903 was in force at the date of the collision. Under that agreement the possession, control, and management of the hopper were vested in the plaintiffs. The plaintiffs also repaired and insured the hopper, appointed and paid the crew with the exception of the engineer, and the latter, although appointed by the London and Tilbury Lighterage Company, was paid by the plaintiffs, Sir John Jackson Limited. These facts show that the plaintiffs, who are admittedly charterers by demise, are owners of the *Hopper No.* 66 within the meaning of the Merchant Shipping Act 1894, and are entitled to limit their liability under sects. 503 and 504. The word "owner" is not defined in those sections, but it has been held to apply to equitable owners, who are not on the register:

The Spirit of the Ocean, 12 L. T. Rep. 239; 2 Mar. Law Cas. O. S. 192; Br. & Lush. 336.

It is submitted that where the actual owner has parted with the possession and control of the ship to the charterer, the latter is *pro hac vice* owner:

The Ticonderoga, Swab. 215, at p. 217.

That case implies that, although the right to proceed *in rem* against the vessel doing the damage could not be affected by any contract made by the owner with a third party, there is at common law a liability incurred by the charterer as "owner." That case and also the case of *The Druid* (1 W. Rob. 331, at p. 339) were referred to in the case of *The Lemington* (32 L. T. Rep. 69; 2 Asp. Mar. Law Cas. 475, at p. 478), where Sir R. Phillimore lays down that "a vessel placed by its real owners wholly in the control of charterers or hirers, and employed by the latter for the lawful purposes of the hiring, is held by the charterers as *pro hac vice* owners. Damage wrongfully done by the *res* whilst in possession of the charterers is, therefore, damage done by 'owners' or their servants, although those owners may be only temporary." The registered owner of a ship is not always the only person who is to be regarded as owner, for a registered owner has been held not to be liable to shippers under bills of lading signed by the master, for loss of cargo arising from the unseaworthiness of the ship:

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

In that case, as in this, the registered owner had

divested himself of all control and possession of the vessel by the charter-party.

A. D. Bateson and *L. F. C. Darby* for the owner of the *Blanche*.—There is no case which lays down that charterers by demise are owners within the meaning of sects. 503 and 504 of the Merchant Shipping Act 1894. Sir John Jackson Limited are not the owners of the *Hopper No.* 66. Two people cannot both be owners of the same ship, and the owners in this case are the London and Tilbury Lighterage Company. The plaintiffs have no right to alienate, incumber, or destroy the ship; those rights are essential to ownership. They do not own the ship, but only a limited right over the ship. A wrongdoer is liable for the full extent of the damage sustained by the person wronged, and a statutory abridgment of such a liability is to be construed strictly:

Maxwell on the Interpretation of Statutes, 4th edit., p. 427.

Limitation of liability being a creature of statute the person claiming the benefit of it must bring himself within the plain meaning of the sections:

The Andalusian, 39 L. T. Rep. 204; 4 Asp. Mar. Law Cas. 22; 3 P. Div. 182.

The preamble of the first statute passed on this subject (7 Geo. 2, c. 15) shows that the protection of owners was the object of the Legislature, and that is the key-note of the subsequent legislation: (see 26 Geo. 3, c. 86; 53 Geo. 3, c. 159; and the Merchant Shipping Acts 1854, 1862, and 1894). There is no evidence that Sir John Jackson Limited are shipowners; they are contractors, and it is the carrying trade of the country which is meant to be encouraged. Charterers are not persons contemplated by the statutes as being within these sections. If charterers are included, foreigners, who charter British ships by charters which amount to a demise, may become *pro hac vice* owners of British ships, which is contrary to law. If charterers are included in the word "owners," sect. 12 of the Regulation of Railways Act 1871 (34 & 35 Vict. c. 78) was quite unnecessary, for the railway companies could have protected themselves by chartering vessels by charters amounting to a demise. Sect. 1 of the Merchant Shipping (Liability of Shipowners) Act 1898, and sub-sect 5 of sect. 2 of the Merchant Shipping (Liability of Shipowners and Others) Act 1900 clearly show that where the Legislature intends to allow others besides owners to limit their liability it says so in terms. The case of *Baumvoll Manufactur von Carl Scheibler* v. *Furness* (*ubi sup.*) is one of contract, and has no bearing on this case, which is one of tort. If the charterers can limit their liability, the plaintiffs have to say that two people can limit their liability in respect of the same ship and the same collision, for the real owner must be entitled to limit his liability as the *res* can always be proceeded against, and he would have to appear and defend the action, and could then limit his liability:

Quinlan v. *Pew*, 1893, 56 Fed. Rep. 111.

The case of *The Lemington* (*ubi sup.*) is commented on in *The Ripon City* (77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226), and is cited there to support a proposition 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. *The Spirit of the Ocean* (*ubi sup.*) only decided that beneficial as well as registered owners are entitled to limit their liability, and, with regard to that decision, Marsden in Collisions at Sea, 5th edit., p. 156, says: "It would probably be held that charterers and other persons having a temporary ownership of the vessel are not entitled to the benefit of the Act." [*Pickford*, K.C.—The same learned author, at p. 162, says: "Whether charterers and others in the position of *pro hac vice* owners are within the benefit of the Act seems doubtful."] In the present case the position of the charterers in regard to the vessel is determined by the contract with the owners, and rights which arise from contracts are rights to acts or forbearances on the part of determinate persons and to nothing more:

Austin's Jurisprudence, 3rd edit., p. 386.

The rights of the charterers do not fall under the description of ownership "involving the *jus utendi, fruendi, et abutendi*" given in Sweet's Dictionary of the English Law, and see Markby's Elements of Law, 4th edit., sect. 315. Their rights are rights of user only; they could not mortgage, sell, or break up the vessel or change her character or flag, all of which an owner could do.

Pickford, K.C. in reply.—Assuming that the original object of the Legislature in allowing limitation of liability was to encourage British shipping, and that a foreigner could not limit his liability (*Cope* v. *Doherty*, 31 L. T. Rep. 307; 2 De G. & J. 614), that has now ceased to be the object of the Legislature, for a foreigner has for long been able to limit his liability: (Merchant Shipping Act 1862, 25 & 26 Vict. c. 63). The owners, builders, or parties interested in an unregistered ship may limit their liability for three months after the launch (Merchant Shipping Act 1898, 61 & 62 Vict. c. 14), and owners of docks and canals, under the Merchant Shipping Act 1900 (63 & 64 Vict. c. 32), can also limit their liability. The object of these statutes is to protect persons who are not actually in fault themselves, but who are responsible for the acts or defaults of their servants, and that was the aim of the early statutes:

Wilson v. *Dickson*, 2 B. & Ald. 2.

A charterer by demise has been held to be an owner *pro tempore* of the ship:

Colvin v. *Newberry*, 1 Cl. & F. 283.

Charterers are also referred to as *pro hac vice* owners in *The Tasmania* (59 L. T. Rep. 263; 6 Asp. Mar. Law Cas. 305; 13 P. Div. 110). As to the suggestion that by construing the Act as the plaintiffs wish it construed a foreigner might become *pro hac vice* owner of a British ship, the answer may be that a British ship cannot be chartered by demise to a foreigner, but it is unnecessary to decide that question now.

Dec. 21.—BARGRAVE DEANE, J.—On the 30th Nov. 1904 the steam *Hopper No.* 66, whilst proceeding from the Langton Dock, Liverpool, to sea, with a load of excavations, collided with the steamship *Blanche* in Liverpool Bay. In consequence of the collision the *Blanche*, which was

bound from Fleetwood to Liverpool, with a cargo of gravel, sank, and, together with her cargo, was lost, and seven of her crew lost their lives. The collision was caused by the negligent navigation of the steam *Hopper No.* 66 by the plaintiffs' servants, but without the actual fault or privity of the plaintiffs. On the 1st Dec. 1904 an action was instituted in this court on behalf of William Ernest Rowland, the owner of the steamship *Blanche*, and the master and crew thereof, against Sir John Jackson Limited, for the damages they had sustained in consequence of the said collision. The defendants in the action appeared and counter-claimed for damages sustained by the *Hopper No.* 66 in consequence of such collision. On the 24th July 1905 judgment was delivered in the action, and a decree was made pronouncing the steam *Hopper No.* 66 alone to blame for the collision, and referring the damages to the registrar and merchants to report the amount thereof. On the 4th Aug. 1905 the following actions were commenced in the King's Bench Division against the plaintiffs in this action, Sir John Jackson Limited, claiming damages for personal injuries and loss of life arising out of the said collision. An action by Robert Harrison for damages for personal injuries. An action by Elizabeth Gibson (widow), claiming damages for the loss of her husband, John Gibson. An action by Thomas Caygill and Mary Caygill, his wife, claiming damages for the loss of their son, Walter Caygill. An action by Jane Salisbury Constantine (widow) and others, claiming damages for the loss of Henry Constantine, husband of the said Jane Salisbury Constantine. An action by Helen Rennie (widow) and others, claiming damages for the loss of Andrew Rennie, husband of the said Helen Rennie. An action by Elizabeth Ann Ravenscroft (widow) and others, claiming damages for the loss of Ralph Ravenscroft, husband of the said Elizabeth Ann Ravenscroft. The said actions were consolidated, and are ready for trial at the Liverpool Assizes. Sir John Jackson Limited have reason to believe that other claims may be brought against them in respect of the loss of or damage to the *Blanche*, her boats, goods, merchandise, or other things, and in respect of loss of life or personal injury occasioned by the said collision. The gross tonnage of the steam *Hopper No.* 66, without deduction for engine-room space, ascertained according to the Merchant Shipping Act 1894 in that behalf, is 413·82 tons and no more. The claims in respect of the loss of the *Blanche*, and her goods, merchandise, and personal effects or other things on board of her at the time of the said collision, will exceed the aggregate amount of 8*l.* per ton on the gross tonnage of the steam *Hopper No.* 66 ascertained as aforesaid. On the 17th Nov. 1905 an action was instituted in this court by Sir John Jackson Limited against "the owners of the steamship *Blanche* and her master and crew and the owners of the cargo lately on board of her, and all and every person or persons whomsoever claiming or being entitled to claim in respect of damage to the *Blanche*, or to any goods or merchandise or other things whatsoever on board of her." In the action Sir John Jackson Limited claimed, as "owners" of the steam *Hopper No.* 66, to be entitled to a declaration of the court limiting their liability under sect. 503 of the Merchant Shipping Act 1894 to 8*l.* per ton under sub-sect. 1 (ii.), and to 15*l.* per ton under sub-sect. 1 (i.), and offered to pay into court the sum of 3310*l.* 11*s.* 2*d.* (being the limitation of 8*l.* per ton on 413·82 tons), and to give bail for a further sum of 2896*l.* 14*s.* 10*d.*, being the further sum of 7*l.* per ton, making 15*l.* per ton in the aggregate. Alternatively, Sir John Jackson Limited alleged that "by an agreement dated the 9th June 1903, made between the London and Tilbury Lighterage, Contracting, and Dredging Company Limited, as owners of the steam *Hopper No.* 66, and the plaintiffs, the said steam *Hopper No.* 66 was demised to the plaintiffs for a minimum term of eighteen months from the said date, and the plaintiffs by the terms of the said agreement, which was in force at the time of the said collision, had the sole possession, control, and management of the said hopper and were the temporary owners thereof, and owners within the meaning of sects 503 and 504 of the Merchant Shipping Act 1894." The defendants by way of defence did not admit the agreement, and denied that the plaintiffs were owners of the steam *Hopper No.* 66 at the time of the collision so as to be entitled to a declaration for limitation of liability.

This case came before me and was argued on the 4th and 5th Dec. 1905. The agreement of demise was proved. In it the London and Tilbury Company are throughout described as owners and Sir John Jackson Limited as charterers. The term was eighteen months as a minimum, with power to charterers to extend the hire by giving three months' notice before the end of the eighteen months; the owners to have the right of determining the hire at the end of two years by giving the charterers three months' notice prior to the end of the said two years. Par. 8 provided that "the captain and crew be appointed and paid by charterers, with the exception of the engineer, who is to be appointed by the owners, but shall be paid by and at charterers' usual rate . . . and he shall be deemed to be the servant of the charterers." Par. 9 provided that the charterers should during the period of hire keep and maintain the hopper and her machinery, &c., in good working order, with provision as to times and nature of this repairing. Par. 14 provided that the charterers should insure and keep insured the said hopper, and deposit such policy with the owners, and that they would indemnify the owners against all claims, losses, or liabilities of whatsoever nature or kind, in consequence of any collision, accident, casualty, or otherwise, which might happen to or be caused by the said hopper or to or by the men employed in connection therewith. Par. 18 provided in case of default made by the charterers in any of the conditions in the agreement being performed by them that the owners might put an end to the agreement and retake possession of the hopper and enforce the payment by the charterers of all sums due under the agreement. It was under this agreement that at the date of the collision Sir John Jackson Limited were employing the steam *Hopper No.* 66, and that she was manned by a crew who were the servants of Sir John Jackson Limited. The short question is, Did that possession under the agreement of demise dated the 9th June 1903 constitute Sir John Jackson Limited the owners of the steam hopper within the meaning of the Merchant Shipping Act 1894, ss. 503 and 504. It is agreed that there is no case reported where

this particular point has been decided; but on behalf of Sir John Jackson Limited it was argued that a limited ownership, or ownership *pro hac vice*, would entitle them to the relief given by the sections in question. The name of the London and Tilbury Lighterage, Contracting, and Dredging Company Limited appears on the register as the registered owner of the steam *Hopper No.* 66, and there is no mention in that register of Sir John Jackson Limited. It is to be noticed that the collision action was an action *in personam* for negligence, and not an action *in rem*—the negligence being that of Sir John Jackson Limited by their servants—and there is now no question that the whole of the damage did, in fact, flow from that negligence. It would follow that the wrongdoer would have to make full compensation for the damage so done. Can it be said in this case that the court has power to reduce or limit the amount of that compensation? In the course of the argument various cases have been cited, and I am asked to say that I may treat them as affording me a guide to the conclusion that the word "owners" in those sections of the Merchant Shipping Act may be construed to mean owners *pro hac vice*. The case of *The Spirit of the Ocean* (*ubi sup.*) does not touch the question in my opinion. It was a question of co-ownership and not of charter. *The Lemington* (*ubi sup*) was an action *in rem*, and it was held that even if the *res* be chartered by her owners to charterers so that the whole control and management of ship and crew are vested in the charterers, still the *res* is liable, and thereby the owners as apart from the charterers. Sir R. Phillimore in that case quotes the words of Dr. Lushington in *The Ticonderoga* (*ubi sup.*), as follows: "Supposing the 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 the appointment of the master and crew to the charterers, and suppose in that case the vessel had done damage and was proceeded against in this court—I will admit, for the sake of argument, that the charterers, and not the owners, would be responsible elsewhere, though I give no opinion on that point—but still I should say to the parties who had' received damage that they had by the maritime law of nations a remedy against the ship itself.' These words suggest fairly plainly that in the mind of the learned judge you can reach the owners through the *res*, but also the charterers *in personam*. In the case of *Baumvoll Manufactur von Carl Scheibler* v. *Christopher Furness* (*ubi sup.*) there is a passage in the judgment of the Lord Chancellor which is relied on. The facts of the case were shortly as follows: A., the owner, let his ship to B. for a term for a lump sum, to be paid month by month. The use which was to be made of the vessel was during that term vested entirely in the charterers—the owner had no voice whatever in it. The master and crew were appointed and paid by the charterers. All that A. had a voice in was the nomination of the chief engineer, and even that officer was to be paid by the charterers; and there was a clause indemnifying the owner against liability. Thus far the case is on all fours with the facts in this present case. The charterers by their captain and agents shipped a cargo of cotton at New Orleans, and the ship foundered at sea on her voyage from New Orleans, and the cargo was lost owing, as was alleged, to unseaworthiness. The shippers brought an action against both the charterers and the owner of the ship for breach of duty and contract. It was an action *in personam* and not *in rem*, and the question was whether the owner was liable or the charterers, or both. There is this passage in the judgment of the Lord Chancellor: "There may be two persons at the same time in different senses spoken of as the owner of a ship—the person who has the absolute right to the ship, who is the registered owner; the owner—to borrow an expression from real property law—in fee simple may properly be spoken of, no doubt, as the owner, but at the same time he may have so dealt with the vessel as to have given all the rights of ownership for a given period to some other person, who during that time may equally properly be spoken of as the owner. When there is such a person, and that person appoints the master, officers, and crew of the ship, pays them, employs them, and gives them orders and deals with the vessel in the adventure, during that time all those rights which are spoken of as resting upon the owner of a vessel rest upon that person, who is for those purposes during that time in point of law to be regarded as the owner." These words are used in considering the question, which arose in that case, whether the relationship of shipper and shipowner existed which was requisite in order to establish the liability of A. or B., and in the result the judgment pronounced in favour of A. as not liable, but against B. This decision in no way supports the suggestion that the charterer is owner within the meaning of sects. 503 and 504 of the Merchant Shipping Act, where there is in contemplation the liability of the registered owner for damage caused by the *res*, and the action is one *in rem*, and the cause of action is tort and not breach of contract. In *The Tasmania* (*ubi sup.*) Lord Hannen dealt with the case of a chartered tug which came into collision with another vessel. He held that an action *in rem* would not lie against the tug because the owners, as opposed to the charterers, were not personally liable for the collision, and the charterers had exempted themselves from liability by the terms of their towing contract. Lord Hannen's words are valuable. He 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 persons injured, the charterers are not liable, the ship remains liable nevertheless." The plaintiffs relied on the judgment of Gorell Barnes, J. in the case of *The Ripon City* (*ubi sup.*), but in my opinion the very learned and interesting judgment in that case does not assist the plaintiffs' case. I now turn to the very simple defence put forward, which is as follows: This is a claim for compen-

sation for a tort, and the full compensation is due to the claimants, unless there is any statutory provision which may reduce it. It is said that the Merchant Shipping Act 1894, ss. 503 and 504, do. That Act must be construed strictly. The limitation of the liability to make full compensation is expressly reserved to "owners," and you cannot read into the sections words limiting or varying or adding to the word "owners." The owners of the steam *Hopper No.* 66 are and were the London and Tilbury Lighterage, Contracting, and Dredging Company Limited. Sir John Jackson Limited were the charterers, and the sections do not include charterers within the term "owners." In my opinion the defendants are right in their contention, and Sir John Jackson Limited are not and were not owners of the steam *Hopper No.* 66 at the time of the collision of that vessel with the steamship *Blanche*, and it follows that they have no ground for their application in this action for a declaration that their liability should be limited under the provisions of sects. 503 and 504 of the Merchant Shipping Act 1894. I therefore pronounce judgment for the defendants with costs.

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

Solicitors for the defendants, *Batesons, Warr*, and *Wimshurst*, Liverpool.

Supreme Court of Judicature.

COURT OF APPEAL.

Dec. 14, 15, *and* 16, 1905.

(Before Collins, M.R., Romer, L.J., and Sir Gorell Barnes, P.)

The Bearn. (a)

Defective berth — Damage by grounding—Duty of harbour authority—Condition of harbour and berth—56 Geo. 3, *c.* 81, *s.* 27*—Duty of wharfinger to discover danger—Duty to warn vessels.*

The harbour at S. was vested in trustees who own and have the control and management of the harbour and the berths therein, one of which is alongside a wharf known as the K. wharf. The trustees invite vessels to use the harbour and levy tolls on vessels doing so. The K. wharf is owned, controlled, and managed by the L. B. and S. C. Railway Company, who collect dues on all goods loaded or discharged at the wharf. Vessels loading or discharging at the wharf have to take the ground at low water at the berth alongside the wharf.

The Trinity House pilots licensed to pilot vessels into and out of the harbour at S. from time to time take soundings in the harbour for the purpose of being able to navigate the ships who employ them, and in pursuance of the directions given them by the pilotage authority. The B., *a French steamship, was employed to bring a consignment of flour to R. and A., merchants at S., who owned a warehouse on the K. wharf built on land leased from the railway company. The flour which was carried under bills of lading was to be stored in the warehouse, and the railway company received from R. and A., the consignees of the flour, fees and dues for permission to receive the flour at the wharf. The ship's brokers, who held both the ship's and consignees' bill of lading, expecting the arrival of the* B. *sent a postcard to the pilots at S. directing them to berth the* B. *on her arrival at the K. wharf, and this was done. At low water the* B. *took the ground and was injured by grounding on a heap of rubbish lying in the harbour alongside the wharf. Neither the trustees nor the railway company as wharfingers had ever sounded the berth each thinking it was the duty of the other to do so, and also because both relied on the soundings made by the pilots whom they thought would tell them if anything was wrong. The owners of the* B. *sued the trustees and the wharfingers, the railway company, for the damages sustained by them by reason of the defective condition of the berth, and obtained judgment against both defendants. Both defendants appealed to the Court of Appeal.*

Held (*confirming the judgment of Bargrave Deane, J.*), *that the trustees were liable for the damage caused by the defective berth as they had been guilty of a breach of their statutory duty to remove obstructions for the purpose of preserving the navigation and use of the harbour, and that the railway company, as wharfingers, were liable, for there was at least a duty on them to take reasonable care to find out whether the berth was safe, and that, in the event of the state of the berth being unknown to them, there was a duty on them to warn the* B. *that they did not know what condition the berth was in.*

Action of damage.

The plaintiffs were the owners of the French steamship *Bearn*, the defendants were the Shoreham Harbour Trustees and the London, Brighton, and South Coast Railway Company Limited the owners of a wharf known as Kingston Wharf.

The *Bearn* was a twin screw steamship of 481 tons gross and 191 tons net register, and had been employed to carry a cargo of flour to Shoreham. The *Bearn* arrived at Shoreham at 12.30 p.m. on the 22nd Oct. 1903, and was boarded by a Trinity House pilot who, in consequence of orders received from the ship's brokers, took her to Kingston Wharf. The *Bearn* was then drawing 10½ft. on an even keel. About 6 p.m., at low water, she took the ground, and on the morning of the 23rd Oct. 1903, when the fore hatch was removed for the purpose of discharging the cargo, damage was discovered which showed that the *Bearn* was lying unevenly on the berth, and she was moved. The berth was afterwards surveyed, and an obstruction was found in the berth not far from the face of the wharf, which was afterwards removed by dredging, and consisted of about twelve tons of stokehold rubbish, bits of old firebars, clinker, and ash.

The action was originally instituted by the owners of the *Bearn* against the Shoreham Harbour Trustees.

The writ was issued on the 19th Jan. 1904, and a claim was delivered on the 16th April 1904, in which the plaintiffs alleged that they had suffered

(a) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

damage by reason of the negligence and default of the defendants, and the claim then proceeded

By the New Shoreham Act 1816 (56 Geo. 3, c. lxxxi.), as amended and varied by the New Shoreham Harbour Act 1873 (36 & 87 Vict. c. ccxi.), the New Shoreham Harbour Act 1876 (39 & 40 Vict. c. ccxi.), and the New Shoreham Harbour Act 1887 (50 & 51 Vict. c. xcv.), the defendants are constituted the harbour authority for the harbour of New Shoreham, and as such authority own and have the control and management of the said harbour and the berths therein, including a berth alongside a wharf called the Kingston Wharf, and have full power and authority to direct the mooring of all vessels coming into the said harbour. The defendants publicly invite vessels to enter and use and load and unload within the said harbour, and by the said statutes, have power to levy and do levy tolls in respect of all vessels entering and using the said harbour, and tolls on a higher scale in respect of all vessels loading or unloading within the limits of the said harbour.

The claim then set out the facts as to th arrival and mooring of the *Bearn* to discharg her cargo, and alleged that she was injured when she took the ground, by reason of the defective state of the berth, and then proceeded:

The defendants, in breach of their duty as such harbour authority, failed to make or maintain or to take reasonable care to make or maintain the said berth in a safe and proper condition. The defendants knew, or had the means of knowing, and ought to have known the condition of the said berth, and improperly failed to warn those on board the *Bearn* that the said berth was in an unfit and dangerous condition. The defendants negligently failed to ascertain or take proper care to ascertain if the said berth was in a safe and proper condition for the *Bearn* to lie there, and negligently failed to inform those on board the *Bearn* that they had not ascertained or taken care to ascertain if the said berth was in a safe and proper condition.

The defendants the Shoreham Harbour Trustees delivered a defence on the 24th April 1904, by which they admitted that they were the port and harbour authority for the harbour of New Shoreham, but denied that the *Bearn* was moored with their knowledge or approval, or that they had the control and management of the berth, and did not admit that the berth was in an uneven and defective condition, or that the *Bearn* was in consequence strained or damaged. The defence then proceeded:

There was and is no duty on the defendants to make and maintain the said berth in a safe and proper condition, nor are they or their servants required to ascertain if the said berth was in a proper condition, and if unsafe or dangerous to warn the plaintiffs of the fact. The said berth and adjoining wharf are the property of and maintained by the London, Brighton, and South Coast Railway for their own use and profit, and for the purposes of loading and discharging vessels, and the plaintiffs' steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted) the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible.

On the 18th May 1904 interrogatories on behalf of the plaintiffs were delivered to the Shoreham Harbour Trustees, which were answered by them on the 10th June 1904. Further and better answers were applied for and were given on the 15th July and the 23rd Aug. 1904. In their answers they admitted they had been informed that the *Bearn* was berthed at Kingston Wharf, but said that she had been moored there without the knowledge of the defendants' harbour master, and that they believed she had been invited there by the London, Brighton, and South Coast Railway Company, who they said controlled and managed the wharf and berth attached to it, and said there was no duty on the trustees to remove obstructions from the berth. In answer to an interrogatory as to the reason why the trustees were ignorant of the obstruction at the berth, the trustees replied as follows:

The said wharf and berth are the property of the London, Brighton, and South Coast Railway Company, and are under their control and management for their own purposes and profit, and are not under the control, supervision, or management of the defendants or their servants. There is no duty on the part of the defendants to vessels coming to or lying at the said wharf to provide a safe berth, or ascertain its condition, or give warning if the berth is unsafe. The defendants relied, as they reasonably might, on the proper discharge by the railway company of their duty to vessels using the said wharf, by the pilots of their duty to vessels employing them to keep themselves thoroughly acquainted, by soundings and otherwise, with the depth of water at and the condition of the berth to which vessels are piloted and moored, and by those on board vessels using the said wharf and berth, not to throw or let fall overboard anything likely to make the berth unsafe. No report was made or notice given by the railway company, pilots, or any other person that the said unevenness existed before or whilst the *Bearn* was at the berth, or that the berth was in other than good condition and safe. The *Bearn* shifted into the berth before there was any opportunity for the defendants or their servants or any other person to examine the berth and discover the existence of the deposit left by the vessel which occupied the berth when the *Bearn* arrived, and which lay there without injury.

They also admitted by their answers that the berth was within the limits of the harbour.

In consequence of the attitude taken up by the harbour trustees the owners of the *Bearn* issued a writ claiming damages against the railway company for negligence and breach of duty, and on the 18th Oct. 1904 delivered a statement of claim in which they alleged that the railway company owned and had the control and management of Kingston Wharf and owned and had the control and management of a berth alongside the wharf, and that they invited vessels to use the wharf and berth and load and unload at the wharf and berth for payment to the railway company of certain charges in respect of such use or loading or unloading.

The claim then set out the facts as to the arrival of the *Bearn*, and as to her being moored alongside Kingston Wharf to discharge her cargo at the invitation of the railway company for payment to them of certain charges, that she took the ground, and, owing to the berth being defective, was injured by doing so.

The claim then proceeded:

The defendants failed to make or maintain, or to take reasonable care to make or maintain, the said berth in a safe and proper condition. The defendants knew, or had the means of knowing, and ought to have known the condition of the said berth, and improperly failed to warn those on board the *Bearn* that the said berth was in an unfit and dangerous condition. The defendants negligently failed to ascertain, or take proper care to ascer-

tain, if the said berth was in a safe and proper condition for the *Bearn* to lie there, and negligently failed to inform those on board the *Bearn* that they had not ascertained, or taken care to ascertain, if the said berth was in a safe and proper condition.

On the 5th Nov. 1904 the railway company delivered a defence by which they denied that they had been negligent, and denied that they owned, controlled, or managed the berth at Kingston Wharf, or that they invited persons to use and load and unload vessels there or that the *Bearn* was taken to the berth with their knowledge or approval or at their invitation. They also alleged that they did not owe any duty and were not under any obligation to the plaintiffs in respect of the said berth, and did not admit that the berth was in an uneven and defective condition. Alternatively, they alleged that if the berth was defective such defect was solely caused by the wrongful act of some persons on board of some steamship at present unknown to the defendants, who, in breach of the provisions of sect. 105 of the New Shoreham Act 1816 and the harbour regulations, had thrown or emptied into the said harbour and (or) on to the said berth engine-room and stokehold refuse. The defendants did not know of and had no reasonable means of knowledge of and no reason to apprehend such wrongful act and (or) the defect thereby caused, and they will contend that if they were under any duty or obligation to the plaintiffs they are not in the circumstances liable.

On the 7th Dec. 1904 the plaintiffs delivered certain interrogatories to the railway company; in their answers, delivered on the 20th Dec. 1904, the railway company admitted that they owned, controlled, and managed Kingston Wharf, but stated that they had no power to make any charge for vessels lying at or using the wharf, but they had power by statute to charge, and did charge, the owners of merchandise a reasonable sum for merchandise loaded or unloaded or warehoused at the wharf. They also stated that the berths in the ordinary channel of navigation, one of which was occupied by the *Bearn* at the time of the alleged damage, were not owned by the railway company and were not under their control or management, but were vested in and under the control and management of the Shoreham Harbour trustees; that the warehouse in which the *Bearn's* cargo was to be stored was the property of Rubie and Adams, but was built on space on the wharf leased by the railway company to Rubie and Adams, for which Rubie and Adams paid rent, and that Rubie and Adams paid the usual charges on the merchandise landed on the wharf; that the defendants had no power to prevent vessels coming to the wharf, and that from time to time vessels were ordered or directed to go alongside the wharf by the harbour authority, amongst others; that they had no power to charge any vessels for lying at or using the wharf, but that vessels did from time to time come to the wharf for the purpose of discharging cargo, and in such case the railway company had power to charge, and did charge, against the merchandise a reasonable sum for the goods unloaded. They also admitted in their answers that a heap of engine-room refuse had been found in the berth into which the *Bearn* had been put; that the railway company had not examined the berth, but that they believed that the berth had been from time to time sounded and examined by others on behalf of the Shoreham Harbour authority, who from time to time repaired the berth, as and when required, and maintained the same in good order and condition, but they were unable to say when the berth was last examined.

The following are the material parts of the sections in the New Shoreham Act 1816 (56 Geo. 3, c. 81) which were referred to during the trial:

Sect. 27. And be it further enacted . . . and that the said commissioners, or such person or persons as they shall by any writing or writings under their hands nominate and appoint, and their agents, officers, workmen, and servants shall be and are hereby empowered, authorised, and required . . . and to make and effect such other works within the aforesaid limits as shall be necessary for improving and preserving the navigation of the said harbour, and the use thereof, by the persons trading thereto, and for that purpose to dig, take up, remove, and carry away any rocks, stone, soil, sand, gravel, rubbish, or any other gross matter which shall obstruct, prejudice, or hinder the navigation of the said harbour and the improvements thereof.

Sect. 105. And for the better preservation of the said harbour be it further enacted that if any person shall throw or empty any ballast, earth, dust, ashes, rubbish, or stones into the said harbour . . . except in case of actual distress, or upon any of the wharves within the the same . . . every such person shall forfeit and pay for every such offence any sum not exceeding ten pounds for every such offence.

The regulations made by the Trinity House for the pilots licensed for the Shoreham district contained the following clause:

6. The pilots are to take soundings once a week, or oftener if necessary, at the undermentioned places at the following states of the tide, and the senior pilot is to record the result, with the further particulars required, in the book provided for that purpose, which is to be kept at the watch house, and is to be accessible to the pilots at all times: (*a*) date; (*b*) state of tide—low water, neap tides, low water, spring tides; (*c*) places—on the bar between the piers, East Arm, between the Dolphins, in the channel at various places, and also at the wharves, West Arm, Soldier's Point, in the channel at various places, and also at the wharves; (*d*) result—depth of water to be ascertained by means of a graduated rod.

The harbour master admitted in evidence that the pilots were not subject to his orders, as they were governed by the Trinity House and by the sub-commissioners, but the harbour trustees had made the following by-law:

Every pilot acting as such to any vessel entering or leaving or within the harbour or dock shall from time to time acquaint himself and keep himself thoroughly acquainted by soundings and otherwise with the depth of water in the harbour and dock and the entrance thereof respectively, the shape and slope of the bed of the channels, and all other matters necessary to qualify himself sufficiently to navigate such vessel in and out of the harbour or dock.

The actions were consolidated, and the evidence in them was given before the court on the 23rd, 24th, and 28th March. The arguments of counsel were heard on the 28th and 29th March 1905, and judgment was delivered on the 31st March 1905.

March 28.—*Laing*, K.C. and *Dr. Stubbs* for the plaintiffs.—Both these defendants are liable. The Shoreham Harbour trustees have a statutory duty to perform with regard to the berth to

remove obstructions and keep it in a safe condition. The railway company have also a duty to find out if the berth is safe. What was done was that they each relied on the other and did nothing, and both relied on the pilots who take soundings, and who owe neither the trustees nor the railway company any duty at all. Sect. 105 of the New Shoreham Harbour Act 1816 imposes a penalty on anyone depositing rubbish in the harbour, and here is twelve tons of it in one heap deposited by a vessel, and the harbour authority have never ascertained the fact, and say they have no duty to ascertain it, or have fulfilled their duty by trusting that the pilots will discover if anything is wrong. As to the railway company, they carry on business at the wharf, and they ought to see that the berth is safe, or warn people if it is not:

The Moorcock, 60 L. T. Rep. 654; 6 Asp. Mar. Law Cas. 357, 373 (1889); 14 P. Div. 64.

They did nothing, for they trusted to the pilots, who owed them no duty whatever.

Carver, K.C. and *D. C. Leck* for the defendants, the Shoreham Harbour trustees.—The harbour authority have a duty to keep the berths in the channel clear, but in considering whether they have been negligent in performing it the character of the berth must be considered. This berth wants little or no attention; it does not silt up. There is no statutory duty put on them to keep it clear. [*Laing*, K.C.—By 56 Geo. 3, c. 81, s. 27, there is a duty placed on the trustees to clear away obstructions.] That section does not assist the plaintiffs, for the object of the Act was to construct and not to maintain the harbour. The duty to maintain is a common law duty arising from the invitation to the public to use the harbour. The harbour authority do not warrant the safety of the harbour. It is only where they know or ought to have known of the danger that they are responsible:

Mersey Docks and Harbour Board v. *Gibbs*, 14 L. T. Rep. 677; 2 Mar. Law Cas. O. S. 353 (1866); L. Rep. 1 H. L. 93.

The duty of the wharfinger is laid down in the *Moorcock* (*ubi sup.*). There is no such duty on the harbour authority unless they have directed a ship to a berth. In that case they impliedly represent that the ship can lie there. The duty of a harbour authority is laid down in the case of *Mersey Docks and Harbour Board* v. *Gibbs* (*ubi sup.*). [Bargrave Deane, J.—The 27th section of the Act referred to puts a duty on the trustees to remove obstructions to the use of the harbour. Surely this is one.] The words only refer to making the harbour fit for use; there are no words in the Act placing them under a duty to maintain it. There is no implied warranty by the harbour authority as to the safety of a harbour, but if they invite a vessel to the harbour they may be liable:

Wright v. *Lethbridge*, 63 L. T. Rep. 572; 6 Asp. Mar. Law Cas. 558 (1890).

The fact that there is a danger is not sufficient if the trustees do not invite to a particular spot, as was done in *The Burlington* (72 L. T. Rep. 602; 8 Asp. Mar. Law Cas. 38 (1895). Any duty cast on the harbour authority by their invitation to the public was discharged by them, for the pilots sounded at regular intervals, and the trustees would thus hear of obstructions.

D. Stephens (*Pickford*, K.C. with him) for the defendants, the railway company.—This berth is admittedly under the control of the Shoreham Harbour Trustees. It is suggested that the railway company is under some obligation to the plaintiffs; if so they have fulfilled it. The facts in *The Moorcock* (*ubi sup.*), on which the plaintiffs rely, are very different from the facts in this case. In that case nothing had been done for ten years, and the wharfingers invited someone to come to the berth. In this case there was no contract with the railway company, for the shipbroker ordered the ship to this berth. The railway company had in this case discharged their duty, for they knew soundings were being taken by pilots every month.

Laing, K.C. in reply.—The harbour authority now admits that there was a duty to keep the berth clear. They had both a statutory duty and a common law one. The harbour authority is in the same position as a commercial company:

Mersey Dock and Harbour Board v. *Gibbs* (*ubi sup.*).

The harbour authority had no right to trust to the pilots finding out such an obstruction as this. As regards the railway company, the duty imposed on them is that imposed on the wharfinger in the case of the *Moorcock* (*ubi sup.*). The obstruction in this case is not such as is produced by the action of the tide. The case is distinguishable from that of *The Calliope* (63 L. T. Rep. 781; 6 Asp. Mar. Law Cas. 585; (1891) A. C. 11).

March 31.—Bargrave Deane, J.—This is an action for damage brought by the owners of the French steamship *Bearn* orginally against the harbour trustees of Shoreham Harbour. The defendants in that action denied their responsibility, and put the blame on the London, Brighton, and South Coast Railway Company, because the *Bearn* sustained the damage while lying at the railway company's wharf. Interrogatories were administered to the Shoreham Harbour trustees, and were answered, and then further answers were required and were also given; but, without going into the details of those answers, it is sufficient to say that the general effect of them was "we are not responsible, the railway company are." Thereupon the owners of the steamer brought another action against the London, Brighton, and South Coast Railway Company, claiming damages from them for negligence with regard to the berth in which their ship got damaged, and the railway company took the same line as the harbour authority, like two little boys in the street: "Please, sir, it was not me; it was the other one." The result is that we have now got two actions, consolidated, by the owners of the steamer against both the harbour authority and the railway company. There are one or two points which I shall mention first. There is no doubt, and there has been no dispute, that the *Bearn* was damaged, and that she was damaged at a particular spot; and I do not think, taking the whole course of the evidence, that there is any dispute as to how she became damaged—namely, that there was in this berth what has been described as a hump on which at low tide this vessel rested, with the result that she strained

herself. I do not know the amount, but considerable damage was sustained by her bottom. I may say that there is no suggestion that any blame attaches to the *Bearn* herself or to those in charge of her. First of all, with regard to the harbour authority. They are a body created by an Act of Parliament (56 Geo. 3, c. 81), and this Act has been further enlarged by later statutes, which I need not deal with. By the original Act, which was very much in the same form as other similar Acts of Parliament giving power to harbour authorities, the harbour authority is put in possession of this harbour. They are the owners of it subject to certain liabilities and duties, and certain privileges are conferred on them by Act of Parliament, which enables them to make charges on all vessels that come into the harbour, and additional charges to those vessels if they either load or unload in the harbour. There is no doubt about the limit of their jurisdiction. Their limit extends, for the purpose of this case, up to this wharf—up to where the piles enter the ground, the outside edge of this wharf, the Kingston, or Old Quay Wharf. It is their duty to see that their harbour is kept free from obstructions. It is their duty, I need not go through all the sections of the Act of Parliament, which I have very carefully looked at since the case was heard, to provide that the channel, which includes this berth, is kept free from obstructions, and there is a further duty imposed upon them by reason of their taking tolls to see that the places where those ships go are proper places, fit and safe for those ships.

Now, what do the harbour authorities say with regard to this particular case? They say we have no responsibility with regard to this berth. "We look to the pilots. We have got a by-law which says that the pilots shall take care that the navigation of this place is kept inspected and sounded, and it is their duty to report to us, and we have nothing more to do with it." I confess I am in some difficulty about the position of the pilots. The pilots are not the servants of the harbour authority, they are the servants of the Trinity House, and although there is a by-law which says that these pilots are to take soundings and so on, I am not at all sure that that by-law is one which is of any validity. I do not think that the harbour authority can put upon the servants of the Trinity House a duty which is put on them by Act of Parliament, unless they can show that the Trinity House pilots are their servants, and that they were authorised by them as their servants to take upon themselves these duties. There the Elder Brethren agree with me. They say: "These pilots are our servants, and not the servants of the harbour master or the harbour board, and we protest against their being made the servants of the harbour authority. They have got their own duties to perform, in which they look to us as their masters, and we object to anyone else having any authority over them." That, I think, disposes of one part of the harbour authority's position. They are not entitled to shift on to other persons, who are not their servants, duties which an Act of Parliament imposes upon them.

I must go a little into the history of this matter. On some occasions the question of this berth has been one of dispute between the railway company and the harbour authority, and correspondence has been put in, and also the minutes of the harbour authority, and without taking the whole of the correspondence on each occasion when this matter arose, there are certain documents on each occasion which show the position. The railway company owns two sorts of berths, they own this berth and two others, called outside berths—that is to say, berths in the channel of the river. They have also what are called dock berths, which are inside the line of the wharf, and which are generally dry at low water, and mud and silt accumulates there. The railway company at one time said that those inner dock berths were also subject to the harbour board, but I think eventually it was cleared up in this way, that they both agreed that the inner docks were not subject to the jurisdiction of the harbour authorities, but that the outer docks were. On the 30th Nov. 1877, there is a letter from the harbour board to the railway company which finishes one set of difficulties, and that is a letter from Mr. Myall to Mr. Knight, of the railway company: "You will be pleased to learn that the Shoreham Harbour Works Committee, of which I am chairman, have ordered the berths at the Kingston Wharf to be cleared out and kept clean at the expense of the trust. Can you help us to a few trucks of shingle for the road on each side of the approach to your line at Lancing?" That concluded the correspondence which I have alluded to between the company and the harbour authority with regard to the berth at Kingston Wharf in Shoreham Harbour in the year 1877. Later on, in 1886, there was a further correspondence, and there are two letters, one of the 17th June 1886, from the clerk to the harbour board, Mr. Hardy, to Mr. Knight: "*Re* Kingston Dock Berths.—Your letter of the 31st ult. was laid before the trustees at their meeting on the 15th inst., when I was directed to inform you that the trustees will keep clear the berths abutting on the river; but they do not feel it to be their duty to remove silt from the inside berths." On the 28th June 1886 Mr. Hackett, who was the wharfinger of the railway company at Kingston, writes: "Dock berth" (that is the inside berth.) "The proposal of Mr. Hardy does not in any way alter the case. The berths referred to are those outside, in front of the wharf situated in the channel or bed of the river, the tide flowing and ebbing drives the silt away and keeps them clear. These berths, or rather the ground outside our wharf, belongs to the trustees, and they have always looked after them. We are not asking the trustees to do anything to these berths but to clear the silt and mud out of the dock berths. The trustees ought certainly to give some further explanation for breaking their agreement which they entered into with us in 1877, and considering that since that date, and when the brickmaking business was good, they charged a royalty on the sand taken out of the docks." The end was this, that an agreement was come to that the harbour authority would clear those dock berths, the inner berths, at a price of 6*d.* a ton, and so the matter stood, but the harbour authority repudiated any duty with regard to the inner berths. They agreed to clear them, if necessary, at 6*d.* a ton, while they agreed to keep clear

without cost to the railway company, the outer berths.

The next matter was in 1900, when Mr. Hackett, the wharfinger, wrote to Mr. Catt, the Harbour master as follows: "Nov. 7, 1900.—Old Quay Berth"—that is this very berth—"I beg to inform you that I have repeatedly cautioned your men in charge of loaded hoppers not to put them alongside of this berth. It now appears that a hopper with faulty doors has been left at this berth and a quantity of beach has dropped out, and the pilots inform me that it is in a very bad state, and refuse to put a large steamer, expected every tide, at this berth. This is a very serious matter, and will cause considerable loss to the merchant and the railway company. I must ask you, please, to have this beach removed and the berth levelled without delay." In 1901 there was a complaint that the schooner *Kirkstein* had got damaged at the berth, but apparently nothing came of that. The only reason I use it is that at this time the railway company were complaining that a vessel had been damaged at this berth, and they wrote at once to the harbour authorities to see to it, recognising that they were the proper authorities for that purpose. In 1902 there was the case of the steamer *Balder*, when the same sort of thing happened, the railway company wrote again to the harbour authorities calling attention to complaints that were being made; and then comes this last case, that of the *Bearn*. Looking at the Acts of Parliament, looking at these letters, and at the whole course of the history of the harbour authority in regard to this berth, I think it is perfectly clear that this harbour authority had the duty of seeing that these berths, and this particular berth outside the Old Quay, was kept in a fit condition for vessels using this harbour and berth, and, having the duty to see to that, if by neglect of their duty a vessel got damaged, they are responsible for it. I will refer presently to the *Mersey Docks* case which bears upon this point. The *Bearn* came in on the 22nd Oct. at high water, she took the ground at low water that evening and apparently took the ground at low water again the next morning, and the next morning it was noticed that she had strained, and that evidently she was damaged by some hard substance under her bottom, which had forced up some of her deck, and, as I have said, it was not disputed that this was caused by a hump in the berth. The harbour authority do not seem to have done anything to this berth for the last eighteen months before this date; they rely on the pilots. I do not think that in law is any defence. I think that they cannot be heard to say, "we expect somebody here to do our duty," when those other persons owe them no legal duty or obedience. Therefore on this point I am of opinion that the harbour authority is to blame, basing my decision on the *Mersey Docks* case.

Now about the railway company. The railway company are the owners of the Kingston Wharf, which included this old quay. They, under an Act of Parliament, have power to make charges on all vessels which come in and discharge at that dock. I have pointed out that it is recognised that the harbour authority had charge of this berth at the wharf, and they probably had reason to believe, I take it so for the purpose of this case, that they the harbour authority were responsible for the berth being kept in proper condition. I have omitted one matter which I ought perhaps to have referred to as regards the harbour authority, that is their first by-law. That by-law, which is made pursuant to their Act of Parliament, is this: "The master of any vessel entering the harbour or dock shall properly moor the said vessel under the direction of the harbour master or his assistant, and shall take care while the vessel is so moored that there are at all times a proper buoy and buoy rope to every anchor ordered to be laid out for moorings, and that all booms and boom irons are taken off the yards and that the jib and mizzen booms are rigged in and the yards topped." That is the first by-law made by this harbour authority. There are penalties imposed for the non-obedience to the by-laws. The *Bearn* when she came in was not moored by the harbour master, the harbour master did not take any trouble in the matter, and, as far as I can see, the harbour master in this case had forgotten all about the by-law. He did not seem to make it any part of his duty to look after ships coming into this harbour or to see where they were berthed and whether they were properly berthed or moored, and it seems to me that Shoreham Harbour has been conducted latterly in a very remarkable way, because the authorities charge all these fees and dues, and, as far as I can see, there is no person told off to see that this by-law is carried out, and the harbour master in this particular case did not even know that this particular vessel was coming in and did not know she was in until some time after she had been moored. I should have thought that the proper course would have been that there should have been somebody stationed at this harbour to take charge of vessels coming in and see that they were properly moored at proper berths. This has not been done, and therefore emphasises the judgment I am giving, that I consider the harbour authority responsible in this case for the vessel being properly moored in a safe and proper berth, and that, inasmuch as they took no steps whatever with regard to this berth to see that it was in a proper and safe condition and to have it cleared out, they are responsible for any misfortune that happened to this vessel at this berth. Now, to return to the railway company. As far as I understand, the custom has been allowed to grow up in Shoreham Harbour for the broker to communicate with the pilot, and for the pilot to take the vessel to the berth where the broker wishes the vessel to be taken to. The defendants put in a post-card, which they say is the sort of thing which is the rule, showing how the pilots simply take the authority of the broker as to where to take the ship. On this occasion the pilot was told by the broker to take the ship to this particular wharf, and it was taken to that wharf for this reason, that the cargo was a cargo of flour chiefly, and was consigned to Messrs. Rubie and Adams, who are lessees, from the railway company, of a warehouse on this wharf, and at that warehouse this cargo was to be unloaded and stored. That is what was done, and the railway company received through Messrs. Rubie and Adams, the consignees of the cargo, fees and dues which this vessel had to pay for using their wharf—fees and dues, as I understand, which they have power to levy under their own

private Act of Parliament. That surely imposes a duty upon the railway company if they invite vessels to come to the quay for their purposes. There was, I think, quite apart from the question decided in *The Moorcock* (*ubi sup.*), although that is very much in favour of the view I am taking, an implied warranty to any vessel coming in there that they are to be placed in a proper and safe place. If that is so, it imposes upon the railway company who invite these vessels to come in and discharge at their wharf some duty of seeing that the place where these vessels are coming is a fit and proper place before the vessels come there.

I do not say that they have the same duty as the harbour authority have of always being on the look-out to see whether this dock or berth is perfectly right, but I do think there is a duty imposed on them when they know a ship is coming in, and they invite her to come in, to see that before that ship comes in the berth is in a proper and safe condition. Take this particular case. The harbour authority and the railway company knew of the one important fact in this case, which is that a steamer, the *Worthing Belle*, had been lying in that berth day by day for nearly a month. We have not been told what her tonnage is; she is not a large vessel; she is a paddle steamer, and plies for passengers going pleasure trips between Shoreham, Brighton, Worthing, and various places along that coast, and her home seems to be Shoreham harbour. She coals at this berth, and that is a matter which ought not to be lost sight of so far as both the railway company and the Shoreham harbour authority are concerned. It is common knowledge that when a vessel is coaling lumps of coal do by accident get down into the water. It is also common knowledge—and the Elder Brethren who know this place tell me it is common knowledge—that the bed of the channel at that place is a hard bottom; it is a bottom which if a hard substance gets deposited upon it will not sink, as if it were mud, down to another level, but it will remain an existing projecting lump above the level of the bed of the channel. There is a by-law which says that vessels are not to discharge ashes in this harbour. It is known to both these authorities that the *Worthing Belle* had been lying there day by day from the beginning of this month to the day when this mischief happened, and was lying alongside this quay night after night and coaling there, and therefore there was every reason to take precautions that, first of all, the by-law against discharging ashes had not been broken, and, secondly, that in the coaling operations no damage should be caused by lumps of coal being dropped over; but apparently all that happened in the month of October is this, that without any authority from the harbour master, but simply because they thought it was wise, some of the pilots of Shoreham Harbour on the 3rd Oct. sounded this particular berth, and they say now they reported nothing to the harbour master, or to the harbour authority, but they say that they found that the berth was in a proper condition. On the 23rd Oct. there was a lump in that berth nearly two feet high above the actual bottom of the channel and extending over a number of feet; but more than that, the effect of the tides, obstructed by this lump, had caused a depression which was gradually altering the whole of the shape of this berth, and anybody who knows the effect of a heavy stream or heavy tide meeting an obstruction knows that the result is that behind or below this lump, or obstruction, a hole is sure to be gradually carved out, and that is what happened here. Not only was there this lump, but there was below the lump at the time the matter was investigated a considerable depression in the bed of the channel at this place, which increased the height of the lump, so that the original lump being about eighteen inches or two feet above the natural level, there was to the eastward of it—that is, down below, where the ebb tide would make the hole—this depression, making the lump a good deal higher.

In my view that ought to have been discovered. The harbour authority say: It is no duty of ours. We rely on the pilots. The railway company say: It is no duty of ours. We rely upon the harbour authority. In my view both those contentions are wrong. Neither has to rely upon the other. In one case there is a statutory duty imposed to keep this place safe, and that is a statutory duty imposed upon the harbour authorities, and in the other case the railway company have a duty imposed upon them by reason of the fact that they are allowed to make charges there by inviting vessels for reward to come to their wharf to see that the berth where these vessels are to lie, it being a berth at which vessels have to take the ground at low water, is one fit and proper for a vessel to take the ground on. For these reasons I think both these defendants are to blame. I must say a word as to the cases which have been quoted to me. There is the case of the *Mersey Docks and Harbour Board* v. *Gibbs* (*ubi sup.*). Gibbs was the owner of the ship in that case, and another plaintiff was the owner of the cargo, and the judgment given in the House of Lords grows out of another decision. The suggestion originally was that these authorities, created by Act of Parliament, being public bodies, not in the nature of private commercial concerns making a profit to their own advantage, were not in the same position with regard to the public as commercial undertakings were. That was first of all disposed of by an earlier case of *Mersey Docks and Harbour Board* v. *Cameron* (12 L. T. Rep. 643 (1865); 11 H. L. Cas. 443), where it was held that these authorities were in the position of commercial undertakings and were liable to be rated, and, further, in this particular case of the *Mersey Dock and Harbour Board* v. *Gibbs* (*ubi sup.*) it was decided that they were a public authority, and were not thereby free from responsibility with regard to the public; and in a case, which was a somewhat similar case to this one, it was held that where a public authority, in that case a dock company, had permitted a dock to be silted up with a great accumulation of mud, they were liable for the damage caused thereby. They were liable on two grounds, which were put in a later case in the House of Lords; if you did not know you ought to have known, and you are liable for not having taken the natural course to ascertain whether this dock was in a fit condition; therefore, it was negligence that you did not do that; and if you did know, then you are negligent in allowing the matter to remain as

it was and invite the vessel to use that dock knowing it to be unsafe.

Exactly the same matter applies to this case as far as the harbour authority is concerned; if they did not know they ought to have known; but clearly there was a duty imposed upon them of keeping this berth in proper order, and they do not seem, as far as I can see, to have taken proper steps. Admittedly for some three weeks they had done nothing to this berth, although they knew the *Worthing Belle* had been lying there. If they did know, as is suggested in this case, of course they should have remedied it. That is, as far as I can see, the law as it affects the harbour authority. They are in exactly the same position as any other public authority created by Act of Parliament with very large powers, not only as against individuals who are affected by the harbour, but with regard to the public who use the harbour, of making orders, by-laws, and extracting fees and dues, and the responsibility attaching to them is the same as to a private commercial company. With regard to the railway company, I think that the case of *The Moorcock* (*ubi sup.*) is very much in point, and I am going to read one or two passages from the judgment of Lord Esher in that case. In that case the wharf belonged to the defendants, and the river bed belonged to another person. The action was brought against the wharfingers. Lord Esher, in his judgment, says: "The appellants"—that is, the wharfingers—"can find out the state of the bottom of the river close to the front of their wharf without difficulty. They can sound for the bottom with a pole, or in any way they please, for they are there at every tide, and whether they can see the actual bottom of the river at low water is not material. Supposing at low water there were two feet of water always over the mud, that would make no difference. People who are accustomed to the water do not see the bottom of the water with their eyes; they find out what is there by sounding, and they can feel for the bottom and find out what is there with even more accuracy than if they saw it with their eyes, and when they cannot honestly earn what they are desiring to earn without this, it is implied that they have undertaken to see that the bottom of the river is reasonably fit, or, at all events, that they have taken reasonable care to find out that the bottom of the river is reasonably fit for the purpose for which they agree that their jetty should be used—that is, they should take reasonable care to find out in what condition the bottom is, and then either have it made reasonably fit for the purpose, or inform the persons with whom they have contracted that it is not so." That is the judgment of Lord Esher, which was agreed to by Bowen and Fry, L.JJ., who agree that wherever there is an owner of a wharf who invites vessels, for reward, to come to his wharf, he has an implied duty thrown upon him by reason of that invitation, and because he takes money for the use of his wharf, to see that the berth is in a proper condition. In this particular case it is not the duty of the railway company to keep this berth in proper order; that I agree, but it is their duty to find out before they allow a vessel to come there whether it is or is not in proper order. If it is not in proper order there are two duties imposed upon them—one is to caution the vessel invited to come there either that it is not in proper order, or, if they do not know about it, to caution vessels and give a proper warning which a vessel might take; but beyond that it is their duty if the berth is not in proper order, and has not been properly inspected by the harbour authority, to give notice to the harbour authority at once and say: "You must put it right or satisfy yourselves that it is right, because we have a vessel coming in." This is a duty which the law imposes upon the railway company in this particular case, and in my view both these defendants are to blame, and there will be judgment against both defendants with costs.

On the 10th April 1905 both the Shoreham Harbour Trustees and the London, Brighton, and South Coast Railway gave notice of appeal against the judgment of Mr. Justice Bargrave Deane, and the appeal came on for hearing in the Court of Appeal on the 14th, 15th, and 16th Dec.

Carver, K.C. and *D. C. Leck* for the appellants, the Shoreham Harbour Trustees.

Pickford, K.C. and *D. Stephens* for the appellants, the London, Brighton, and South Coast Railway Company Limited.

Laing, K.C. and *Dr. Stubbs* for the respondents, the owners of the *Bearn*.

The arguments of counsel appear sufficiently in the judgment, and were substantially those in the court below.

Dec. 16.—Collins, M.R.—These are appeals from a decision of Mr. Justice Bargrave Deane, who has held that the two defendants, the Shoreham Harbour Trustees and the London, Brighton, and South Coast Railway Company, are respectively liable to the owners of the *Bearn* for the damage sustained by that vessel, owing to the defective condition of a berth in Shoreham Harbour, where she took the ground. The vessel is French, and was carrying grain, and was brought by a pilot under the direction of the brokers to Kingston Wharf, which is in Shoreham Harbour, and belongs to the defendant railway company. The harbour is under the control of the first defendants, the Shoreham Harbour Trustees, and they are under obligations as to the maintenance of that harbour and as to sounding and the removal of obstructions, and have a number of other duties imposed upon them in the broadest possible terms by their Acts of Parliament. I will refer to the terms of those duties presently. The vessel sustained serious damage owing, as is now admitted, to the defective condition of the berth where she lay, and the action was brought charging each of these defendants with responsibility for that damage by reason of negligence on their part. Of course the plaintiffs in this case, as in every other, have to make out their case, and counsel for the harbour trustees contends that the plaintiffs have not discharged the burden which is on them. That is rather a difficult point, in the particular circumstances of this case, for the trustees to make good. When one comes to look at what their own case is with respect to their duties in this matter they in terms deny, by their statement of defence, that there is any duty on them at all. They plead as follows: "There was and is no duty on the defendants to make and maintain the said berth in a

safe and proper condition, nor are they or their servants required to ascertain if the said berth was in a proper condition, and, if unsafe or dangerous, to warn the plaintiffs of the fact. The said berth and adjoining wharf are the property of and maintained by the London, Brighton, and South Coast Railway for their own use and profit and for the purposes of loading and discharging vessels, and the plaintiffs' steamship *Bearn* came to the said berth at the invitation and request of the said company for the purpose of discharging her cargo at their wharf. If the bottom of the said berth was not in a fit and safe condition (which is not admitted), the same was due to the negligence of the said company or their servants, for whose acts or negligence the defendants are not responsible." In their answer to interrogatories, they take up the same position in a still more emphatic manner. They say, after asserting that the duty is on the defendant railway company, "there is no duty on the part of the defendants to vessels coming to or lying at the said wharf to provide a safe berth or ascertain its condition, or give warning if the berth is unsafe. The defendants relied, as they reasonably might, on the proper discharge by the said railway company of their duty to vessels using the said wharf." That is the attitude of the defendants who are now asserting that there is no *primâ facie* evidence of negligence against them. They begin with an absolute disclaimer of all duty, and they do that in the face of the admitted fact that this berth was in a defective condition. It seems to me that the plaintiffs have gone a long way, under those circumstances, to throw the onus upon the defendants, who certainly have a primary duty, to put it at the lowest, to take reasonable and ordinary care that this berth, among other places in the harbour, shall be safe.

It seems to me that the plaintiffs have discharged the onus upon them, and thrown back upon the defendants, who dispute any obligation, the burden of showing they were not negligent, which is a somewhat difficult position for them to extricate themselves from. I said I would refer to the terms of the duty imposed upon these defendants. They are to be found in 56 Geo. 3, c. 81, s. 27, and that Act has been supplemented by later Acts. That section begins by defining the limits of the harbour, which clearly embrace the *locus in quo* in this case, and proceeds: "Shall and are hereby empowered, authorised, and required to deepen, cleanse, scour, and enlarge the channel of the said harbour within the limits aforesaid, and to make a new pier or piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance to the said harbour, which they are hereby required to open, and from time to time to amend or improve as they may deem expedient." Then follow words empowering them to provide dredgers and hoppers for removing the shoals within the limits aforesaid, and to construct lighthouses, &c., and to make and effect such other works within the aforesaid limits "as shall be necessary for improving and preserving the navigation of the said harbour, and the use thereof by the persons trading thereto, and for that purpose to dig, take up, remove, and carry away any rocks, stones, soil, sand, gravel, rubbish, or other gross matter which shall obstruct, prejudice, or hinder the navigation of the said harbour and the improvement thereof"; and also to remove any "obstructions or impediments whatsoever which may in any way hinder or prevent the navigation of the said harbour" for the purpose of "preserving the navigation and use of the said harbour within the limits aforesaid and rendering the said harbour safe and commodious."

Therefore there can be no doubt whatever that the first defence set up by the defendants, the Shoreham Harbour Trustees, that they were under no duty hopelessly breaks down. So, in my opinion, does the second position taken up by them, which is a corollary of the first, that the obligation was not on them because it was on the railway company. It was not on the railway company. There was nothing to derogate from the absolute duty primarily imposed upon the harbour trustees, and if they rely on someone else performing their duty they take the risk of whether those others perform the duty or not. There is a *prima facie* case, not merely of negligence, but of an absolute declining by them to accept the obligation placed on them. The question then arises, Is the mischief that happened traceable to the negligence of the defendants? As far as the trustees are concerned we start with a complete declining of any duty at all, followed by corresponding conduct—namely, a total abstention on their part from taking any steps whatever to assure themselves that the berth in question is in a safe condition. They took no steps whatever to remove any obstructions by dredging or to see whether obstruction were there or not. They do not pretend they did either. They simply hoped and expected that other people not in their service—namely, the pilots—might do their duty so efficiently as to make it of no consequence whether the harbour authority did their duty or not. Now, the question being whether the harbour authority took reasonable care, and the fact being they took no care themselves, and did not examine to see whether other people had done the harbour authorities' work, they cannot say they have taken reasonable care. If the trustees are going to rely upon the acts of other persons as being an exercise of reasonable care on their own part they are certainly under an obligation to show by the clearest possible evidence that those persons have so acted as to make it unnecessary for the trustees to do anything more to keep the berth safe. When we come to examine the evidence, however, we find that they have done practically nothing. If their harbour master, who in respect of this part of the harbour does not seem to take a very high view of his duties, assumed that the pilots were doing something in the way of dredging, he did not know what it was and he did not inquire what it was, and the records in the pilots' book which he could have seen did not show him that this position had been dredged at such short intervals as to show with reasonable certainty that the place had been dredged at all, for the pilots' book shows no operation at this place between Feb. 1903 and the 3rd Oct., three weeks before this accident happened. That is the position of the defendants the harbour trustees, those facts show what they have done in this matter.

Now comes what is really the main defence of the trustees. It is in fact the only shadow of

defence which, it seems to me, they have raised in their argument. They say, agreed that there was an obstruction which did damage to the *Bearn* on the 22nd Oct., the particular mischief which caused the injury may have arisen on the 21st Oct., and if it arose on that date we had no reasonable opportunity of examining the berth and removing the obstruction before the *Bearn* arrived. Judging from their previous conduct, the chance of their availing themselves of that opportunity was remote. They say, we assume, that the accident that led to the formation of this hump in the berth and rendered it unsafe happened immediately before the *Bearn* arrived at the berth on the 22nd Oct., and there was in the circumstances under which she took the berth no interval between the departure of the *Worthing Belle*, the vessel which occupied the berth before the *Bearn*, and which is supposed to have created this hump, and the arrival of the *Bearn* in which we could reasonably have examined the berth, and consequently there is no case of negligence causing this damage made out against us. To begin with, that entirely rests on the assumption that the mischief which made the berth unsafe was caused by the very last act of the *Worthing Belle* before she left the berth, it is assumed that it was done on the night of the 21st Oct. That assumption is founded on the theory that the *Worthing Belle*, being about to lay up for the winter, availed herself of this opportunity to disgorge all the accumulated rubbish in the stokehold, and that she did so in order to make a final clearance before laying up. When we come to look at the facts, we find that the theory will not fit them, because her season was not in fact closed on that night. She performed her ordinary trip for three days afterwards, so the reason suggested to account for her disgorging that rubbish in the morning or night before the damage to the *Bearn* happened entirely breaks down. What is the evidence with regard to when it did happen? The defendants themselves took no steps to find out when it happened. They cannot assist us, because they took up a position of absolute negation; but the evidence detailed by the learned judge in the court below, upon which he based his conclusions, points much more in favour of a gradual accumulation of the rubbish. Bits of old iron and so forth from the stokehold gradually deposited led to an accumulation of sand, and ultimately a considerable hump formed on the berth which made it unsafe. The learned judge has not drawn the inference that it was done in one day, which is the only inference which will suit the defendants' theory. The defendants also say that they cannot be expected to examine this berth every time a vessel leaves it, and, as this heap must have been made very shortly before the *Bearn* arrived, it is unreasonable to expect them to have examined it before the *Bearn* came in. That may be, but it is not an argument which lies in the mouth of persons who have never examined it at all. If the trustees had examined it once a week or so it might have been contended that they were entitled to rely on that examination, and that it was unreasonable to expect them to make another examination in less than a week or so. That argument, however, is not open to those who have done nothing at all, and who, being under an obligation to take reasonable care, have never taken any care at all. The point can only be made by assuming that this accumulation was only created just before the *Worthing Belle* left the berth for the *Bearn* to come to it. I do not know that the point in fact is good even on that hypothesis, because it would have been possible before the *Bearn* came in to make the moving of the *Worthing Belle* an opportunity to find out what the condition of the berth was. For the reasons I have given I think the evidence does not point to this hump being made on the night or day before this accident. I should draw the inference that there was a gradual accumulation, which may have been going on for days. Putting it as high as possible in favour of the trustees, in my opinion there were ample grounds for the learned judge to come to the conclusion that by ordinary care on the part of the trustees, whose absolute duty it was to use reasonable care in respect of this berth, the state of the berth could have been discovered before the *Bearn* came into it. Therefore I am clearly of opinion that there is no answer on the part of the Shoreham Harbour Trustees to the liability imposed upon them by the judgment of the learned judge in the court below.

Now comes the case of the railway company, as to whom no doubt something more may be said, but I have come to the conclusion that they also are liable. There is no doubt an obligation on the harbour authorities, but without a doubt there is also an obligation upon the railway company. They are not the persons responsible for the condition of the berths in the harbour, but they are the owners of a wharf with a berth for steamers in front of it, and it is absolutely essential to have a berth, although they are not charged with the duty of keeping it in order, and are aware that other people are responsible. What is their duty? It seems to me that it cannot be put better than it was put by Bowen, L.J. in the case of *The Moorcock* (*ubi sup.*). In his judgment he says this: "No one can tell whether reasonable safety has been secured except themselves, and I think if they let out their jetty for use they at all events imply that they have taken reasonable care to see whether the berth, which is an essential part of the use of the jetty, is safe, and if not safe, and if they have not taken such reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." These defendants, the railway company, are inviting persons to come to their wharf for the purpose of gain to themselves, and the persons who come are not mere licensees, but by coming give the owners of the wharf an opportunity of taking a sum of money from the consignees, for the use of their wharf. They cannot earn that sum of money without the assistance of the vessel being given by coming to the wharf. Therefore, it is not the case of a licensee coming, but it is the case of a person coming at the invitation of the wharfinger, and the duty of the wharfinger is therefore higher than that of a mere licensor. Taking the measure of duty as laid down in the passage of the judgment of Bowen, L.J., there is an implication on the part of the wharfinger that he has taken reasonable care to ascertain that the condition of the berth is safe, and if it turns out to be unsafe he cannot shelter himself by saying he did not

know it. He could defend himself by showing that he did take reasonable care to find out, but, knowing how much care he has taken, if that care is not reasonable and he has no reasonable ground for thinking the berth safe, he is fixed with the obligation of telling the person coming to the berth that he does not know what the condition of it is. You cannot put his liability lower than that.

Taking that standard, have the railway company taken reasonable care to satisfy themselves as to the condition of the berth? It is clear that they did not warn the ship that they did not know what the condition of the berth was, and therefore they are liable unless they can show that they have taken reasonable care to satisfy themselves that it was in a safe condition. They simply rely upon the chance of other people, the pilots, doing all that is necessary with regard to the safe condition of this berth. They do not really know what those other people have done, because they do not take any steps to inform themselves what they have done, except that they have seen those other people moving about in a way to suggest sounding. Whether they found anything there the railway company did not take any steps to inquire. That I think is not an unfair interpretation of the evidence. This one passage in the evidence of the company's wharfinger sums up a series of questions. "You leave it to chance whether the pilots tell you whether there is anything the matter with the berth or not?—Certainly. And for yourself and your company you take no steps at all?—Not unless I know there is something there." In further cross-examination he admits that he has taken no steps to find out whether there is anything the matter. As to the sounding by the pilots on the 3rd Oct. which the trustees relied on, the wharfinger was in a state of ignorance. He had seen the pilots there some time or other, but whether it was on the 3rd Oct. or not he did not know. It seems to me that he is not in a position to show that he took reasonable care to ascertain the condition of the berth as to which he has a duty to perform.

Now we fall back to the pilots, who have to bear the whole weight of the obligation to keep the berth in a proper condition. To begin with, it does not appear to me that there is any duty imposed upon the pilots in this particular matter. They are under an obligation to the Trinity House, which lays down the standard of duty for them, and they are required to take soundings once a week; but, as has been pointed out, the pilots are not sounding for the special purpose of seeing whether the berths are in a safe condition for vessels to lie in, but they are sounding, primarily, for the purposes of their own concerns —namely, the safety of the means of access or egress in and out of the harbour. That might embrace the examination of the particular *locus in quo*, but the object would be not to take the contour of the berth, but simply to see whether the navigable passage was obstructed. Therefore, the main basis on which these defendants erect their structure of reasonable care seems to me to break down. The obligation of the pilots did not embrace an examination of the particular contour of the bed of the berth. If they have examined it it is an accident. In this particular case the harbour trustees and the railway company have never taken any steps to ascertain what the pilots did know about the berth and had done, and the pilots themselves, instead of examining, even for their own purposes, once a week, as the Trinity Masters have appointed, do not pretend to have examined it more than once a fortnight or once in three weeks. I very much doubt, on the evidence whether they have examined it as often as that. The result is that these two defendants are both resting their defence upon speculation of what they chose to assume those other people had probably done. They seem to shelter themselves, for their own failure to do what they were bound to do themselves, behind the hope that other people have done something, which even if done would not relieve the defendants from the responsibility for not doing what they ought to have done. I think on both points of the case the learned judge was right. I do not stop to criticise in detail one or two sentences of the judgment which the ingenuity of counsel singled out for comment. There may be some ground for saying that one passage, taken by itself, put the wharfinger's obligation higher than what I have called the low-water mark laid down in *The Moorcock* (*ubi sup.*), but when it is examined with the context I do not think the learned judge departed from the authority most relied on in this case—namely, *The Moorcock* (*ubi sup.*). Even if he did, there was, in my opinion, on the principles laid down in that case abundant ground for establishing this liability. Therefore the appeals must be dismissed.

ROMER, L.J.—I have come to the same conclusion. It is clear that the damage to the *Bearn* was caused by the existence of the hump, referred to in the evidence, in the berth where the ship lay, and that that hump ought not to have been where it was. I will first take the case of the harbour authorities. They had a general duty imposed upon them by statute to keep clear the channel of the harbour, including, of course, that part of it where this berth was, and they are liable for damage caused by their negligence in the performance of their duty. The first question one has to consider is, did they neglect their duty with reference to this berth? I think, undoubtedly they did. If you look at their defence, and their answers to interrogatories, it is clear that the position they have taken up and acted upon for a considerable time is this, that they were not bound to clear this berth at all, but that the railway company were under some obligation to do so, or had some duty cast upon them with reference to this berth which relieved the harbour trustees of all liability in regard to this berth. If you look at the evidence of the harbour master and the harbour clerk, it is clear that they took up that position and have acted upon it for some considerable time, and this although, if you look at the instructions to the harbour master, they clearly point out to him that it was part of his duty, from time to time, to take proper soundings in the channel and berths. It is clear, I suppose as a consequence of that attitude, that they never did for some years dredge this particular berth. Among other excuses for their conduct is this: that this particular berth was so well scoured by the tide that they were entitled to assume that it practically needed no supervision; that it could

not have become unsafe, except for some unexpected accident which they were not bound to provide against, or bound to inquire as to its existence. In my opinion that position cannot be maintained. If you look at the evidence given by a former harbour master, who was in that position from 1873 to 1885, he thought that this berth was a berth liable to be silted up, and one with regard to which he thought it was his duty to take frequent soundings. When that evidence was given it so impressed counsel for the harbour trustees that they had the wharfinger recalled, to try and extract from him that whatever might have been the condition of affairs from 1873 to 1885 matters had improved since then. The evidence of the wharfinger, however, was to the effect that, so far from improving, matters were worse; so, if frequent soundings and inspections were necessary in the time of the old harbour master, they were still more necessary at the present time.

Then we come to another suggestion of theirs which has been urged before us on their behalf. It is said that the harbour trustees were free from any obligation to take active steps by their own servants in reference to this matter, because of the directions that had been given to the pilots. It is clear that the pilots were not the servants of the harbour trustees, and owed no duty to them, nor did the harbour trustees supervise them or see that they sounded sufficiently often or properly, not with regard to navigation, but with reference to ascertaining the condition of the bottom of the berth with reference to the question of vessels coming to the berth and having to lie in at low water. If the rule is turned to with regard to these pilots, you will find that such obligations as were cast upon the pilots with regard to soundings were with reference to pilots acting as such to any vessel entering or leaving or within the harbour or dock, and for the purpose of enabling the pilot "to qualify himself efficiently to navigate such vessel in and out of the harbour or dock." It is to be remembered that pilots bring in and take out their vessels at high tide, and such steps as they have to take or would take as to soundings are for the purpose of their own information, and are with reference to the question of navigation and not directly with reference to the question of the safety of a berth on which a vessel is to lie. It further appears on the evidence that the harbour trustees contented themselves with doing this: they waited until some one reported that the berth required attention or dredging, and then they dredged. That was the beginning and end of the way they performed their duty with regard to their obligations; and it is to be noticed, on the evidence before us, that some three weeks elapsed without the pilots taking any soundings whatever, and it cannot be said that no soundings could have been effected in that period of three weeks before the accident, for the *Worthing Belle* was the only vessel in this berth during that period, and was out of it practically every day on excursions. There was ample time for the discharge of this duty to sound this berth. The harbour trustees then say that, although there may have been negligence on their part, that it did not cause the harm that occurred to this ship. They say on the evidence you ought to hold that this lump was caused by some single discharge by the *Worthing Belle*, or in so short a time that no diligence on their part would have enabled them to discover it. It is a difficult thing for the harbour trustees to make out that they, who wholly neglected their duty in this respect, would not have discovered this lump, if they had done their duty, in time to have prevented any vessel from coming in after the *Worthing Belle* went out. It appears to me that if the harbour trustees had performed their duty the existence of this hump would have been detected, and ought to have been detected, before the *Bearn* came in. On the evidence I do not think it is established that this heap was the result of some sudden discharge of rubbish by the *Worthing Belle* when she left the berth shortly before the *Bearn* came in. What are the suggestions made by the harbour trustees why we should assume it was a sudden discharge? They say, first, that probably the weather was so rough during this period of the last few days the *Worthing Belle* was there that she could not get rid of her refuse at sea. Unfortunately for their contention we have a record of the weather, and it was not rough during that time. Then they suggest that the *Worthing Belle* was going out just before the *Bearn* came in for the purpose of lying up, and therefore made a final clearance, probably, of its stokehold. That, again, is not the fact. On the evidence I do not come to the conclusion that the hump was a matter of sudden creation; and even assuming that the hump was not there to a noticeable extent when the pilots last sounded, in my opinion the defendants had no right to let nearly three weeks elapse without taking any soundings of this berth. On the evidence as to the hump, I come to the conclusion that this injury to the *Bearn* would not have been caused had the defendants, the harbour trustees, not been negligent in the performance of their duties. Therefore I think the appeal fails.

Next as to the railway company. Their duty apart from any special circumstances may be gathered from what Bowen, L.J. said in *The Moorcock* (*ubi sup.*), where he said in a similar case: "They, at all events, imply that they have taken reasonable care to see whether the berth, which is an essential part of the use of their jetty, is safe, and if it is not safe, and if they have not taken reasonable care, it is their duty to warn persons with whom they have dealings that they have not done so." In fact, the railway company did no acts and took no active steps whatever to discharge that duty. Their case is that they were entitled to be passive by reason of two matters. The first of those matters is that the harbour trustees had the duty cast upon them to which I have previously referred, and the next is what the pilots did or have to do. With regard to the first point—namely, the duty of the harbour trustees, in my opinion the fact that the harbour trustees had also a duty cast upon them did not free the railway as the owners of the wharf, from their duty, or justify a perfectly passive attitude on their part. I think any vessel entering this harbour and berth was entitled to rely upon both the duty cast upon the harbour trustees and the duty cast upon the railway company as owners of the wharfs, inviting ships to come there for remuneration. It is not suggested in this case that the railway company had observed, in fact, or had taken steps to observe, that the harbour trustees were, in truth, properly attending to their duty in regard to this

berth; and we know, in fact, that the harbour trustees had not done their duty. It is a curious commentary on this contention on the part of the railway company to see the two contentions of the defendants together. The harbour trustees say: We did not do our duty, because we relied upon the owners of the wharf, the railway company, doing theirs. The railway company, the owners of the wharf, say: We are excused from doing our duty because we rely upon the harbour trustees doing theirs. In my opinion, the vessel was entitled to require both defendants to do their respective duties, and therefore the railway company cannot escape from their duty by seeking to shift the sole responsibility on to the shoulders of the harbour trustees.

Next, with regard to the matter of the pilots. I have already dealt with what their position is, what they were instructed to do, and for what purpose; and it appears to me that the railway company were not entitled to regard the duties and acts of the pilots as justifying the railway company in simply standing by and doing nothing. Moreover, the railway company, in fact, took no steps to see whether the pilots sounded sufficiently often, or whether they did their work in a way which would be satisfactory and sufficient, not for the purpose of navigation by the pilots, but for the purpose of seeing whether the berth was a safe one for vessels coming into it to lie on it. The true position taken up by the railway company is that which is shown by the evidence of the wharfinger read by the Master of the Rolls. On these facts I hold that the railway company did not discharge their duty, and that but for their neglect this accident would not have happened. Consequently their appeal also fails.

Sir Gorell Barnes.—This case has been so fully dealt with in the judgments which have just been delivered that I only desire to state quite shortly how the matter presents itself to me. The vessel, the *Bearn*, came into Shoreham Harbour to discharge her cargo in circumstances which are stated in the evidence and which are not disputed. She was there seriously damaged by the improper state of the berth in which she was placed. A claim is then made by the plaintiffs against each of these defendants for the negligence which led to that damage. Each defendant, by his defence, practically denies that any duty whatever was imposed upon him with regard to this ship in relation to the berth in which she was berthed; but when this case was argued before the court it was quite clear, and in fact counsel conceded, that there was a duty upon each of these defendants in relation to this berth and to this particular ship in the circumstances in which she came into the port. What the extent of the duty in each case was I do not think it necessary to recapitulate, because the duty in each case has been fully pointed out in the judgments which have already been delivered, and I agree with the statement of the duty cast upon each defendant in relation to the case indicated in those judgments. Having, then, the duty established in each case, the next question is whether there was any breach of the duty imposed upon each defendant, and I think it is clear from the position this case assumes, after the evidence has been fully considered, that the duty was in each case broken and not properly discharged, because neither defendant is able to show that he did anything whatever in connection with the discharge of the duty imposed upon him. The substantial defence in each case is this: We, ourselves, did nothing, but we sufficiently performed our duties by leaving this matter connected with this berth to the pilots of the port. Upon that there is one point upon which I think it is desirable I should refer. It is to be found in the learned judge's judgment. Dealing with it he says: "And there the Elder Brethren agree with me. They say: 'These pilots are our servants, and not the servants of the harbour master or harbour board, and we protest against them being made the servants of the harbour authorities. They have got their own duties to perform in which they look to us as their masters, and we object to any one else having any authority over them.'" I do not desire that anything I say should in any way minimise the duties cast upon pilots by instructions from the Trinity House, or which may possibly be put upon them by the by-laws of the defendants; but it is perfectly clear, when their position is considered, that their duty is a duty to themselves and the ship which employs them, and is really put upon them with the object of enabling them, as the by-law says, efficiently to navigate a vessel or vessels in and out of the harbour or dock. They are not duties placed upon them for the purpose of enabling them to discharge the duties of the harbour trustees or railway company; and the mere fact that the pilots do from time to time make an examination to qualify themselves to perform their own special duties appears to me not in any way to relieve the two defendants in this case of the duties placed upon them by law. Then, having established both the duty and the breach of it, the only remaining question is whether the damage followed from the breaches of duty on the part of the defendants. Here we have a dangerous berth and damage which undoubtedly followed from the vessel being placed in it, and the only question, then, seems to be whether the evidence was sufficient to show that had the defendants discharged their duties the state of the berth might have been discovered and the damage prevented. I really do not desire to add anything to what has already been said by the learned judges, because they have analysed the evidence upon that point, but it seems to me, stated broadly, there was ample evidence upon which the learned judge was entitled to act in finding that the damage was a consequence of the breach of duty on the part of each of the defendants in this case. Therefore I agree that both appeals fail.

Solicitors for the appellants, the Shoreham Harbour Trustees, *W. A. Crump* and *Son*.

Solicitors for the appellants, the London, Brighton, and South Coast Railway Company, *Rose* and *Co.*

Solicitors for the respondents, the owners of the *Bearn*, *Stokes* and *Stokes*.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Monday, Dec. 18, 1905.

(Before Lord ALVERSTONE, C.J., LAWRANCE and RIDLEY, JJ.)

SIBERY (app.) *v.* CONNELLY (resp.). (*a*)

Seaman—Wages—Maintenance—Carrying coal—Contraband of war—Non-disclosure that cargo for belligerent port — Refusal by seaman to proceed.

The respondent (a seaman) signed articles at Glasgow for a voyage on the British steamship G. *of "not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude commencing at Glasgow, proceeding thence to Hong Kong, via the Bristol Channel, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master."*

The vessel proceeded to Cardiff, where she was loaded with a cargo of coal. At the time the articles were signed a state of war existed between Russia and Japan, and both Powers had declared coal to be contraband of war.

The appellant, the master of the vessel, knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the respondent and the rest of the crew. Sasebo is within the limits prescribed in the articles.

Upon arrival at Hong Kong the respondent discovered the port of destination, and refused to proceed in the vessel. He remained at Hong Kong until she returned, when he rejoined her and returned to Cardiff.

Held, that the respondent was entitled to wages and maintenance while he was waiting at Hong Kong.

CASE stated on a complaint preferred by the respondent under the Merchant Shipping Act 1894, s. 164, and the Employers and Workmen Act 1875 against the appellant, in respect of a claim for 15*l.* 8*s.* 1d. balance of wages due to him as fireman on board the steamship *Gogovale*.

Upon the hearing the following facts were proved or admitted:—

On the 8th April 1904 the respondent (a seaman) signed articles at Glasgow for a voyage on the British steamship *Gogovale* of not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude commencing at Glasgow, proceeding thence to Hong Kong, *viâ* the Bristol Channel, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as might be required by the master.

The appellant was master of the vessel.

The wages stipulated were 4*l.* a month.

The vessel proceeded to Cardiff, where she was loaded with a cargo of coal.

At the time the articles were signed a state of war existed between Russia and Japan, and both Powers had declared coal to be contraband of war, as appeared by the *London Gazette* for the 22nd March 1904.

The appellant knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the respondent and the rest of the crew.

Sasebo is within the limits prescribed in the articles.

The vessel proceeded with her cargo from Cardiff to Hong Kong, and on the arrival of the vessel at Hong Kong on the 20th July the crew (including the respondent) discovered that the port of destination of the cargo was Sasebo. They thereupon refused to proceed in the vessel, inasmuch as she was carrying contraband of war to the port of a belligerent.

An alteration in the agreement with the respondent and other members of the crew was then made in accordance with sect. 122 of the Merchant Shipping Act 1894, these members of the crew (including the respondent) being left at Hong Kong by mutual consent until the ship returned from Japan, where they refused to proceed, alleging she carried contraband of war (coals), their wages in meantime to run on until they rejoined the ship again.

The appellant informed the crew that the dispute would be settled by the authorities at the final port of discharge.

The vessel proceeded to Sasebo with a Chinese crew.

The respondent and other members of the crew named in the agreement remained at Hong Kong until the return of the vessel on the 17th Aug., when (after the discharge of the Chinese crew) they rejoined the vessel on the original articles of agreement.

The voyage terminated at Cardiff on the 4th March 1905.

The appellant disputed the respondent's right to the amount of the wages for one month (4*l.*) and expenses incurred (2*l.* 4*s.*) whilst the respondent was waiting at Hong Kong for the return of the vessel from Sasebo.

On the part of the appellant it was contended that the voyage was not illegal, and that, as Sasebo was within the limits prescribed in the articles, the respondent was bound to proceed there. That it was incumbent upon the respondent to prove that the cargo was contraband of war, as coal was not of itself contraband, but only became so under certain circumstances. That he had failed to discharge the burden of proof, inasmuch as there was no evidence that the cargo was destined for the use of a belligerent Power, or that Sasebo was a blockaded port, or a port of naval equipment, or a base of naval operations. That the respondent was not justified in his refusal to proceed in the vessel from Hong Kong to Sasebo, and, having refused, he was not entitled to recover the amount claimed.

On the part of the respondent it was contended that the cargo was contraband of war, and that the respondent, on discovering the real destination of the vessel and the increased risk to which he would be exposed, was justified in refusing to serve, and was entitled to recover wages and damages in respect of the time he remained at Hong Kong awaiting her return;

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

and that the respondent was never discharged from the articles, but remained at Hong Kong for the convenience of the appellant, and was entitled to recover under the agreement entered into between the parties at Hong Kong.

Having regard to the facts that when the respondent signed the agreement he had no knowledge which would lead him to anticipate any greater perils than the ordinary perils of the sea; that the appellant knew when the vessel was loading at Cardiff that his cargo was destined for Sasebo, the port of a belligerent, and knew that by an imperial order of Russia coal was an absolute contraband; that the respondent did not know the destination of the cargo until the arrival of the vessel at Hong Kong; and that to proceed from Hong Kong to Sasebo with a cargo declared by a hostile belligerent to be absolute contraband obviously exposed the vessel to risk of hostile capture just as much as a cargo of arms or ammunition even if consigned to a private individual, the magistrate was of opinion that the risk which the appellant knew and did not disclose to the respondent placed the voyage outside the terms of the contract into which the parties had entered, and the omission of the appellant to disclose such material information constituted a breach of contract which justified the respondent's refusal to proceed from Hong Kong to Sasebo: (*O'Neil* v. *Armstrong*, 73 L. T. Rep. 178; 8 Asp. Mar. Cas. 63; (1895) 2 Q. B. 70, 418; *Burton* v. *Pinkerton*, 2 Mar. Law Cas. O. S. 494, 547 (1867); 16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340).

The magistrate was also of opinion that the appellant's breach of contract entitled the respondent to treat such breach as an end of the engagement within sect. 134 of the Merchant Shipping Act 1894, and to the wages therein prescribed (*Re Great Eastern Steamship Company*, 5 Asp. Mar. Law Cas. 511 (1885); 53 L. T. Rep. 594); but the appellant and respondent as hereinbefore stated mutually agreed that the engagement should not be terminated. This agreement contained no waiver by the respondent of his right to wages and maintenance during the month he remained at Hong Kong, and the agreement was acted upon and the engagement was not determined until the respondent was discharged at Cardiff on the 4th March 1905. Therefore the magistrate was of the opinion that at his discharge the respondent was entitled to the wages that accrued and maintenance stipulated for in the articles during the whole period that the articles were in force—from the 8th April 1904 to the 4th March 1905—and he therefore gave judgment for the respondent.

J. A. Hamilton, K.C., *John Sankey*, and *Herman Cohen* for the appellant.—The following cases were referred to:

Ex parte Chavasse; Re Grazebrook, 2 Mar. Law Cas. O. S. 197 (1865); 12 L. T. Rep. 249; 34 L. J. 17, Bank.;

Burton v. *Pinkerton* (*ubi sup.*);

O'Neil v. *Armstrong*, 8 Asp. Mar. Law Cas. 8, 63 (1895); 73 L. T. Rep. 178; (1895) 2 Q. B. 70, 418;

Austin Friars Steam Shipping Company v. *Strack*, 10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315;

Lloyd v. *Sheen*, 10 Asp. Mar. Law Cas. 75 (1905); 93 L. T. Rep. 174.

A. Neilson, for the respondent, was not called upon.

Lord ALVERSTONE, C.J.—In my view, notwithstanding the ingenious distinction that has been drawn by Mr. Hamilton, this case is, if anything, a stronger case either than the *Austin Friars Steam Shipping Company Limited* v. *Strack* (*ubi sup.*) or *Lloyd* v. *Sheen* (*ubi sup.*), but I will take his argument and deal very briefly with the points Mr. Hamilton has raised. In this case the seaman shipped at Glasgow, and the ship loaded at Cardiff with a cargo of coals for Hong Kong. At that time it is admitted that the captain knew the coals were not for Hong Kong, but were for a Japanese port, and that fact was concealed from the seaman. It seems to me that on first principles, if the voyage to Sasebo would involve the seaman in risks which he was not willing to undertake, he could not be compelled to go on at the same rate with the same articles when that fact had been kept back. But it is ingeniously contended that, whereas he might be liable to certain other risks if he went to this port—risks which might involve him in inconvenience—this was a duty he was bound to perform under his articles. I do not accede to the proposition. The case does not admit of argument. The coals were going to a Japanese port. Both belligerents, the Russians and the Japanese, had declared them to be contraband of war. Therefore the Japanese could not have objected to the coals being seized by a Russian cruiser, and the vessel containing them might have been taken as a prize because they were carrying Japanese coal, and, if that had happened to the ship, the seaman would have been liable to have been carried to some Russian port and either stranded there, or possibly have had to wait there a considerable time, and be sent home some other way. It seems to me quite impossible to contend that that consequence, which was a risk within the international lawful right of a belligerent, was one which the seaman could have put upon him simply on the ground that if he had contracted to go to this port under other circumstances it would possibly have involved some such risk. I think, therefore, when it became known to the crew at Hong Kong that they were to be subjected to this risk, they could not be compelled to go on at the same rate of wages or under the same articles. What was done was this: The voyage was not put an end to by summary proceedings under the Merchant Shipping Act. A sensible arrangement was made that the voyage should be resumed when the ship came back to Hong Kong. Meanwhile, a Chinese crew was engaged for the voyage to Sasebo, and when the ship came back these men were taken on board again. In my judgment there was no full disclosure of the actual destination of the ship, and there is no ground for contending that the man acted unlawfully in refusing to do his duty. I think, therefore, that the magistrate was right, and that the appeal must be dismissed.

LAWRANCE, J.—I agree.

RIDLEY, J.—I agree. I do not think the case is distinguishable from the former one.

Appeal dismissed.

Solicitors: *Botterell* and *Roche*, for *Vaughan* and *Roche*, Cardiff; *Robinson* and *Stannard*, for *H. Morgan Rees*, Cardiff.

Thursday, Dec. 21, 1905.

(Before BRAY, J.)

MONTGOMERY *v.* HUTCHINS. (*a*)

Carriage of goods—Conversion—Property passing —Measure of damages.

H., the defendant, was a shipowner, and L. loaded a quantity of barley on his ship and received bills of lading. The ship was unable to load the whole of the barley, and L. agreed to indemnify the holder of the bills of lading. One bill of lading came into the hands of B., who handed it to M., and M. advanced 5057*l.* 16*s.* 4*d.* *upon it. M. received less than the quantity of barley covered by his bill of lading, as the holders of the other bills took delivery first from the agents of H., and he called upon B. to make good the deficiency, which he did by making certain payments and delivering some barley. M. sold the barley, and rendered B. an account showing a balance remaining due on the transaction from B. of* 12*l.* 1*s.* 9*d.* *Afterwards B. failed, owing M. some* 1651*l.*

Held, that, as between M. and H., the shipowner, M. had the full property in the barley covered by his bill of lading, and that H. had been guilty of a conversion, but that M. could only recover 12*l.* 1*s.* 9*d.* *as damages, and not the value of the converted barley.*

ACTION brought by the plaintiff as indorsee of a bill of lading against the defendant as shipowner for short delivery.

The facts as proved were as follows:—

In Sept. 1903 the steamship *Kate B. Jones* was chartered to carry a cargo of barley not exceeding 2750 tons from a port on the Danube to a port in the United Kingdom. Under this charter Mr. W. Lowenton loaded a quantity of barley, about 1500 tons (French), at Killia, on the 29th Sept., and the captain on that day signed and gave to Mr. Lowenton a bill of lading for that quantity, to be delivered to his order at the port of discharge in the usual form. The ship was unable to load more than 1500 tons at Killia owing to her draught, so she proceeded down the river to Sulina, followed by two lighters containing about 1150 tons, the remainder of the intended cargo. She was unable to load the whole of this, and from 200 to 300 tons was left in one of the lighters. The captain, nevertheless, gave Mr. Lowenton a second bill of lading, dated the 30th Sept., for 1150 tons, though he had 200 or 300 tons less than that quantity on board. On this bill of lading there was a note in the margin as follows: "Part of a parcel shipped in bulk without separation, and any shortage on delivery of such parcel to be borne proportionally by each receiver." After the ship left Sulina Mr Lowenton, at the request of the ship's agent, took possession of what was left in the lighters, and agreed with the ship's agent that he (Lowenton) would indemnify the holders of the bills of lading. Both the bills of lading came, it did not appear how, under the control of Messrs. Bennett, grain merchants, of Liverpool. They sold the 1150 tons represented, or supposed to be represented, by the bill of lading of the 30th Sept. to four persons—357 to Ridley, 357 to Ouston, 250 to Stonehouse Schultz, and 167 to Ostoby and Sons—and on the 28th Oct. they applied to the plaintiff, a broker in Liverpool, to make them an advance on the other bill of lading, dated the 29th Sept., for the purpose of taking up the documents relating to that bill of lading from a bank where they were lying. The plaintiff agreed to make the advance on the terms that he should have absolute power to sell. He accordingly advanced 5057*l.* 16*s.* 4*d.*, and the bill of lading was handed to his bankers. It bore the indorsement at this time of W. Lowenton.

The steamship *Kate B. Jones* arrived at Hull on the 29th Oct., and the plaintiff instructed the North-Eastern Railway Company to present the bill of lading and take delivery of the parcel.

The railway company accordingly presented the bill of lading to the defendant's agents, Cockerline and Co., at Hull, on the 31st Oct., and the following indorsement was made on this bill of lading by Messrs. Cockerline: "This bill of lading presented by the North-Eastern Railway Company (Hull Docks) as agents for Mr. James Montgomery, Liverpool; A. E. Ballan per H.R.W. pp. W. H. Cockerline and Co; E. J. Vause, agent, Hull. 31.10.03." The other bill of lading was also presented by the above-mentioned purchasers to Messrs. Cockerline.

It was not known to Messrs. Cockerline that there was not sufficient barley on board to fulfil both bills of lading, and, as the holders of the bill of lading dated the 30th Sept. took delivery first, they got the full amount, and the plaintiff got delivery of less than his 1500 tons. He alleged that there was a deficiency of about 1300 quarters, and he claimed in this action to be paid the full value of this. In his statement of claim he claimed alternatively for damages for breach of contract contained in the bill of lading or for damages for conversion.

At the trial the learned judge left to the jury the question, "Was there a new contract between the plaintiff and the defendant whereby the plaintiff became bound to the defendant and the defendant to the plaintiff, to carry out the obligations contained in the bill of lading?" The jury answered in the affirmative, and, on this finding, the learned judge held that the plaintiff was entitled to damages, and, as it did not appear that there was any further question in dispute, it was agreed that he should assess them.

The following additional facts were proved:—

On hearing of the short delivery, the plaintiff called upon Messrs Bennett to make good the deficiency, and Messrs. Bennett handed to him on the 12th Nov. a sum of 300*l.*, on the 14th Nov. some barley ex *Eugenie* which realised 737*l.* 19*s.* 8*d.*, and on the 16th and 30th Nov. two cheques of 150*l.* each.

In December the plaintiff sold the barley ex *Kate B. Jones*, and rendered to Messrs. Bennett on the 30th Jan. an account showing a balance remaining due on the transaction by them to him of 12*l.* 1*s.* 9*d.*, after crediting them with the sums mentioned.

In March Messrs. Bennett failed and an account was put in showing a series of transactions between Bennett and the plaintiff resulting in an indebtedness by Bennett to the plaintiff of 1651*l.* 0*s.* 10*d.* This account apparently showed that the balance on the 30th Jan. was in favour of Bennett, but the plaintiff held bills of theirs which matured later, and were dishonoured.

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law

The plaintiff made his first claim against the defendant on the 25th March, after Messrs. Bennett's failure.

The only further fact which appeared in evidence was that Lowenton, after agreeing to give the indemnity, informed Messrs. Bennett that he had done so, and that, when he settled with them, he paid or allowed in account the proper amount for the shortage. He therefore only received from Messrs. Bennett the proceeds of sale of the quantity actually shipped and delivered. It did not appear when this settlement took place, but no doubt it was before Messrs. Bennett's failure.

Horridge, K.C. and *Keogh* for the plaintiff.

A. G. Steel, K.C. and *Bateson* for the defendant.

BRAY, J. [Having stated the facts set out above, continued:]—On these facts the plaintiff contended that the defendant had converted the barley short delivered by giving delivery of it to the holders of the other bill of lading, and that the plaintiff was entitled as damages to recover the market value of the barley—a sum of over 1000*l.*; and, in the alternative, that, if the property in the barley had not passed to him, the defendants had broken their contract to deliver, and the plaintiff was entitled to the same full value as damages. The defendant denied that there had been a conversion, contending that the property had not passed to the plaintiff, and, further, that, whether there was a conversion or breach of contract, the only damages recoverable are the 12*l.* 1*s.* 9*d.* In my opinion, the dictum of Lord Selborne in the case of *Sewell* v. *Burdick* (5 Asp. Mar. Law Cas. 79, 298, 376 (1884); 52 L. T. Rep. 445; 10 App. Cas. 86) correctly states the law. It is to this effect: "The authorities decided upon the statute itself appear to me to be most easily reconciled with its apparent objects, and with each other, by a view which, if hardly consistent with expressions to be found in some other cases, nevertheless seems to me to have a real and substantial foundation in reason and good sense—namely, that the indorsee, by way of security, though not having 'the property' passed to him absolutely and for all purposes by the mere indorsement and delivery of the bill of lading while the goods are at sea, has a title by means of which he is enabled to take the position of full proprietor upon himself, with its corresponding burdens if he thinks fit, and that he actually does so as between himself and the shipowner if and when he claims and takes delivery of the goods by virtue of that title."

I think, therefore, that, as between the plaintiff and the defendant, the plaintiff had the full property and the defendant was guilty of a conversion. Now, *primâ facie*, the damages for conversion are the full value. The conversion took place between the 31st Oct. and the 3rd Nov., and, as at that time the plaintiff was not fully secured, he would, in my opinion, if nothing else had happened, have been entitled to the full value. He had advanced 5057*l.* The barley actually delivered had realised 3731*l.*, leaving a deficiency of 1326*l.* and interest, caused partly by the short delivery of barley and partly by the fact that he had advanced more than the full value of the barley. The value of the barley short delivered was about 1000*l.*, and the plaintiff would, if he had paid this 1000*l.*, have been entitled to put the whole of it into his pocket and keep it. During November, however, and before any action was brought, he was paid by Bennetts in cash or barley 1337*l.* In order to see the effect of this it is necessary to examine the position at the time. It is clear that Lowenton was bound under his indemnity to repay the defendant any sum which they would have to pay the plaintiff for short delivery, and, as Bennetts had sold and received the proceeds of the whole 1150 tons, they, as between themselves and Lowenton, were the persons to make good the shortage to the defendant, and it was their duty to provide the money which was required to satisfy the plaintiff's claim. It is not clear that the plaintiff knew this, but it was on Bennetts and not on the shipowner that he made his claim, and he made it on the ground of the short delivery. I think I have a right to infer, and I do infer, that Bennetts complied with his demand, because they knew perfectly well that it was they who were to provide the shortage. They did not go through the form of handing the money to the defendant in order that he might pass it on to the plaintiff, because the plaintiff was then claiming against them, and not against the defendant. In my opinion, the defendant is entitled to avail himself of that payment, and to say that to that extent the plaintiff has been paid his claim. I think it is quite immaterial whether the plaintiff knew the real position or not. It is plain that on the 30th Jan. he considered that, except as to the 12*l.*, he had been fully paid all that he was entitled to, and it was only after Messrs. Bennett's failure, owing him on later transactions a large sum, that he made a claim against the defendant. Before action brought he had received the full value of the barley except 19*l.* 1*s.* 9*d.* I have considered whether he was not fully paid, but I do not think he was. The money he received from Bennetts was partly to satisfy the deficiency that existed apart from the short delivery. As to this he was unsecured, and I think he was entitled even at the trial to appropriate the payment he received first to the unsecured balance. This would leave him 12*l.* 1*s.* 9*d.* still unpaid in respect of his claim for short delivery.

The case was also put by the defendant in another way. He said—and I think truly—that if the plaintiff recovered, say, 1000*l.*, as damages for short delivery, he would have to account to Bennetts for all except the 12*l.* He would really hold it as trustee for Bennetts, and Bennetts would be bound to pay it, as soon as they received it from the plaintiff, either direct to the defendant under the indemnity, or to Lowenton, who would have to hand it to the defendant, so that all except the 12*l.* would at once find its way back to the defendant. It may be said, therefore, that the defendant was not really a stranger, and was entitled to set up the rights of Bennetts, because they were really his own rights. This raises a more difficult question, and, though I think a great deal is to be said in favour of this argument, I prefer to base my judgment on the first ground. In one way or the other it seems to me to be in accordance with common sense to say that the plaintiff's real interest in these damages is 12*l.* 1*s.* 9*d.* only, and that the defendant ought not to be obliged to pay the full value and then recover it back. It would seem absurd that it

should be necessary for the defendant to have to sue Lowenton, and Lowenton sue Bennetts, and Bennetts sue the plaintiff (if he retained the whole damages) to set matters right. I have not lost sight of the plaintiff's contention that, though he would have to account to Bennetts for all but the 12*l.*, he would not have had to pay it, as he would have a good set-off for money due in respect of other transactions; but he had no general lien on all moneys coming to his hands, and he treated, and rightly treated, this transaction as standing by itself, and I do not think the mere fact that he happened at a later period than the 30th Jan. to have a set-off against Bennetts can alter the position as between himself and the defendant. The result is that I assess the damages at 12*l.* 1*s.* 9*d.*, and the plaintiff is entitled to judgment for that amount.

Judgment accordingly.

Solicitors: *Simpson, North,* and *Co.*, Liverpool; *Holman, Birdwood,* and *Co.*

Nov. 1 *and* 2, 1905.

(Before CHANNELL, J.)

SMAILES AND SON *v.* HANS DESSEN AND CO. (*a*)

Charter-party—Demurrage—Customary discharge—Discharging subject to lien—When to be exercised—Barry Port—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 493, 494.

Where a charter-party provides for discharge "in the manner and at the rate customary at each port during the customary working hours, and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day," the shipowner cannot land the goods subject to lien under the provisions of the Merchant Shipping Act 1894 *until it is evident that the ship cannot be discharged within the time allowed.*

ACTION tried in the Commercial Court by Channell, J.

The plaintiffs claimed 160*l.* for eight days' demurrage of the steamship *Mutual*; a declaration that they were entitled to a lien on the cargo shipped on board the said vessel, and upon 160*l.* deposited in respect of the said demurrage, and payment of that sum so deposited; and for damages for breach of contract contained in a bill of lading.

The claim for damages for breach of contract referred to delay in berthing and unloading the vessel on her arrival, but, for the purposes of this report, is immaterial and is not dealt with.

Messrs. Capper, Alexander, and Co., who were the charterers of the steamship *Mutual*, sold a quantity of pit props to one Schaumann, the shipper.

The defendants were taken to be the indorsees of the bill of lading, to whom the property passed.

The plaintiffs were the owners of the steamship *Mutual*.

The bill of lading, which was dated Jakobstad, the 15th June 1904, was as follows:

Shipped in good order and condition by W. Schaumann . . . upon the . . . steamship *Mutual* . . . now lying in the port of Jakobstad and bound for Barry, 765 cubic fathoms pit props . . . to be delivered in the like good order and condition at . . . Barry (all and every the dangers and accidents of the seas and navigation of whatsoever nature or kind excepted) unto order, he or they paying freight for the said goods, and all other conditions according to the charter-party. London, the 4th May 1904. . . . Quantity and quality unknown.

By the charter-party, dated London, the 4th May 1904, made between Messrs. Smailes and Son, the owners of the steamship *Mutual*, and Capper, Alexander, and Co., agents for merchants, it was agreed:

That the said steamship . . . shall . . . proceed to Jakobstad . . . and there load . . . a full and complete cargo of usual short pit props . . . and being so loaded shall therewith proceed to one of the destinations hereinafter mentioned at charterers' option . . . and there deliver the same, at such wharf or in such dock or berth as ordered always afloat; freight to be paid as follows: Cardiff, Barry, Newport, or Port Talbot, one port only, at 25*s.* all per cubic fathom delivered, as ascertained in the customary manner at place of discharge, in full of all port charges and pilotages as customary. . . . The cargo to be supplied to and received from the steamer in the manner and at the rate customary at each port during customary working hours, and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at twenty pounds per day. . . . Owners to have an absolute lien on cargo for all freight, dead freight, and demurrage in consideration whereof charterers' liability to cease on shipment of cargo. . . .

The vessel loaded her cargo and proceeded to Barry, arriving on the 26th June 1904.

At Barry the discharge is done by the Barry Railway Company.

Certain disputes having arisen, orders for berthing the vessel were not given till the 4th July.

On the 5th July the discharge was commenced by the Barry Railway Company, part of the freight having been advanced.

The balance of freight not being paid, the discharge was stopped on the 7th July.

The defendants were appointed agents for the shipper on the 8th July.

Notice was given on the 13th July to the Barry Railway Company to discharge under lien for freight and demurrage by virtue of the provisions of the Merchant Shipping Act 1894.

The discharge recommenced on the 15th July, and was finished on the 21st July.

Under ordinary circumstances the discharge should have been finished on the 13th July. The freight was paid.

The defendants deposited 160*l.* with the Barry Railway Company to prevent the sale of the goods, under the Merchant Shipping Act 1894, s. 497, after the expiration of ninety days after discharge subject to lien, and received the goods.

Scrutton, K.C., *Adair Roche,* and *H. L. Tebbs* for the plaintiffs.—But for the default of the defendants the cargo could have been discharged within the proper time. Between the 5th July and the 7th July the plaintiffs were landing the cargo in the customary manner through the Barry Railway Company, as agents for the shipper. The cargo could not have been landed under the provisions of the Merchant Shipping

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

Act 1894, subject to lien, between the 7th July and the 13th July. The cargo was landed at the earliest time under that Act. The plaintiffs were only obliged to land, under the provisions of the Merchant Shipping Act, within a reasonable time, or when it became clear that the difficulties and disputes would not disappear, and not so soon as those difficulties and disputes arose. The conduct both of the master and of the plaintiffs had been reasonable:

Hick v. *Raymond*, 7 Asp. Mar. Law Cas. 233; 68 L. T. Rep. 175; (1893) App. Cas. 22.

Robson, K.C. and *Bailhache* for the defendants.—The defendants are not liable, even assuming that they were in default, if the delay was caused by the state of Barry Port. The obligation to take discharge did not commence till the 5th July. The plaintiffs, instead of stopping the discharge on 7th July and using the vessel as a warehouse, should have exercised the powers of the Merchant Shipping Act, and landed the cargo subject to lien. The damages would thus have been lessened:

Modesto, Pineiro, and Co. v. *Du and Co.*, 9 Asp. Mar. Law Cas. 297; 86 L. T. Rep. 560; 7 Com. Cas. 105;

Moller v. *Young and others*, 1855, 24 L. J. 217, Q. B.

Lyle Shipping Company v. *Corporation of Cardiff and Churchill and Sim* (third parties), 9 Asp. Mar. Law Cas. 23, 128; 81 L. T. Rep. 642; (1900) 2 K. B. 638.

The Merchant Shipping Act 1894, s. 493 (1), provides:

Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or having made entry thereof, to land the same or take delivery thereof and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the goods at the following times: (*a*) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed. (*b*) If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship.

Sect. 494 provides:

If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner, to an amount mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him.

CHANNELL, J.—The principal point in this case is whether the shipowner could, and, if he could, whether he ought to have acted on the provisions of the Merchant Shipping Act, and have got his lien preserved for him by the dock company instead of turning his ship into a warehouse, as the expression is, and keeping the goods there in exercise of his lien. Now as to that, assuming that he could have done it, I think the cases are quite clear that it is a question whether or not it was reasonable for him to do it. The ordinary principles of the law in reference to damages apply—that a man may not increase damages by unreasonable conduct. He is bound to act not only in his own interests, but in the interests of the party who would have to pay the damages, and keep down the damages, so far as it is reasonable and proper, by acting reasonably in the matter. That is the general rule with reference to damages, and this seems to be only one illustration of it. The provisions in the Merchant Shipping Act 1894 have been enacted for the very purposes of preventing large damage arising from the detention of a vessel, which often is an extremely expensive matter, and to give a means of securing the shipowner for his freight, or anything else that he has lien for, without incurring the large expenses of detaining the vessel. That is the very object with which the enactment was made. Therefore if he can do it, and if there is nothing to make it unreasonable for him to do it, I think, as Bigham, J. and Kennedy, J. seem to have said in two of the above cited cases, it would really be pretty clear that under those circumstances he would not be able to recover the large amount which the demurrage would probably reach. It is a case in which it would go in mitigation of damages. I do not think, when you examine it, there is anything in the case of *Moller* v. *Young* (*ubi sup.*) to the contrary of that.

But one has two propositions to consider: First of all, whether the shipowner was in a position to exercise his rights under the Merchant Shipping Act 1894, and, secondly, if he was, whether it was reasonable or unreasonable to do so; and the general circumstances show whether his conduct was reasonable or unreasonable. Now I certainly thought, at first, on reading sect. 494 of the Merchant Shipping Act, that "if at the time when any goods are landed" would cover the time when any goods have been landed, and that in this case as the landing in point of fact was going on, that it might have been continued, and that instead of stopping the discharge the shipowner might have given to the dock company a notice that as to any goods landed after that date they were to be held by them subject to his lien. These words cannot refer to goods which have been landed, when you consider it, because, as Mr. Scrutton points out, as to this the lien would have gone when the possession was parted with, and so they must mean when goods are being landed the shipowner gives a notice in writing that the goods which are to be landed subsequent to that are to be subject to the lien. I cannot therefore say that these goods were at the time of the stoppage of the discharge "landed" within the meaning of sect. 494, and the only question is as to the right to land them. Sect. 493 gives the shipowner power to land them practically when there has been a default by the owner of the goods, and for the purpose of seeing whether he has a right to land them you have to see whether there has been a default. Now in this case when you come to look at it there was not at the time when the discharge was stopped any default by the owner of the goods. He was

still within the time. He was not taking them at the moment, because he was not paying the freight, the payment of which, concurrently with the delivery of the goods, was a thing entitling him to have them delivered, so that unless he had his money for the freight he was not getting the goods, but he had still a certain number of days within which to pay and take them, because the contract gives the customary time plus so many days of demurrage.

On the whole, therefore, although at first I certainly thought the contrary, I think that the position was that the shipowner could not insist upon landing the goods subject to a lien for freight until the time had arrived when it was clear that the owner of the goods could not take them within his demurrage days. I do not think it is to the end of the demurrage days, but a time so near to the end of the demurrage days that it would be impracticable to take delivery of them within the time. Then he would be in a position to say the owner is in default under sect. 493, and then he would be able to exercise the power of sect. 493, and exercising the power contained in sect. 493 he could then give the notice that the goods were to remain on his lien for freight. That being so, at this particular time the thing could not have been done except possibly by the consent of the parties. I am not dealing with what could have been done by consent, but what there was an absolute right to do. If I had to decide it on the ground of reasonableness I think there is a good deal to be said about it. I am quite clear that if they had been landed there would have been ninety days before the shipowner could have insisted upon the goods being sold, because that is what it is. I am not at all sure whether that would of itself have made the thing unreasonable. The ninety days are given by the statute because the case contemplated is where there is some real difficulty about the ownership of the goods, where a consignee cannot be found, and there is nobody there, and it is necessary, of course, to give a considerable time before the goods are sold in order to clear up the dispute which is supposed to exist. I do not feel quite sure that that in itself is enough; on the other hand, there is something in the argument that when, as in the present case, the shipowner has reason to think that if he stands firm and says, "Now, I am going to stand upon my lien, and there will be demurrage to my ship, you had better pay," he has reason to think the thing is so near being settled that it is likely to be settled to-morrow, which I think was the present case or getting near enough to it. I think one would be inclined, on the whole, to find, and I think a jury most likely would find, that his conduct was reasonable. However, I think in this case my decision is based not so much on a finding of fact that his conduct was reasonable. I do not find it to be unreasonable, but I am not quite clear about that point. I think when you come to look at the thing the real truth is that he was not in a position to do it. The plaintiffs are entitled to judgment; to a declaration under (i.), (ii.), (iii.) of the claim that they are entitled to a lien for 160*l.* demurrage, and judgment for that amount.

Solicitors for the plaintiffs, *Botterell* and *Roche*

Solicitors for the defendants, *Trinder, Capron,* and *Co.*

Friday, Feb. 16, 1906.

(Before Bigham, J.)

South British Fire and Marine Insurance Company of New Zealand *v.* De Costa and others. (*a*)

Marine insurance—Reinsurance "1000*l. excess of* 500*l.*"—*Payment by insurer of* 298*l. on loss of barge-load—F.P.A. clause—*"*Each craft to be deemed a separate insurance.*"

The plaintiffs, who had insured a cargo of wheat for 1914*l., reinsured part of their risk with the defendants. The reinsurance policy was for* "1000*l. excess of* 500*l.*," *and contained the following clauses:* "*Including all risks of craft and (or) raft and (or) of any special lighterage, each craft, raft, or lighter to be deemed a separate insurance*"; "*warranted free from particular average unless the ship or craft or cargo be stranded, sunk. . . .*"

A barge carrying wheat to the vessel sank, and the plaintiffs in respect of that loss paid their proportion, 298*l. The plaintiffs sued the defendants for the latter's proportion* (70*l.* 4*s.* 4*d.*) *of the reinsured amount of* 1000*l. excess of* 500*l.*

Held, that the words "*each craft . . . to be deemed a separate insurance*" *were put in solely with reference to a particular average claim, and had no reference to the circumstances of this case; that the excess for which the defendants were liable ought to be calculated on the value of the plaintiffs' whole interest at risk, and not on the plaintiffs' interest in the particular craft only; and that the defendants were liable for their proportion of the loss.*

Action tried in the Commercial Court by Bigham, J., sitting without a jury.

The plaintiff's claim was on a policy of reinsurance to recover the sum of 70*l.* 4*s.* 4*d.*, being the defendants' proportion of the amount subscribed by them.

On the 5th June 1905 an insurance was proposed to the plaintiffs on wheat to be carried from Ghenitschesk, in the Black Sea, to the United Kingdom in the steamship *Whinfield.* As the value of the wheat was not then known, a provisional slip for 2000*l.* was effected, the actual value to be ascertained later. The plaintiffs reinsured part of their risk—viz., 500*l.*—but for the purposes of this report that policy need not be further considered.

The plaintiffs reinsured with the defendants part of their risk by an open slip for "1000*l.* excess of 500*l.*: F.P.A. . . . Quay and craft risks."

The value of the wheat was subsequently ascertained to be 1914*l.*, and accordingly a policy of insurance, dated the 3rd July 1905, was effected by Messrs. Capel Cure and Co., as agents for the owners, with the plaintiffs for 1914*l.*,

Lost or not lost, at and from Ghenitschesk to Barrow-in-Furness, including risk of craft to and from the ship. Upon any kind of goods . . . of and in the good ship or vessel called the *Whinfield* s. . . . The said ship, &c., goods and merchandises . . . are and shall be rated and valued at 1914*l.* on . . . wheat, including 200*l.* freight advances, subject to clauses as attached.

. . . And it is . . . agreed that corn . . . and seed shall be and are warranted free from average,

(*a*) Reported by Trevor Turton, Esq., Barrister-at-Law.

unless general, or the ship or craft be stranded, sunk, or burnt; and that sugar . . . and that all other goods, also the ship and freight, shall be and are warranted free from average under three pounds per centum, unless general, or the ship or craft be stranded, sunk, or burnt.

The attached clauses contained (*inter alia*) the following:

Including all risks of craft and (or) raft and (or) of any special lighterage (each craft, raft, package, or lighter to be deemed a separate insurance). . . .

Warranted free from particular average under three per cent., unless the ship or craft or cargo be stranded, sunk. . . .

On the 25th July 1905 a policy of reinsurance was effected by the plaintiffs with the defendants in accordance with the slip.

The policy was as follows:

1000*l.* excess of 500*l.* . . . lost or not lost, at and from Ghenitschesk to any port and (or) ports, place or places in the United Kingdom and (or) on the continent of Europe as per original policy or policies. Warehouse to warehouse. Being a reinsurance of the South British Insurance Company. Upon any kind of goods . . . of and in the good ship . . . *Whinfield* s. . . . The said ship, &c., goods and merchandises, &c. . . . are and shall be valued at 1000*l.* on grain and (or) cargo and (or) advances. Valued as per original policy or policies. Warranted F.P.A., &c., as per clause attached. . . . N.B. Corn . . . and seed are warranted free from average, unless general, or the ship be stranded; sugar . . . ; and all other goods, also the ship and freight, are warranted free from average under three pounds per cent., unless general, or the ship be stranded, sunk, or burnt. . . .

Attached to the policy, amongst others, were the following clauses:

Including all risks of craft and (or) raft and (or) of any special lighterage (each craft, raft, or lighter to be deemed a separate insurance). . . .

Warranted free from particular average unless the ship or craft or cargo be stranded, sunk. . . .

On the 10th July 1905 it was discovered that a barge carrying to the ship wheat to the value of about 3000*l.* had sunk.

The plaintiffs, in respect of that loss, paid, under their policy of 1914*l.*, their share, amounting to 298*l.* Their interest in the said barge-load was about 400*l.*

The plaintiffs thereupon called upon the defendants to pay their proportion—viz., 70*l.* 4*s.* 4*d.*—of the reinsured amount of 1000*l.* excess of 500*l.*

Mackinnon (*Hamilton*, K.C. with him) for the plaintiffs.—The plaintiffs were interested to the extent of 1914*l.* in the whole cargo, which is in excess of 500*l.*, and the defendants are liable in excess of 500*l.* up to 1000*l.* The words "1000*l.* excess of 500*l.*" mean that, whatever the difference is between 500*l.* and the amount the policy is closed at (provided it is within 1000*l.*), the reinsurers will reinsure the insurers to that amount, or to the reinsurers' proportion of that amount. The phrase defines the interest—that is to say, the reinsurers are not to be liable unless the insurers are interested in excess of 500*l.* The clause "each craft to be deemed a separate insurance" was inserted in the policy, in view of the particular average warranty, for the purpose of enabling the assured to recover for a total loss of one barge-load as a total loss of a thing separately insured.

Scrutton, K.C. and *Maurice Hill* for the defendants.—The policy contained the clause "including all risks of craft and (or) raft and (or) any special lighterage, each craft, raft, or lighter to be deemed a separate insurance." By the terms of the policy no risk attached under the defendants' policy unless the plaintiffs were interested to an amount exceeding 500*l.*, and, inasmuch as each craft was to be deemed a separate insurance, no risk attached under the defendants' policy in regard to any craft-load unless the plaintiffs were interested in respect to that craft-load to an amount exceeding 500*l.* The plaintiffs' interest in the particular barge-load was only about 400*l.* There was, therefore, in respect of the barge which was lost no excess of 500*l.*, and therefore no liability attached to the defendants.

Bigham, J.—It is a little difficult for me to state the facts in this case, but I have very little doubt as to the conclusion which I ought to arrive at. It appears that on the 5th June 1905 Mr. Capel Cure proposed to the plaintiffs an insurance of 2000*l.* on wheat to be carried from some place in the Black Sea to England in a steamer called the *Whinfield*, and the risk, as I understand, was from warehouse to warehouse, the cargo coming to the United Kingdom. It was not known at that time what the value of the cargo would be, but the proportion that the plaintiffs were to underwrite was estimated at 2000*l.* The actual sum that they were to be at risk for was to be ascertained later on. On the 13th June the plaintiffs desired to reinsure part of their risk, and they went to some brokers named Matthews, Wrightson, and Co., and they reinsured what is called "1000*l.* excess of 500*l.*" Now, the question that I have had some trouble about was as to what that exactly meant, but I think I now understand what it does mean. It means this, that if on the original policy it should turn out that the plaintiffs were interested to an amount over 500*l.* then for that excess up to 1000*l.* the reinsurers, the clients of Messrs. Matthews, Wrightson, and Co., should relieve the plaintiffs. The next thing that happened was that the owners of the cargo ascertained the value of the whole cargo, and the proportion in respect of which the plaintiffs were to make themselves responsible was ascertained to be 1914*l.*, being less by 83*l.* than the provisional amount which had been inserted in the original policy. That policy was issued on the 3rd July, and the policy was then drawn up with those words inserted in it. On the 10th July, or thereabouts, shortly after this policy was issued, it was discovered that a barge going to the ship with about 3000*l.* worth of wheat on board it had sunk, and it seems to be agreed—I think rightly—that the loss sustained by the cargo owners by the loss of that barge was a loss falling upon the plaintiffs amongst others, and the plaintiffs have in fact paid their share of that loss, amounting, as I understand, to 298*l.* As soon as this loss was ascertained the plaintiffs came upon the defendants, the reinsurers, and asked them to pay the proportion which they had undertaken to be responsible for—namely, the excess up to 1000*l.* beyond 500*l.* The defendants refused to pay, and as I understand they refused to pay because of a clause in their policy. They refused to pay because of a clause attached to their policy which is headed "Special F.P.A. Clause," and which is in these

words: "Including all risks of craft and (or) raft, and (or) of any special lighterage (each craft, raft, or lighter to be deemed a separate insurance)." It is said by the defendants that the amount which the plaintiffs had at risk on this particular barge did not amount to 500*l.*; that is to say, their proportion which they would have to pay having regard to the other policies which were in existence on the whole of the cargo did not amount to 500*l.* in this barge; and therefore, say the defendants, inasmuch as each craft, raft, or lighter is to be deemed a separate insurance, we are not liable; there is no excess beyond 500*l.* Now, of course, that depends upon whether these words which I have just read, being the first words upon this so-called F.P.A. clause, applied at all to the circumstances of this case. It is well known that in insurance policies like charter-parties and other documents used in shipping business there are to be found all sorts of provisions which may or may not be applicable to the particular contract which is being made, and it is to be remembered that this was a contract of reinsurance — a contract primarily meant to indemnify the man who is already at risk against that risk. That is the primary object of this contract. And one must look to see whether these words which are relied upon by the defendants to excuse them from paying under their policy really do relieve them from their liability. Now, I have always had a view about the meaning of these words gathered from a very long experience—a view which I find is confirmed by the plaintiffs' evidence and by the evidence given to me by Mr. Capel Cure. These words, in my opinion, are put in with reference to, and solely with reference to, a particular average claim, and they have this, and only this, meaning, that if a craft is lost containing part of the whole insured interest that craft shall, although it only contains part of the whole, be treated as if it were a separate insurance, so that, although it is only part, yet it shall be paid for as if it were the whole. That is the object of this clause. There is very often another object; that is to say, to apply the clause in cases where there may be a loss in a barge or craft which is not anything like 3 per cent. of the whole, but which is considerably in excess of 3 per cent. of what is in the barge. The clause applies in those cases, and gives to the assured a right to ask the underwriter, notwithstanding the clause as to paying nothing under 3 per cent., to pay, and, in my opinion, this clause is inserted with reference to those considerations, and to those considerations alone, and ought not to be read, and would not be read, in ordinary business by underwriters or by merchants as in any way affecting this contract of reinsurance — this promise by the defendants to stand in with the plaintiffs and to indemnify them in respect of the risks which the plaintiffs have undertaken. I am satisfied that the defendants are liable. There must be judgment for the plaintiffs for the amount claimed.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 17 *and* 18, 1906.

(Before Bargrave Deane, J., assisted by two of the Elder Brethren.)

THE BREMEN. (*a*)

Salvage — Award — Apportionment — Navigation and engineer officers' ratings—Separate representation of some members of crew—Costs.

The tank steamship L. *fell in with the disabled twin-screw steamship* B. *in the North Atlantic and towed her into Halifax, a distance of about* 280 *miles. The* B.*'s boat was employed in passing the hawsers and making the vessels fast. No member of the crew of the* L. *performed any special service.*

On the 1*st Dec.* 1905 *the solicitors acting for the owners of the* L., *without any direct authority from the crew, who numbered thirty-six, issued a writ on behalf of the owners, master, and crew of the* L., *claiming salvage for services rendered to the* B., *her cargo and freight, and on the* 12*th Dec.* 1905 *delivered a statement of claim on behalf of the owners, master, and crew of the* L., *to which on the* 27*th Dec. the owners of the* B. *delivered a defence.*

On the 18*th Dec. twelve of the crew of the* L.— *four able seamen and eight firemen—gave notice to the defendants' solicitors of a change of solicitors, and on the* 5*th Jan.* 1906 *a further statement of claim was delivered on behalf of the twelve, and on the* 10*th Jan. the owners of the* B. *delivered a defence to that claim.*

On the hearing of the salvage suits the court awarded salvage, and the owners, master, and twenty-four of the crew were represented by two counsel, and the remaining twelve of the crew were also separately represented by two counsel. Counsel for the owners, master, and twenty-four of the crew, when asking for an apportionment, stated that if the usual practice was followed of apportioning the salvage among the crew according to their rating, the effect would be that the engineer officers would receive more than the navigating officers, who probably had harder work in consequence of the salvage than the engineer officers.

Held, that, as the navigating officers had not taken any extraordinary part in the salvage service, they were not entitled to an increased share in the award, which would be apportioned amongst the crew according to their rating.(*b*)

Counsel for the twelve seamen asked for costs. The twelve seamen had recovered salvage, and were entitled to be represented; they had not authorised the owners' solicitors to appear for them. The owners of the B. *opposed the application on the ground that, as the interests of the twelve seamen were exactly similar to that of the rest of the crew, who were represented by counsel for the owners, there was no necessity for separate representation. The owners of the* B. *asked that the twelve seamen should be*

(*a*) Reported by L. F. C. Darby, Esq. Barrister-at-Law.

(*b*) Since this decision the court has in several cases apportioned salvage to the executive officers upon the basis of their pay being assumed to be equivalent to the pay of the engineer officers.—[Ed.]

ordered to pay the extra costs to which they had been put by reason of the separate representation.

Held, that the twelve seamen were not entitled to costs, but that they were not to be condemned in costs.

ACTION of salvage.

The plaintiffs were the owners, master, and crew of the steamship *Lucigen*, and the defendants were the owners of the steamship *Bremen*, her cargo and freight.

The *Lucigen* was a steel screw tank steamship of 2939 tons net and 4526 tons gross register, fittted with engines of 410 horse-power nominal, working up to 2300 indicated, was manned by a crew of thirty-six hands all told, and at the time she rendered the services was on a voyage from the Tyne to Philadelphia in water ballast.

The *Bremen* was a twin-screw steamship, owned by the Norddeutscher Lloyd line, of 7202 tons net and 11,750 tons gross register, fitted with engines of 1015 horse-power nominal, was manned by a crew of 263 hands all told, and when the services were rendered to her was on a voyage from New York to Bremen with a general cargo, and had on board about 160 passengers.

The value of the *Lucigen* was 68,000*l.*; the value of the *Bremen* was 147,204*l.*, of her cargo 88,800*l.*, of her freight 3500*l.*, making in all 239,504*l.*

The following facts as to the incidents and character of the services rendered were also proved or admitted:—

About 4.23 p.m. on the 15th Sept. 1905, when the *Bremen* was in about latitude 41 degrees 11 minutes N. and longitude 64 degrees 51 minutes W., steering a course of N. 77 degrees E. true, her port tail end shaft broke between the brace hanger and stern tube, and the port propeller, with the portion of the broken shaft, slipped aft, fouling the blades of the starboard propeller, so that it was impossible to work it. During the night those on board the *Bremen* attempted to draw out the port propeller, but they were unsuccessful, so her towing hawsers were got ready.

About 8 a.m. on the 16th Sept., when the *Bremen* was in about latitude 41 degrees 14 minutes N. and longitude 65 degrees 17 minutes W., the *Lucigen* came up to her, and the *Bremen* sent an officer off in a boat to her to ask to be towed to New York. The master of the *Lucigen* suggested towing to Halifax, as it was a shorter distance and there was a dry dock there sufficiently large to take the *Bremen*; and the officer in the boat undertook to report that fact to the master of the *Bremen* when he returned to his vessel. The towage began about 12.20 p.m., and by 1 p.m. the *Lucigen* had got on a course for New York, with her engines working full speed, when those on the *Bremen* signalled that they wished to proceed to Halifax. The *Lucigen* then altered her course for Halifax, and was proceeding for that place when at 1.25 p.m. the 15in. manilla hawser connecting the vessels parted. The manilla hawser was again made fast, and the towage began again about 5.45 p.m., and continued without incident till the early morning of the 18th Sept. About 2.30 a.m. on the 18th Sept. a fog came on, which continued all through the day, and at 5.30 p.m. an officer from the *Bremen* came on board the *Lucigen* to inquire what was to be done if the fog continued. Those on the *Lucigen* told him they were going to hold on for eight or nine miles, and then keep off till the weather cleared. About 7.30 p.m. the fog signal on Sambro Island was heard, and shortly afterwards the whistling buoy was heard, and the course was at once altered, soundings being frequently taken. About 2.50 a.m. on the 19th Sept. the fog lifted a little, and the master of the *Lucigen* then made for Halifax; at 11 a.m. a Halifax pilot was taken on board, and at 3 p.m. the *Bremen* was safely anchored in Halifax harbour. The services delayed the *Lucigen* for six days, and when she arrived at Philadelphia she found her cargo had been taken by another steamship, and instead of loading in two or three days, as she usually did, she had to wait seven days before she got a full cargo. Her owners incurred expenses for repairs amounting to 150*l.*

The writ in the salvage action was issued on the 1st Dec. 1905 by the solicitors acting for the owners, and, although the solicitors had not received any instructions from the master and crew to act on their behalf, it was, in accordance with the usual practice, issued on behalf of all three interests—the owners, master, and crew of the steamship *Lucigen*—the defendants being the owners of the *Bremen*, and the owners of her cargo and freight. A statement of claim was delivered to the defendants' solicitors on behalf of all three plaintiffs on the 12th Dec., which, after stating the facts, alleged that the *Bremen* had been saved from a position of great danger by means of the services rendered by the *Lucigen*, and alleged that they cast on the master and crew of the *Lucigen* much extra labour and fatigue, and asked for an apportionment of the salvage award between the owners, master, and crew.

On the 18th Dec. 1905 four able seamen and eight firemen served the defendants' solicitors with a notice of a change of solicitors.

On the 27th Dec. 1905 the defendants delivered a defence to the claim which had been delivered on the 12th Dec. on behalf of the owners, master, and crew of the *Lucigen*, in which they admitted that salvage services had been rendered, and that the account of them in the statement of claim was substantially correct.

On the 5th Jan. 1906 solicitors acting on behalf of the four able seamen and eight firemen delivered a further statement of claim, but it alleged no fact and described no incident which had not been referred to in the original claim.

On the 10th Jan. 1906 the defendants delivered a defence to the statement of claim delivered on the 5th Jan., in which the following paragraphs dealt with the point as to the separate representation of the twelve men:

1. Subject to proof that the plaintiffs formed part of the crew of the *Lucigen*, the defendants admit that they rendered salvage services. 4. The defendants say that there were no special or distinctive services rendered by these plaintiffs, most of whom it is believed were firemen, and there are no reasonable grounds justifying their severing their claim from that of the other members of the crew.

Evidence was called on behalf of the owners, master, and twenty-four of the crew of the *Lucigen*, and on behalf of the owners of the *Bremen*.

Pickford, K.C. and *Dawson Miller* for the plaintiffs, the owners, master, and twenty-four of the crew of the *Lucigen*.—It is submitted the service was a valuable one, and merits a high award. As to the apportionment, if the crew's share of the salvage is distributed according to their rating, the engineers will get a larger share than the navigating officers, who had more work than the engineers. It is suggested that it might be well to allow the navigating officers to share as though rated at a higher rate.

Morgan Morgan (*S. Evans*, K.C. with him), who did not cross-examine the witnesses called on behalf of the other interests, did not address the court on behalf of the other plaintiffs, the twelve seamen of the *Lucigen*.

Laing, K.C. and *D. Stephens* for the defendants, the owners of the *Bremen*.—The value of the property salved must not be allowed to raise the quantum of salvage to an amount out of proportion to the services rendered:

The Amerique, 31 L. T. Rep. 854; 2 Asp. Mar. Law Cas. 460 (1874); 6 L. Rep. P. 468;
The Toscana, 93 L. T. Rep. 392; 10 Asp. Mar. Law Cas. 108; (1905) P. 148.

With regard to the claim on behalf of the twelve seamen, it should be dismissed. The defence to that claim admits they performed salvage services subject to proof that they formed part of the crew. There is no proof of that fact; no one has been called in support of the claim.

Morgan Morgan, for the twelve seamen, asked and obtained leave to recall the master of the *Lucigen* to prove that fact. The master of the *Lucigen* admitted that the twelve plaintiffs were on board the *Lucigen*, and, when cross-examined on behalf of the owners of the *Bremen*, stated that the claims of the twelve men had been mortgaged and assigned to moneylenders.

Jan. 18.—BARGRAVE DEANE, J.—This action is one for salvage services rendered off the coast of America by the steamship *Lucigen* to the steamship *Bremen*. The *Lucigen* is a single screw steamship of 4526 tons gross and 2929 tons net register, with engines of 410 horse-power nominal working up to about 2300, and she was on a voyage to the Delaware River, Philadelphia. The *Bremen* is a North German Lloyd passenger steamer of 11,570 tons gross, 7202 net, with engines of 1015 horse-power nominal, which, I take it, means somewhere between 5000 and 6000 indicated, and with a crew of 263 hands and 160 passengers on board. The values are large—the *Lucigen* 68,000*l*., and in the *Bremen's* case the total value of ship, cargo, and freight 239,500*l*., so there was a very large amount of property at risk. The services commenced about 8.30 a.m. on the 16th Sept. last year. The *Bremen*, which had come from New York, broke down completely—that is to say, her engines were absolutely useless to her on the afternoon of the 14th, when she was on her way from New York to Bremen. It was fine weather fortunately; there was a swell, but the condition of things was such that it was impossible for her to do anything to restore her engine power so as to enable her to move at all. The position she was in is practically agreed. She was not exactly in the track of steamers, but the Elder Brethren tell me, taking the place which is agreed, that she was not very far out of the track of steamers; the more important point is this—it is said on behalf of the salvors that this vessel was drifting towards St. George's Shoal, a dangerous shoal some ninety miles or so to the north-west of her; but the Elder Brethren have pointed out that before she got there she would cross the northern track of vessels, and there is no doubt in their minds that she would have been picked up, and that she would not have gone on to that shoal. The towage having commenced on the 16th, it was completed by the vessel being towed into Halifax, where there was a dry dock capable of taking the *Bremen*, at three o'clock on the afternoon of the 19th, and, except from the fact that the two vessels ran into a serious fog before they got into Halifax, and had to work out to sea to keep off the land, and that there was serious danger at that time, owing to this smaller vessel towing this very large ship behind her in the fog, there would have been nothing particular in the towage. But in my opinion, and the Elder Brethren agree with me, the fact that the *Lucigen* was towing this big steamer in the fog, in the track of other vessels, was a very serious and a very anxious matter for those on board the *Lucigen* to have to consider. In addition to the towage service, which was 280 miles — 230 to Halifax, and 50 miles dodging for the fog—the *Lucigen*, by her salvage services, lost between six and seven days, and the result was that she arrived at Philadelphia at a time when she had owing to delay lost a chartered cargo. She had to wait a longer time than she would otherwise have done to get another cargo, and there is a certain amount of demurrage which has to be considered. The actual expenses for damage done has been agreed at 130*l*., not a very large amount, but in addition we have to remember the straining which affected the engines of the *Lucigen*. The damage was repaired by her own people, therefore there is no express charge for that, but additional labour fell on that part of the crew because the engine-room worked double watches during the services, which imposed upon them additional labour, additional anxiety, and additional care.

The result we have arrived at is that this is a salvage service which deserves recognition. I had fairly well made up my mind as to the amount to be awarded before the case of *The Toscana* (*ubi sup.*) was quoted to me. I confess the case of *The Toscana* (*ubi sup.*) has affected my mind, but not in the direction in which I expect counsel for the defendants meant it to be affected. The award I had in my mind was smaller than I arrived at after hearing the judgment in *The Toscana* (*ubi sup.*). The Elder Brethren, like myself, have had some difficulty in assisting me to arrive at what would be a fitting award, but I do not think any of us differ in opinion. The total amount I award is the sum of 5000*l*. Of that, I award 3500*l*. to the owners, which will include all extras in the shape of expenses, demurrage, and so on. I think that Captain Dyer deserves a considerable award for the responsibility and anxiety which these services imposed upon him, and I award him 500*l*., and the remaining 1000*l*. to the crew, according to their ratings. I have spoken to the President upon the questions suggested to me as to whether the executive officers, whose pay is lower than that of the engineer staff, should not be treated in exactly the same way as the practice of the court treats

them, but that there should be some special recognition. The President thinks that it would be a mistake to alter the practice of the court, and that an exception should only be made to that practice when any particular member of the crew has rendered special service in the course of the salvage operations. I cannot say that in this case the chief or second or third mates rendered any specific special services. On the other hand, the engineer staff did render special services, for they kept double watches, and had of course the anxiety of watching the engines during the towage service. The result is that, although the pay of the engineer staff will entitle them to a bigger sum out of this 1000*l. pro ratâ* than the executive, the first, second, and third officers, I do not think in this case there is any reason to depart from the usual practice of the court.

Laing, K.C.—The twelve seamen who are separately represented should not receive any costs; their separate representation was unnecessary. They should be ordered to bear any extra costs which the defendants have been put to in consequence of their separate representation.

S. Evans, K.C.—These twelve plaintiffs have been successful and have recovered salvage, and they are entitled to be represented, and should be given their costs. They never authorised the owners' solicitors to act for them.

Pickford, K.C.—I submit that the owners, master, and the twenty-four of the crew of the *Lucigen* are entitled to their costs, and that they ought not to be ordered to share them with the other twelve plaintiffs.

Bargrave Deane, J.—The interests of these twelve men are exactly the same as those of the rest of the crew. There is no distinction to be drawn between the services rendered by these men and the services of the remainder of the crew. I shall not give them any costs, and I shall make no order against them that they are to pay any.

Solicitors for the plaintiffs the owners, master, and twenty-four of the crew of the *Lucigen*, *W. W. Wynne* and *Sons*, for *Forshaw* and *Hawkins*, Liverpool.

Solicitors for the plaintiffs the twelve seamen, *Andrews* and *Andrews*.

Solicitors for the defendants, *Clarkson, Greenwell*, and *Co.*

Supreme Court of Judicature

COURT OF APPEAL.

Wednesday, Jan. 31, 1906.

(Before Collins, M.R., Romer and Cozens-Hardy, L.JJ.)

The Marpessa. (*a*)

Collision—Damage to dredger owned by public authority — Demurrage — Pecuniary loss — Measure of damage.

A sand pump dredger owned by the Mersey Docks and Harbour Board was run into and injured by a steamer whose owners admitted liability.

On the hearing of the reference, the owners of the dredger claimed demurrage at the rate of 102l. 9s. 5d. a day. That figure was arrived at by assuming that the loss to the plaintiffs was equivalent to the expenditure on the dredger for maintenance, working expenses, and sums to cover insurance, depreciation, and owners' profits.

The district registrar allowed the owners of the dredger 315l. in respect of demurrage, being 35l. a day.

That sum was arrived at on the principles laid down in The Greta Holme (77 *L. T. Rep.* 231; 8 *Asp. Mar. Law Cas.* 317; (1897) *A. C.* 596).

The owners of the dredger appealed, and the judge affirmed the registrar's report.

On appeal:

Held (affirming the decision of the court below), that, in the absence of direct proof of pecuniary loss, the board were entitled to such a sum as would be sufficient to compensate them for actual out-of-pocket expenses properly chargeable against the dredger whilst being repaired, together with depreciation and loss of interest on capital during the repairs, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident.

Judgment of Sir Gorell Barnes, P. (94 *L. T. Rep.* 168; 10 *Asp. Mar. Law Cas.* 197; (1906) *P.* 10) *affirmed.*

Appeal by the owners of the suction dredger *G. B. Crow*, the Mersey Docks and Harbour Board, against a decision of Sir Gorell Barnes, P. affirming a report of the district registrar at Liverpool in favour of the defendants, the owners of the *Marpessa*.

The claim arose out of a collision which occurred between the *G. B. Crow* and the *Marpessa* on the 6th Oct. 1904, when the *G. B. Crow* was sheltering from the weather in the river Mersey.

The facts are fully set out in the court below: (*The Marpessa, ubi sup.*). The following is a summary of them:—

The *G. B. Crow*, a suction dredger built in 1895 at a cost of 56,700*l.*, was designed for and employed in dredging operations at the bar and in the sea channels at the mouth of the Mersey, Liverpool Bay.

The damage caused by the collision with the *Marpessa* involved her being laid up for nine days.

Her value, allowing for depreciation at 7 per cent., was at the time of the collision 33,736*l.*, and she was expected to do work for another five or six years.

The respondents, the owners of the *Marpessa*, admitted liability subject to a reference, and the appellants filed a claim in the district registry.

The respondents agreed to all the items of the claim with the exception of an item for demurrage which the appellants fixed at 102*l.* 9*s.* 5d. per day.

The appellants arrived at the figure of 102*l.* 9*s.* 5*d.* per day by assuming that the vessel was worth per day to the dock board the amount they expended on her in keeping her up, and they arrived at that by calculating what the annual average cost of the dredger was under the headings of insurance, repairs, wages, supplies, expenses of engineer's department, together with depreciation at 7 per cent. on the original outlay, and to that

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

they added a sum of 25 per cent. on the original outlay as owners' profits.

The registrar in his report, which is set out in the report in the court below (*ubi sup.*), reduced the amount claimed, and allowed the sum of 35*l.* a day.

The appellants moved in objection to the report, and on the 9th Nov. 1905 Sir Gorell Barnes, P. affirmed the report.

Carver, K.C., *Aspinall*, K.C., and *Leslie Scott* for the appellants, the Mersey Docks and Harbour Board.

The arguments were the same as in the court below, but the following additional cases were referred to:

The Kate, 80 L. T. Rep. 423; 8 Asp. Mar. Law Cas. 539; (1899) P. 165;
The Mediana, 82 L. T. Rep. 95; 9 Asp. Mar. Law Cas. 41; (1900) A. C. 113;
Clydebank Engineering and Shipbuilding Company v. *Yzquierdo y Castaneda*, 91 L. T. Rep. 666; (1905) A. C. 6.

Pickford, K.C. and *Greer*, for the respondents, the owners of the *Marpessa*, were not called on.

COLLINS, M.R.—This is an appeal from a decision of the President, and the question is as to the proper measure of damages in a case where a steam dredger, the property of the Mersey Docks and Harbour Board, was disabled for a certain number of days—I think for nine days. The defendants being admittedly responsible for the damages consequent upon the collision, the question is what is the proper measure of those damages. We must remember that damages are not a matter of nice mathematical adjustment. Damages, until a recent period, were exclusively in the province of juries, who were not supposed to measure them upon strictly mathematical lines, but had to say what men of ordinary sense and business knowledge would fix upon as the money compensation for the damage sustained. In this case the result of what I must assume was the defendants' negligence was that this steam dredger was put out of action for some nine days, and the learned President, with whose decision we are dealing, came to this conclusion. He said—it is summarised in the headnote to the report of the case in the Law Reports—"In the absence of proof of direct pecuniary loss in respect of that part of their claim which is in the nature of demurrage," the court will award "such a sum as will be sufficient to compensate the board for the actual out-of-pocket expenses properly chargeable against the dredger during the period of her detention for repairs, together with depreciation and loss of interest on capital during the delay, such depreciation and interest being calculated on the capital value of the dredger at the time of the accident." At the end of his judgment he says: "I conceive that, applying the principles in the case of *The Greta Holme* (*ubi sup.*), a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation." In this case the standard which the appellants desire us to assume is applicable, as far as I understand it, is this. They say: "We can show you the first cost of this dredger to us. We will assume that the life of that dredger is fifteen years, and we can also calculate for you the total expense we should be put to over that period of fifteen years in keeping this vessel in a condition to carry out its work; and we also claim something in the shape of interest upon the total sum expended by us, and also a sum for owners' profits; and having arrived at the aggregate sum represented by all those items put together, which would be the amount at the end of the fifteen years, we now ask you to assess the damages in respect of nine days' detention at the expiration of ten years out of her life—we ask you to assess the damages payable to us in respect of the loss of the use of this vessel for nine days, on the theory that every day throughout the whole period of this vessel's existence is to be assumed to be of equal value to us; that is to say, that the cost which we should incur in respect of every day throughout the whole of the fifteen years would be the same; and as we cannot show any actual money loss arising from inability to use the dredger, we ask you to say that the damages to us must be at least equivalent to that sum of money which we, as reasonable persons, have been willing to devote to keeping this dredger in existence, and that that sum is to be arrived at by treating the share of each particular day simply as representing the aliquot part of that particular day, by dividing the number of days into the number of pounds." It seems to me that that suggested mode of assessing the damages involves at least two assumptions which are not proved. First of all it involves this—namely, that the cost to the Mersey Docks Board for every day during the fifteen years, in respect of this dredger, is to be taken to be the same. That does not appear to me to be a self-evident proposition, and there is no evidence upon it. We are dealing here with a perishing subject-matter, and damages are sought upon a calculation which is based upon a fundamental fact—the actual original cost of the vessel with all these other sums added to it. It seems to me that in each succeeding day in the whole period of fifteen years that is a fluctuating factor—that there is depreciation continually going on, and if you are going to introduce, as a factor, into the calculation, a sum representing the value of the vessel at a given date, you are bound to take into account the necessary depreciation in value which takes place between the date of first purchase and a date which is two-thirds of the way through the career of the vessel. That is the first point, and the chief point upon which the appellants impugn the decision of the court below. They say the President's decision involves taking into account from day to day, month to month, and year to year, the depreciation of this vessel, whereas their contention is that inasmuch as the benefit which the vessel was able to confer upon them through each week of the whole fifteen years was the same, there must be attributed to each week, in arriving at a figure to represent the loss of the use of the dredger in any particular week, the same sum for cost.

This last proposition brings me to the second fallacy, as I regard it, in this contention. They

have first assumed that the aliquot parts of the cost ought to be treated as equally applicable to every week, and they have assessed their damages in each particular week by reference to the aliquot part of the cost so arrived at; but they have also assumed that throughout the whole period of fifteen years this vessel is equally adequate to the work to be done, and so they must be deemed to receive the exactly equivalent benefit for their expenditure throughout this whole period of fifteen years. That, again, is not a self-evident proposition to me, and there is no evidence to support it, and therefore I do not think the learned President was wrong in not accepting it and in not regarding it as proved. Furthermore, I am also asked to assume that the life of this vessel remains the same, and will terminate on the same day, notwithstanding the fact that she has been laid up and not been put to use for the period of nine days, during which she was undergoing repairs. That, also, does not appear to me to be a self-evident proposition, and there is no evidence to show it is so, or that there may be no extension of the vessel's life by reason of the fact that she has not been worked, as she would have been worked in the ordinary course, during this period of nine days whilst undergoing repairs. Taking all those considerations together and remembering that we are dealing after all with that which is a matter of what is called rule of thumb calculation and adjustment by business men, something which is not capable of mathematical calculation, it seems to me that counsel for the appellants are asking us to assume a most artificial and technical mode of arriving at a figure which it appears to me has been arrived at by ordinary business methods, on a proper business calculation, in the court below. When the elements which form the basis of his own judgment have been taken into consideration, the learned President is of opinion that it has not been made out to his satisfaction that anything else ought to be taken into consideration; and he introduced a most important argument, it seems to me, into that view which he has followed—an argument to which I have really not heard any satisfactory answer in the able arguments addressed to us to-day. He says: On your theory you actually show, claiming as you do about 100*l.* a day, that practically in one single year, out of your receipts, you would be able to supply a new vessel. The value of the vessel, taken as it is now, is not quite as high as 33,000*l.*, and on your calculation of 100*l.* a day you practically, at the end of a year, would have replaced the whole of the value. It shows that, whatever is the true standard, that cannot be the right standard of assessing the damages. It is contrary to common sense. It seems to me, therefore, that in this case we are not called upon to lay down any exact standard of mathematical calculation as the basis upon which these damages are to be assessed. It seems to me that the learned President, in directing the line upon which they are assessed, came as near a definition in the proper direction as it is possible to obtain on such a subject-matter. In my opinion, therefore, the appeal fails, and must be dismissed.

ROMER, L.J.—I am of the same opinion. The only question here is one concerning the loss accruing to the owners of the dredger injured, owing to what is called demurrage; that is to say, the delay in the use of the dredger, owing to the accident, before it was properly repaired. The question of the repairs is not before us. They have been allowed to the owners and will be paid for, if they have not already been paid, by those who caused the accident. In my opinion the appeal fails on the broad ground which has been put by the President into the following words: "I do not feel satisfied that the plaintiffs have made out any case for a larger allowance than that which the district registrar has made to them." I am exactly of that opinion. Of course, if I thought that the district registrar in arriving at the amount specified in his report had proceeded throughout on a wrong principle, I might be compelled to say that the matter must be, or ought to be, referred back to him; but I think that cannot properly be said. This is a peculiar case, where the owners of the dredger injured were not using it for profit, and where the evidence does not establish, and it cannot properly be inferred, that the dredger could have been used by them for profit. In that state of things I think the loss they suffered by the delay, which would be the loss to them of the advantages accruing by the work that would otherwise have been done, but for the injury, might rightly be taken to be equivalent, roughly speaking, to the cost of that work to the owners, had that work been done. Upon that principle the registrar has proceeded. The appellants contend that in addition they ought to have credited to them something in the nature of imaginary profits. I say imaginary, because upon the facts before us it is not shown that any such profits could or would have been made. The President, in his judgment, has pointed out several reasons why the contention of the appellants should not be acceded to, and I agree with him, and will not repeat his reasons. In that state of things, as the registrar has proceeded on a right principle, and I think, on the whole, he has awarded a sum which is just, I decline, speaking for myself, to let the amount he has arrived at be upset because he might not, as regards each subsidiary item, have proceeded upon a mathematical basis, according to the plaintiffs' contentions—especially when I find those contentions are based upon certain speculations which I am not prepared to accede to. For instance, there are the assumptions that the dredger would work just as well at the end of its life as when it was new, that the expenditure on the dredger ought to be and would in fact be the same, uniformly, throughout the whole life of the dredger, and, lastly, that the life of the dredger was shortened exactly by the period of the delay during the repairs. Looking at the matter broadly, as I think it ought to be looked at, I can only say in conclusion that I agree again with the President when he said that "a business and reasonable view to take is that when the plaintiffs content themselves with such evidence as they gave in the present case, this tribunal, in assessing their damages, may say, as a jury would do, we must act with some reasonable certainty, and you, the plaintiffs, are reasonably compensated by being awarded a sum, which we are fairly satisfied you may have lost, but we cannot follow you into mere speculation." On

these short grounds I think the appeal fails, and must be dismissed with costs.

COZENS-HARDY, L.J.—I agree.

Solicitors for the appellants, *Rawle, Johnstone, and Co.*, agents for *W. C. Thorne*, Liverpool.

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

Jan. 31, *Feb.* 1 *and* 2, 1906.

(Before VAUGHAN WILLIAMS, STIRLING, and MOULTON, L.JJ.)

THE SCARSDALE. (*a*)

Wages of seamen—Agreement with crew—Voyage—Duration of voyage—Port required by the master—Loading port clause—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 113, 114, 115, 116, 742.

A fireman B. signed articles on the steamship S. *for "a voyage not exceeding one year's duration to any ports or places within the limits of* 75 *degrees N. latitude and* 60 *degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent (within home trading limits) as may be required by the master."*

The S. *left Cardiff for Malta and the Black Sea, where she loaded grain to be wholly discharged at Southampton. At Southampton the* S. *discharged her grain, and B. claimed his discharge from the master, who refused to give it him, telling him that he was required to proceed with the* S. *to Cardiff. B. then instituted proceedings against the master before the justices of the peace at Southampton to recover the wages and compensation he alleged to be due to him. The justices referred the case to the Admiralty Court. It was held by Bargrave Deane, J. that B. was entitled to his discharge at Southampton, as the agreement only gave the master a liberty to select any port within home trading limits to which to bring back the ship and that the voyage then ended, and that to allow him to refuse to discharge the crew and to permit him to proceed to a further port after having returned to a port within home trading limits would be to permit time agreements with the crew, and would render the duration of the voyage so indefinite that the agreement would contravene sect.* 114, *sub-sects.* 2 (*a*) *and* 3, *of the Merchant Shipping Act* 1894. *On appeal by the master of the* S. :

Held (reversing the decision of Bargrave Deane, J.), that the master was entitled to refuse B. his discharge, for by the terms of the agreement he was allowed to fix the termination of the voyage at any port within certain limits; that the voyage referred to was the voyage of the ship and not of the cargo, and that there was nothing in the agreement which was contrary to the provisions of sect. 114 *of the Merchant Shipping Act* 1894, *as it stated the maximum period of the voyage or engagement and the places or parts of the world to which the voyage or engagement was not to extend.*

APPEAL by the master of the steamship *Scarsdale* from a decision of Bargrave Deane, J. in favour of a claim for wages and compensation made by the plaintiff, a fireman on the *Scarsdale*.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The case raised the question whether under the agreement under which the fireman served he was entitled to his discharge at the port (within home trading limits) at which the cargo was discharged, or whether the master was entitled to make him serve till the ship arrived at her next loading port.

On the 5th Aug. 1904 the plaintiff, Charles Baxter, signed on as fireman on the *Scarsdale*, and signed the ship's articles for "a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees N. latitude and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master."

The *Scarsdale* proceeded from Cardiff to Malta, where she discharged a cargo, and then went to the Black Sea, where she loaded under a charter-party a cargo of grain for Southampton. She arrived at Southampton on the 28th Sept. 1904, and discharged the whole of her cargo there.

While she was discharging, the plaintiff asked the master, Colin MacDiarmid, for his wages and discharge, saying that the voyage was ended, but the master refused to give them to him, claiming that the voyage was to terminate at the port fixed on by himself, which was Cardiff, the loading port for the next cargo, and told Baxter he was to proceed with the ship to Cardiff.

On the 6th Oct. 1904 the plaintiff summoned the master before the justices of the peace for the borough and county of the town of Southampton, under sect. 164 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), to recover the sum of 4*l.* 3*s.* 9*d.*, balance of wages due to him as fireman on the *Scarsdale*, and 2*l.* as compensation.

The justices made no order, but with the consent of the parties referred the matter to the Probate, Divorce, and Admiralty Division of the High Court under sub-sect. 3 of sect. 165 of the Merchant Shipping Act 1894.

On the hearing before Bargrave Deane, J. on the 5th May 1905, the following counsel appeared:—

Robson, K.C. and *Morgan Morgan* for the Seamen and Firemen's Union, on behalf of the plaintiff, Charles Baxter.

The *Attorney-General* (Sir R. Finlay, K.C.), the *Solicitor-General* (Sir E. Carson, K.C.), and *Sutton* for the Board of Trade, who intervened.

Sir *Edward Clarke*, K.C. and *Lewis Noad* for the Shipping Federation, on behalf of the master, Colin McDiarmid.

The arguments of counsel were the same as in the Court of Appeal.

The following are the material parts of the sections of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) which were cited in the Admiralty Court and the Court of Appeal:

Sect. 113 (1). The master of every ship, except ships of less than eighty tons registered tonnage exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom

he carries to sea as one of his crew from any port in the United Kingdom. (2) If a master of a ship carries any seaman to sea without entering into an agreement with him in accordance with this Act, the master in the case of a foreign-going ship, and the master or owner in the case of a home trade ship, shall for each offence be liable to a fine not exceeding five pounds.

Sect. 114 (1) An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same. (2) The agreement with the crew shall contain as terms thereof the following particulars: (*a*) Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend. (3) The agreement with the crew shall 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 are not contrary to law.

Sect. 115. 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: (5) The agreements may be made for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages, and agreements so made to extend over two or more voyages are in this Act referred to as running agreements. (6) Running agreements shall not extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on that arrival. (7) On every return to a port in the United Kingdom before the final termination of a running agreement, the master shall make on the agreement an indorsement as to the engagement or discharge of seamen, either that no engagements or discharges have been made, or are intended to be made, before the ship leaves port, or that all those made have been made as required by law, and if a master wilfully makes a false statement in any such indorsement, he shall for each offence be liable to a fine not exceeding twenty pounds.

Sect. 116. The following provisions shall have effect with respect to the agreements with the crew of home trade ships for which an agreement with the crew is required under this Act: (1) Agreements may be made either for service in a particular ship or for service in two or more ships belonging to the same owner, but in the latter case the names of the ships and the nature of the service shall be specified in the agreement. (4) Agreements shall not, in the case of ships of more than eighty tons burden, extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her final port of destination in the United Kingdom after that date or the discharge of cargo consequent on that arrival.

Sect. 742. "Home trade ship" includes every ship employed in trading or going within the following limits; that is to say, the United Kingdom, the Channel Islands, and Isle of Man, and the continent of Europe between the river Elbe and Brest inclusive.

The following statutes were also referred to: 2 Geo. 2, c. 36, ss. 6, 7; 37 Geo. 3. c. 73, s. 11; 5 & 6 Will. 4, c. 19, ss. 2, 3, 11; 17 & 18 Vict. c. 104, s. 149; 36 & 37 Vict. c. 85, s. 17.

May 8, 1905.—BARGRAVE DEANE, J.—This is a claim for wages referred to this court under the provisions of sect. 165, sub-sect. 3, of the Merchant Shipping Act 1894. On the 6th Oct. 1904 a summons was heard by the magistrates of the borough and county of Southampton, at the Guildhall, Southampton, which summons had been taken out by Charles Baxter, as plaintiff, against Colin MacDiarmid, as defendant. The plaintiff's claim was for 4*l.* 3*s.* 9*d.* wages and 2*l.* compensation, as fireman on board the steamship *Scarsdale*, against the master, and was taken out under the provisions of sect. 164 of the Merchant Shipping Act 1894. The plaintiff had shipped on board the *Scarsdale* at Cardiff, and signed an agreement on the 5th Aug. 1904 in the following terms, so far as is material to the inquiry: "A voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master." The *Scarsdale* sailed from Cardiff to Malta, from Malta to the Black Sea, where she took in a cargo of grain for Southampton, and arrived with that cargo at Southampton on the 28th Sept. 1904, and proceeded to discharge and did discharge the whole of her cago there. On the 28th Sept. 1904 the plaintiff asked the master for his wages and his discharge, on the ground that the voyage and agreement were at an end. The master refused to give him his wages on the ground that they were not due, and said that he would have to go on to Cardiff as his port of discharge.

Upon this statement of facts the question of law arose whether the voyage and agreement of the plaintiff with the master terminated at Southampton or Cardiff, and with the consent of the solicitors on both sides the magistrates referred the plaintiff's claim to this court under the provisions of sect. 165, sub-sect. 3, of the Merchant Shipping Act 1894. The question submitted is an important one, involving far-reaching commercial interests, and I am not aware of any authority to guide me. It therefore is necessary that I should clearly state the statutory provisions which affect the points at issue, and I have to thank the eminent counsel who have appeared for the various parties at the hearing for the full and interesting arguments which they addressed to the court. The material sections of the Merchant Shipping Act 1894 which affect this case are sects. 113, 114, and 115. Sect. 113 (1) provides that "The master of every ship, except ships of less than eighty tons registered tonnage, exclusively employed in trading between different ports on the coasts of the United Kingdom, shall enter into an agreement (in this Act called the agreement with the crew) in accordance with this Act with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom." Sect. 114 (1) provides that "An agreement with the crew shall be in a form approved by the Board of Trade, and shall be dated at the time of the first signature thereof, and shall be signed by the master before a seaman signs the same. (2) The agreement with the crew shall contain as terms thereof the following particulars: (*a*) Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engage-

ment is not to extend." Sect. 115 sets out various special provisions as to agreements, and sub-sect. 5 is as follows: "The agreements may be made for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages, and agreements so made to extend over two or more voyages are in this Act referred to as running agreements." Sub-sect. 6 provides that "Running agreements shall not extend beyond the next following thirtieth day of June or thirty-first day of December, or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on that arrival." I need not trouble with that because counsel on both sides have agreed that in this case we have to deal with a voyage agreement.

The first difficulty which arises is to ascertain and state a legal interpretation and definition of the word "voyage." The word is French in origin, and its original meaning is "to move afar," or "go abroad," as applied to persons or things leaving the place to which they belonged. The word has inherent in it the sense of movement, and I have no doubt originally was confined to a passing from one given spot to one other given spot. There was a definition of the word "voyage" given some years ago, not in reference to such a matter as this, but as regards a charter-party. The word was then defined as "going from one given spot to another given spot"; and I think that was the meaning attached to the word when it was adopted into the English language. But the meaning of the word has undoubtedly changed, and especially as applicable to ships. I believe the more modern meaning of the word is, so far as an English ship is concerned, the passing of that ship from home to a given port and back again to home, and that this is the meaning which the framers of the Merchant Shipping Act had in view when the wording of sect. 115, sub-sect. 5, was considered: "The agreement may be for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages." I read this to contemplate such voyages as those of trans-Atlantic or Peninsular and Oriental liners, or even cross-channel steamers, which leave their own port, go abroad, and return home, each thus completing a voyage; but it is not inconsistent with this reading of the word voyage that the vessel should, after leaving home, go to more than one port abroad before returning home—on the contrary it would seem to be consistent that both on the passage out and the passage back the British vessel should go to more than one foreign country, when she should unload or load and trade. before finally loading for her return home. We speak of a voyage round the world, which implies stopping at many places in transition, but it is all one voyage up to and until the return of the ship home to this country. I am of opinion that the agreement in this case recognises a voyage in the sense in which I have defined it—namely, from England to Malta, trading with other ports or places within certain degrees of latitude, and back again to England or a port within home trade limits. A port within home trade limits is defined by sect. 742 of the Merchant Shipping Act 1894, and may be taken to be equivalent, for the purpose of a voyage of an English ship, to a return to an English port at the end of the voyage; and provision is made by statute for the crew being brought home to England, if they require it, at the expense of the owners.

But this definition of a voyage does not conclude the whole matter. The further question arises: Given that the voyage ends within these home limits, at what place within these home limits does it end? The Merchant Shipping Acts from 1729 downwards do not in terms define the "end of a voyage," but there are three expressions which in my opinion offer a fairly sure guide to what may be taken to be the place where a voyage is to end. "The place of unlivery of the cargo," "the final port of discharge," and "the final port of destination," are terms which will be found fairly frequently in the various Merchant Shipping Acts, and so far as I can judge are intended to be correlative terms, each pointing to what must be taken to be the end of a voyage; and reading them in this light it seems clear to me that, taking the definition which I have before expressed, the end of a voyage is the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally. In the case where the home cargo is consigned to more than one place, "finally" means that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits. It was contended on behalf of the master of the *Scarsdale* that the words of the agreement in question: "Such port . . . as may be required by the master," entitled the master to say to his crew, "True, I have brought home and discharged my cargo, but I have the right to name any other port where my voyage, within home limits, may end, other than the place to which my cargo is consigned and delivered"; and counsel for the master, in support of his contention, read the preamble to the statute of 1729, with the view of showing that the statute was enacted to protect the shipowners against the possible misconduct of their crews in leaving the ships in places and under circumstances prejudicial to the commercial enterprises of the time. The argument is perfectly correct, but in my opinion, whatever may have been the view or policy which led to the preamble in question, the policy of the mercantile law now is not one-sided, but has in view the protection of seamen as well as shipowners, and it is only necessary to read sect. 114 (2) (*a*) of the Merchant Shipping Act 1894 to see that the whole object of the agreement to be made under that Act is to secure to the crew as definite a statement as possible of the nature and duration of the intended voyage. In my opinion the final words of this agreement which we now have under consideration intend no more than to leave it to the master to say to what port in the United Kingdom or continent of Europe, within home trade limits, he will accept his homeward charter. This construction of the words is consistent with what I have said before as to the meaning of the words "final port of destination," whereas the contrary construction—namely, that having discharged his home cargo the captain is at

liberty, if he chooses, under these words, to take another cargo on board at his said port of discharge in the United Kingdom—would render the nature and duration of the voyage so indefinite that it would be contrary to the spirit of that part of sect. 114 which I have quoted. I must add one finding of fact outside the statement of facts submitted to me—namely, that so far as the evidence goes, there is nothing to show that Cardiff was intended to be the *Scarsdale's* home port, or that the crew or vessel were in any way connected with that port; nor is there any consideration apparent why, when once the cargo was discharged, the crew should be bound by their agreement to take the ship to Cardiff or anywhere else than the final port of discharge of the cargo. Reading, therefore, this agreement by the light of the Merchant Shipping Act 1894, I find that it is an agreement within the meaning of sect. 114 (2) (*a*) and sect. 115 (5), and that the master, by accepting a charter for a cargo from the Black Sea to Southampton, exercised his power to end the voyage at Southampton, a port in the United Kingdom, as his "final port of discharge," making it thereby his "final port of destination"; that having so exercised his power he had no right to require the plaintiff to proceed further with the ship; and that the plaintiff was entitled to his discharge and his wages at Southampton.

The master of the *Scarsdale* appealed to the Court of Appeal.

Jan. 31 *and Feb.* 1, 1906.—Sir *Edward Clarke*, K.C. and *Lewis Noad* for the Shipping Federation, on behalf of the appellant, the master of the *Scarsdale*.—This agreement complies with the requirements of sect. 114 of the Merchant Shipping Act, for it states "the maximum period of the voyage or engagement and the places or parts of the world, if any, to which the voyage or engagement is not to extend." It is said that under the agreement the master has only got the right to say to what port in the United Kingdom or continent of Europe, within home trading limits, he will accept a homeward charter, but the voyage referred to is the voyage of the ship and not of the cargo, and the discharge of the cargo does not put an end to the agreement. The word "discharge" is used in different senses in the Act; in sect. 115, sub-sect. 6, it refers to cargo; in sects. 218, 242, sub-sect. 1, and 253, sub-sect. 2 (*a*), it refers to the crew; and in sect 239 to the ship; but the discharge of the cargo has no bearing on the termination of the voyage. The voyage must be as definitely described as possible; this agreement does define it, and is perfectly valid. The master had a right to select a port at which the voyage was to terminate, and selected Cardiff.

The *Solicitor-General* (Sir W. Robson, K.C.), Sir *R. Finlay*, K.C., Sir *E. Carson*, K.C., and *Rowlatt* for the Board of Trade.—The voyage terminates at the place where the cargo is finally discharged. The last clause in the agreement only permits the master to select any port for his homeward charter, and when he has selected one he has selected his final port of destination, and the voyage ends there. The wages of the seamen are, therefore, due there, and they are entitled to their discharge. The word "voyage" in the Act of 1894 is used in the ordinary meaning of a transit at sea from one terminus to another (Stroud's Dictionary); or a journey by sea, including outward and homeward trips, which are called passages (The Sailor's Word Book). The return to a port within home trading limits and the discharge of the cargo put an end to the voyage: (see the meaning given to the word in sect. 370 of the Act of 1894). The great object of the Legislature is to prevent vagueness in the contract entered into by the seamen. Under the Act of 1894 there are two kinds of agreements—running agreements and voyage agreements. This agreement contemplates the voyage ending at any port within the United Kingdom or continent of Europe between the Elbe and Brest. Southampton is such a port, and there the voyage ended. This is an attempt to make the crew take the ship on to the next loading port, by fusing "the loading port clause" into the description of the voyage. The seaman is entitled to have the voyage defined:

The Minerva, 1 Hagg. 347;
The George Holme, 1 Hagg. 370;
The Westmoreland, 1 W. Rob. 216.

The carrying voyage is not necessarily the same as the chartered voyage:

Nelson v. *Dahl*, 41 L. T. Rep. 365; 4 Asp. Mar. Law Cas. 172; 12 Ch. Div. 568, at p. 580.

But the word "voyage" limits the contract, and if the master wanted to keep the seamen after discharging his cargo he should have entered into a running agreement with them.

Sir *Edward Clarke*, K.C. in reply.

Feb. 3.—Vaughan Williams, L.J.—The question in this case turns on the construction of an agreement entered into between Charles Baxter, a seaman, and Colin MacDiarmid, the master of the steamship *Scarsdale*. The case began by a summons being taken out under sect. 164 of the Merchant Shipping Act 1894 by Charles Baxter, the plaintiff, against the defendant MacDiarmid, the master of the steamship *Scarsdale*, for 6*l.* 3*s.* 9*d.*, being the balance of wages owing to him, the plaintiff, whilst employed on the defendant's said steamship as a fireman. At the hearing of the summons the plaintiff was represented by Mr. Charles Ansell Emanuel for the Seamen's and Firemen's Union, and Mr. Charles Lamport appeared for the Shipping Federation. The ship's articles, showing the terms upon which the crew were engaged, were put in evidence, and the material terms were as follows: "On a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees N. latitude and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master." Home trading limits include the United Kingdom, the Channel Islands, and the Isle of Man, and the continent of Europe, between the river Elbe and Brest, inclusive. The plaintiff signed on board the *Scarsdale* at Cardiff on the 5th Aug. 1904, and proceeded in that vessel to Malta, then to the Black Sea, where the *Scarsdale* took in grain and then went to Southampton under charter-party, arriving on the 28th Sept. at Southampton, where the ship

discharged the whole of her then cargo. Baxter at Southampton demanded his discharge, but the defendant refused to give it to him, saying that the agreement was not at an end, and telling Baxter he would have to go on to Cardiff. It was admitted by the master that Southampton was the final port of discharge for the cargo. I find that "the cargo" in this admission meant the cargo which the master then had on board. It was contended on behalf of the plaintiff that as the vessel was going to discharge the whole of her cargo at Southampton the voyage entered into under the articles was completed, and the plaintiff was entitled to his discharge at Southampton. It was contended on behalf of the master that the voyage was not ended, and that the captain could require the plaintiff to go to Cardiff.

The question whether the voyage mentioned in this agreement terminated at Southampton, or whether the master could require the voyage to end at Cardiff and refuse to give Baxter his discharge or to pay him his wages until arrival at Cardiff, depends upon the true construction and meaning of the agreement in question. In my opinion, if one looks merely at the words of the agreement, the master would seem to be entitled to require the voyage to end at Cardiff, as being a port in the United Kingdom. I can find no words within the four corners of the agreement which would lead me to say that the voyage mentioned in the agreement determined at Southampton by reason of the discharge of the cargo then on board the *Scarsdale* at Southampton, a port within the United Kingdom, and therefore a port within the limits within which the master is by the agreement entitled to require the voyage to end. The voyage mentioned in the agreement is a voyage of the ship and not of the cargo. It was urged by counsel for the Board of Trade that the agreement provided for the ship commencing its voyage at Cardiff, proceeding thence to Malta, and thereafter making a circular voyage trading to ports in any rotation, but necessarily ending the voyage by the arrival of the ship at any port within home trading limits; that is to say, within the United Kingdom or within the continent of Europe between the river Elbe and Brest. He argued that trading to ports in rotation meant ports exclusive of those within home trading limits. I see nothing in the words of the agreement to justify the contention that the voyage intended by this agreement necessarily came to an end by the arrival of the ship in ballast or with cargo at a port in the United Kingdom or within home trading limits. On the contrary, it seems to me that the words of the agreement give the master a right of election as to which of the ports within the limits of the prescribed district shall in fact be the final port of destination of the ship. Even if the words of the agreement, looking only to what one finds within the four corners of the agreement, were much less clear than they seem to me to be, I should have hesitated long, having regard alike to the interests of seamen and shipowners, before I held that the true construction of this agreement necessitated the engagement of a new crew in the case of a British foreign-going ship arriving at Hamburg, before the master could proceed with the cargo from Hamburg to any port, whether within or without home trading limits. I will next consider the construction of this agreement, taking into consideration the provisions of sects. 113, 114, 115, and 116 of the Merchant Shipping Act 1894, and also the provisions and language of that Act generally. Sect. 113 requires that the master of every ship, except coasting ships of less than eighty tons registered tonnage, shall enter into an agreement (called the agreement with the crew) with every seaman whom he carries to sea as one of his crew from any port in the United Kingdom. Sub-sect. 2 of sect. 114 prescribes what the agreement with the crew shall contain as terms thereof. Sub-sect. 2 (*a*) runs thus: "Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement, and the places or parts of the world, if any, to which the voyage or engagement is not to extend." It was argued by counsel for the Board of Trade that if the construction above mentioned, which was the construction contended for by counsel for the appellant, was put on the agreement this construction in effect turned the agreement into a time agreement, and that a time agreement would not be an agreement in accordance with sect. 114 of the Merchant Shipping Act 1894, or with the provisions of that Act taken as a whole.

Then they argued that if the words of the agreement were capable of two constructions, one of which resulted in an agreement which was void under the Act and inconsistent with its provisions, and the other consistent with its provisions, the court ought to adopt the construction consistent with the provisions of the Act, even though such construction should be a non-natural construction or not the construction which *primâ facie* one would give to the words of the agreement. I agree entirely with this contention, but I do not think that a time agreement, as distinguished from a voyage agreement, would be inconsistent with the provisions of sect. 114, or with the provisions of the Act taken as a whole. First let me take sect. 114, sub-sect. 2, clause (*a*). Clause (*a*) contains alternative particulars, either of which will satisfy clause (*a*) of sub-sect. 2 of sect. 114. Under the first alternative the agreement must contain particulars of the nature, and, as far as practicable, of the duration of the voyage or engagement. It will be observed that this alternative provides not only for particulars of a voyage, but alternatively for particulars of the engagement which, I take it, is not a synonym for a voyage. The second alternative also deals both with one agreement which contemplates a voyage and also with an agreement which contemplates an engagement. Under this latter alternative the particulars must be of the maximum period of the voyage or engagement, and of the places or parts of the world, if any, to which the voyage or engagement is not to extend. The difference between these two alternatives is this, that under the first the contracted employment extends to the whole duration of the voyage or engagement, as the case may be, whereas under the second alternative the contractual employment must not exceed the maximum period of the voyage or engagement, but may be determined on an event or at a time happening before the determination of the maximum period. It seems to me that the word "engagement" in both of these alternatives covers a time agreement as distinguished from a

voyage agreement. Under the first alternative the agreement has to be for a fixed time. Under the second for a maximum period of time. I am inclined to think that where the agreement is for a maximum period of time the agreement would lack that precision for the information of the sailor which the statute contemplates, unless it stated the occasion, or occasions, on which the employment might fall short of the maximum period. We have not got to decide this, but assuming this to be the true construction of clause (*a*), it is fully satisfied by the choice given to the captain as to the port, within the limits prescribed, at which the voyage is to end, and the time at which, within the twelve months, the vessel shall arrive at the port, within the home trading limits, at which he requires the ship to end its voyage. But then it is said that there is to be found in sect 115 provisions relating to running agreements which, by express statement of occasions on which the agreement may be based on time, exclude agreements based on time in respect of foreign-going ships, except on these occasions defined under the head of running agreements. The sub-sections of sect. 115 which are in particular relied upon are sub-sects. 5, 6, and 7. Sub-sect. 5 runs thus: "The agreements may be made for a voyage, or, if the voyages of the ship average less than six months in duration, may be made to extend over two or more voyages, and agreements so made to extend over two or more voyages are in this Act referred to as running agreements." Now, sub-sect. 5 provides that an agreement may be made by a foreign-going ship for a voyage—*i.e.*, may be made under so much of sect. 114 as relates to a voyage as distinguished from an engagement. But an agreement for a voyage may be made for a maximum period, provided it states the places or parts of the world, if any, to which the voyage is not to extend. This being so, it seems to me that if the agreement under consideration is a voyage agreement which complies with these conditions, we have not to trouble ourselves with the provisions as to running agreements which, as sub-sect. 5 states, are agreements made to extend over two or more voyages.

I do not think that this agreement under consideration does extend to two or more voyages. It is a single agreement for one voyage of the ship. Indeed, counsel for the Board of Trade admitted that this agreement, so far as it related to a tramping voyage in the Mediterranean or outside the limits for selection of the port of final destination, was one voyage under a single agreement within the meaning of sect. 114. They only contended that arriving at at a port within those limits, or at all events arriving at such a port and discharging the whole of the cargo, constituted necessarily a determination of the voyage of the ship. I cannot agree; but I would observe that they did not contend that the agreement was a running agreement, but only that such arrival at a port within the district where the voyage might end, terminated the voyage under an agreement made under sect. 114. With regard to sect. 116 I have only to say that it does not contemplate agreements for a voyage, and certainly not agreements for a voyage of a foreign-going ship. It deals with agreements for service of crews of home trading ships in a particular ship or of a service in two or more ships belonging to the same owner, so I do not think we need consider the effect of sub-sect. 4 of sect. 116.

Having thus far dealt with the question of the validity of the agreement, and the meaning of the word "voyage" in the agreement, I now propose to deal with the meaning of the words in the agreement as to the end of the voyage. The words are "to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master." Bargrave Deane, J., after dealing with the meaning of the word "voyage" in terms in which I entirely concur, says: "The further question arises: Given that the voyage ends within these home limits, at what place within these home limits does it end? The Merchant Shipping Acts from 1729 downwards do not in terms define the 'end of a voyage,' but there are three expressions which in my opinion offer a fairly sure guide to what may be taken to be the place where a voyage is to end. 'The place of unlivery of the cargo,' 'the final port of discharge,' and 'the final port of destination,' are terms which will be found fairly frequently in the various Merchant Shipping Acts, and so far as I can judge are intended to be correlative terms, each pointing to what must be taken to be the end of a voyage; and reading them in this light it seems clear to me that, taking the definition which I have before expressed, the end of a voyage is the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally. Where the home cargo is consigned to more than one place, 'finally' means that place where the last portion of the cargo is discharged, and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits."

I cannot agree that in this agreement the end of the voyage means the place where the final or home passage of the whole voyage terminates by reason that it is the place at which the cargo brought home is to be discharged finally, or that place where the last portion of the cargo is discharged and the adventure of the ship outward and homeward is at an absolute end, and where she is fully discharged on her return within the home limits.

The voyage to be ended is the voyage of the ship, not of the cargo. The adventure of the ship outward and homeward does not terminate until the ship returns to the port within the limits of home trade where the master elects, within the period of twelve months mentioned in the voyage agreement, to end her voyage and prepare for a fresh voyage. I agree also with the criticism by counsel for the appellant upon this part of the judgment of the learned judge, that "discharge" is a word which applies not only to cargo but also to crew and to ship. I cannot agree that the place of "unlivery of the cargo," "the final port of discharge," and "the final port of destination," are either correlative or synonymous terms. Lastly, I think that the argument of counsel for the Board of Trade made it necessary for him to say that an express agreement that the voyage should begin at Cardiff and proceed to Bilbao and back to Cardiff, with liberty to call at Southampton and there discharge her cargo, would not be a voyage ending at Cardiff within

the meaning of this agreement. It seems to me that this is a most strained construction of the simple words of this agreement. I only wish to call attention for a moment, before concluding, to the judgment of Lord Stowell in the case of *The George Holme* (*ubi sup.*) and the judgment of Dr. Lushington in *The Westmoreland* (*ubi sup.*). Dr. Lushington cites the judgment of Lord Stowell, and without going minutely into the statements which are made by either of those great judges, it will be seen plainly that in both of those cases the judges took the view that what the Legislature really required was that the agreement should be so expressed as to give sufficient information to the seamen about to be carried on the ship as to the voyage which they were about to undertake. In my view, if an agreement sufficiently does this —that is say, gives in sufficiently clear terms the information which the various merchant shipping statutes have required should be given to the sailors —that is all that the law requires; and provided that has been done, the sailors are to be treated in all other respects as free men, capable of taking care of themselves and capable of entering into any agreement they choose with the shipowners. I think, therefore, that this appeal ought to be allowed, with costs.

STIRLING, L.J.—The question which we have to decide turns on the construction of the agreement entered into by the plaintiff fireman with the master of the steamship *Scarsdale* in accordance with the Merchant Shipping Act 1894. By that agreement the plaintiff was engaged "on a voyage not exceeding one year's duration to any port or places within the limits of 70 degrees N. latitude and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trading limits) as may be required by the master." It was admitted by the learned counsel for the Board of Trade that the voyage contemplated was one which might be divided into various stages, as, for example, from Cardiff to Malta, Malta to the Black Sea, and from the Black Sea to Southampton, and that a full cargo might be taken in or discharged at these various places as circumstances might require. It was admitted also by them that the agreement for a voyage of this nature was perfectly valid, provided that the "ports" to which the ship might trade "in any rotation" were ports beyond home trading limits. I assume, without deciding, that this is the true construction of the word. It was, however, contended that the voyage contemplated by the agreement came to an end when the ship arrived at the final port of discharge of cargo within home trading limits—in this case Southampton—and that the master could not require the plaintiff to proceed to Cardiff with the ship in ballast, though it was not disputed that if the cargo had been only partially discharged at Southampton the master might have required the plaintiff to proceed to Cardiff in order that the rest might be discharged. The most material portions of the Act are sect. 114, sub-sects. 2 (*a*) and 3, and sect. 115, sub-sects. 5, 6, and 7. The agreement in question falls within the second branch of sub-sect. 2 (*a*). Unless, therefore, it contains some provision which is contrary to law effect ought to be given to it under sub-sect. 3. The agreement is admittedly not a running agreement within the meaning of sect. 115 of the Act. It must, therefore, under sect. 115, sub-sect. 5, be for a voyage; and if it provides for more than one voyage it is bad. It was argued that on any other construction than that adopted by Bargrave Deane, J. it does provide for more than one voyage. In order to test the argument on behalf of the Board of Trade the case was put to counsel of a voyage "commencing at Cardiff, proceeding thence to Malta, thereafter to the Black Sea, and thence with cargo to Southampton, and (if required by the master) from Southampton to Cardiff in ballast," and it was said—as I think the case of the Board of Trade required—that that would have been not one voyage but two. I am unable to agree. I think it was only one voyage, longer or shorter as the master might require. I also agree with the contention of counsel for the appellant that the voyage contemplated was that of the ship and not of the cargo. In the present case the master is by the terms of the agreement intrusted with the power of determining at what place within home trading limits the voyage is to end. The parties to an agreement of the kind with which we have to deal appear to be left by the Act of 1894 at perfect liberty to fix the commencement and ending of the voyage as they see fit. I think that the master could not use this power so as really to convert a single voyage into two; but in my judgment he has not so done. In my opinion, therefore, the appeal ought to be allowed.

MOULTON, L.J.—The decision in this case will be found to turn entirely upon our interpretation of the agreement entered into by the plaintiff seaman. I will not recapitulate the terms of that agreement, or that which was done thereunder, because in the judgments which have been already delivered these facts have been set out with perfect clearness. What is the interpretation of that agreement? It appears to me that if it was before the court uncomplicated by any reference to statute law relating to shipping one could come to no other conclusion as to the meaning of the agreement than that this was a contract for what I may call a tramp voyage, commencing at Cardiff, having its first station at Malta, then having freedom to trade to any ports within such wide limits as practically to include all the ports of the world, for a period not exceeding one year's duration, with the stipulation that it must end at a port within home trading limits, such port being a port required for that purpose by the master. With a great deal of that interpretation both the parties to this appeal agree. It is conceded by counsel for the Board of Trade that it was for a tramp voyage; that it was contemplated by the parties that the voyage should consist of trips from place to place, accompanied from time to time by shipments of fresh cargo, and by the total or partial discharge of such cargo. The only difference between the two interpretations is this, that the counsel for the Board of Trade contend that so soon as the ship arrived at a port within home trading limits — subject to certain stipulations as to discharge of cargo to which I will refer presently—the contract of service automatically came to an end. I cannot follow that contention.

It appears to me that the visit of the ship to a port within home trading limits might

occur lawfully in two ways. It might occur during what I may call, without ambiguity, the currency of the service, in virtue of the master's right to trade between ports within those wide limits—which include home trading limits—in any rotation; in other words, the master has a perfect right to go from Bilbao to London and from London to Bremen and from Bremen to Liverpool in virtue of his powers of trading to those ports in any rotation. He might do this during the currency of the contract, but a visit to a home port might also lawfully occur in virtue of the obligation that the crew have accepted to take the ship to such port as the captain may require at the termination of the contract. I can see nothing which estops the master from saying that the visit to Southampton was a visit during the currency of the contract, in virtue of his right of trading, or which compels us to assume that it was under the latter of the two powers, by which he would take the ship to a port within home trading limits for the purpose of terminating the service. If I might put it in a skeleton form, it appears to me that the contract says that the master must come to a port within home trading limits if he wishes to terminate the service. Counsel for the Board of Trade would have us invert that proposition and say the master must terminate the service if he wishes to come to a port within home trading limits. Those two propositions are widely different. The first appears to me to be correct, and the second I can see no ground for; and I am therefore of opinion that in trading the master had full right to go to ports situated within the home trading limits, and that those rights were exactly the same as those which he possessed to go to ports outside the home trading limits in that trading. I think counsel for the Board of Trade felt the difficulties of the contention which he was supporting very much in the way that they suggested themselves to me, and accordingly, with a perfectly logical frankness, he admitted that the contention practically amounted to requesting the court to read the words "other than ports within home trading limits" into the agreement just before the words "within the above-mentioned limits," so that the agreement would read like this: "Proceeding thence to Malta, thereafter trading to ports other than ports within home trading limits in any rotation." If I could see my way to read those words into the agreement—by which I mean to take them as implied—I think the contention of the respondents would be right. The presence of the ship at a port within home trading limits would no longer be capable of bearing two interpretations. It could only lawfully occur in virtue of the power possessed by the master to require the crew to take the ship to a port within home trading limits, for the purpose of terminating the contract. Consequently, by taking the ship to Southampton the master would have elected to terminate the contract of service there I can see no ground whatever for reading those words into the contract. It appears to me that they contradict and are inconsistent with the words "ports in any rotation," those ports having been previously defined by words which unquestionably include ports within home trading limits. Not only do I think that they are inconsistent with the agreement as it stands, but I can see no good sense or reason in implying them there because I can see no good reason why the parties to this agreement should wish to exclude ports within home trading limits from the trading rights which were intended to be given in this tramp voyage. Why they should wish to exclude the power of going from Lisbon to Bremen and Bremen to Gibraltar, when they were going to give the power of going from Lisbon to Bordeaux and from Bordeaux to Gibraltar, I cannot see. Therefore I cannot imply those words, and I think the contract must be construed as it stands.

What are the grounds on which counsel for the Board of Trade have asked us to construe this contract in a sense other than its natural sense? Two matters have been urged before us, and I have given them full consideration because I can see they are considered, both of them, to be important by those very eminent counsel. The first, which seems to have weighed most heavily with counsel for the Board of Trade, is that on the arrival at Southampton there was a total discharge of the cargo, and they contended that on the discharge of the cargo the voyage necessarily came to an end. In my opinion they have been deceived by the use of the phrase "the cargo." This contract does not contemplate a cargo, but a succession of cargoes, and just as it is agreed by all parties that the complete discharge of a cargo at Bilbao would not terminate the term of the agreement, so a complete discharge of the cargo at Southampton cannot have any such effect. So soon as you realise that the agreement contemplates cargoes taken and discharged and fresh cargoes taken up, there is no more difficulty in coming to the conclusion that the contract was not at end when that occurred at Southampton, than there would be if it had occurred at any other place outside home trading limits.

The other point on which great weight was laid by counsel for the Board of Trade is that if you construe this agreement in the way contended for by counsel for the appellant, it amounts to a time agreement for a period of not more than one year, and that time agreements for seamen are not permitted by law, and, therefore, the agreement would be invalid. On this point I have formed no opinion, and I intend, therefore, to express none, and my reasons are these: In the first place I realise that the question whether time agreements other than the running agreements referred to in sects. 115 and 116 are legal in the case of contracts for seamen's service may be a point of enormous importance to the mercantile marine and to sailors, and, therefore, I should be loth to decide it excepting in a case where, by reason of its being necessary to the decision, it would be certainly argued fully. In the present case it is quite immaterial—it can produce no effect upon our decision. If this contract was illegal, and therefore void, the appellant must succeed in the present case, because there was no contract upon which the magistrates could exercise jurisdiction; but I think a further reason for not deciding this question is that in my opinion if the contract with the one interpretation was illegal on the ground suggested, it would be equally so on the other interpretation. The two interpretations do not differ in any way in

respect of whether the contract is for a period of time or not. They only differ in the latitude of choice of the trading ports which may be called at during the contract of service. That is seen if you compare the contract in its present state with the contract as altered by reading in the words prayed for by counsel for the Board of Trade. They are both contracts for a period not exceeding a year, and according to the one interpretation with full liberty to call at any ports in the world during that period, and in the other case to call at any ports outside the home trade limits within that period; and the difficulty that has been referred to by counsel for the respondents, that the master would have the power of prolonging the service for any period within the year, would apply equally to one as to the other, the only difference being that in order to do so within one interpretation he must not come within home trading limits. In my opinion both interpretations would make the contract good or would make the contract bad alike. The principle *ut res magis valeat quam pereat* has no application. I therefore express no opinion whatever as to whether time agreements other than the running agreements referred to in the statute are permissible, and I base my decision solely upon this fact—that in order to succeed the respondents must show that there was a valid agreement which was terminated by a call at Southampton. Whatever were the purposes for which that call was made, in my opinion they have failed to establish that, and therefore I am of opinion that the appeal should be allowed, with costs.

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

Solicitors for the respondent, *Chivers* and *Co.*

Solicitor for the Board of Trade, *Treasury Solicitor*.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Dec. 4, 1905.

(Before Lord ALVERSTONE, C.J.)

HUTTON *v.* RAS STEAM SHIPPING COMPANY LIMITED. (*a*)

Seamen—Naval court—Offences against discipline—Complaint to naval court against seaman—Powers of naval court—Jurisdiction to dismiss from ship—Finality of order of court—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 225, 480-486.

Upon a complaint made to a naval court duly convened in pursuance of sect. 480 *of the Merchant Shipping Act* 1894 *by the master of a British ship under sect.* 225 *of that Act for offences against discipline, the naval court is not restricted in its punishments to those prescribed by sect.* 225, *but may inflict the punishments prescribed by sect.* 483, *sub-sect.* 1, *and may therefore order the seaman to be discharged from his ship and his wages to be forfeited, as provided by that sub-section.*

The plaintiff shipped as a seaman on the defendants' ship at Barry under articles for a voyage for three years for Port Arthur and (or) any ports within certain limits, which included Japan, and back to a final port of discharge in the United Kingdom. Whilst at a certain port in Japan, which was then at war with Russia, the plaintiff and others of the crew objected to continue the voyage, on the ground that the vessel was carrying contraband of war. They refused to work until an arrangement was made under which they would be indemnified in the event of capture. Upon the complaint of the master of the ship they were summoned before a naval court under sect. 225 *of the Merchant Shipping Act* 1894 *upon the charges that they had been guilty of continued wilful disobedience to lawful commands, and of continued wilful neglect of duty, and that court, after hearing the evidence, found them guilty of the charges and ordered that they should be discharged from the ship and their wages forfeited.*

In an action for wages and damages for the dismissal from the ship:

Held, that the naval court had power to inflict the punishment of dismissal from the ship and forfeiture of wages under sect. 483, *sub-sect.* 1 *of the Act; that there was no substantial evidence before the naval court that the vessel was carrying contraband of war; that the order was not made without jurisdiction, and was therefore conclusive of the rights of the parties under sect.* 483, *sub-sect.* 2, *and that therefore the plaintiff could not maintain the action.*

ACTION tried by Lord Alverstone, C.J. without a jury.

The action was brought by the plaintiff, Peter Hutton, against the defendants, the Ras Steam Shipping Company Limited, for wages due as donkeyman on board the steamship *Ras Bera* and for damages for breach of contract of service.

The statement of claim alleged that on the 11th Nov. 1903 it was agreed between the plaintiff and the defendant company that the plaintiff should enter into the defendant company's service and serve them for three years in the capacity of a fireman on the ship *Ras Bera* at the wages of 4*l.* 10*s.* per month, and that the defendants should retain the plaintiff in that service for the term of three years; that the plaintiff entered into the defendants' service in that capacity and upon those terms, and so continued therein until the 10th Dec. 1903, when he was promoted to the position of a donkeyman at the wages of 5*l.* 10*s.* a month; that he continued in the service of the defendant company as a donkeyman on the *Ras Bera* until his dismissal; that on the 16th April 1904, and before the expiration of the term of three years, the defendants dismissed the plaintiff from their service and refused to retain him therein for the remainder of the term, by reason whereof the plaintiff lost wages and was not allowed to return to the vessel to recover his effects, and in consequence of the negligence of the defendants in throwing such effects on to a lighter instead of packing them up securely he suffered loss of certain articles of clothing, and the plaintiff claimed 100*l.* damages, including wages up to the 20th July 1904 (29*l.* 1*s.*) and loss of clothes (8*l.* 10*s.*).

The defendants in their defence denied that they had dismissed the plaintiff as alleged, and they said that on the 10th April 1904 and

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

continuously thereafter the plaintiff had refused to perform his duties; that by a decision of a naval court held at Yokohama on the 16th April 1904, under the provisions of the Merchant Shipping Act 1894, to which court the conduct of the plaintiff was referred, the plaintiff was ordered to be discharged from the steamship *Ras Bera*, and his wages to that date, amounting to 6*l.* 19*s.* 11*d.*, were forfeited to the ship, and the plaintiff was thereby discharged and his wages forfeited accordingly; that the decision of the naval court was, by the provisions of the Act, final and was a bar to so much of the action as related to damages for wrongful dismissal and to wages; and, further, that the plaintiff had not lost his clothes as alleged, or that he had not done so by any act or default of the defendants.

The plaintiff in his reply said that if he refused to perform his duties he was justified in doing so as the ship was carrying contraband of war; and he objected that the matters stated in the defence as to his dismissal by the order of the naval court disclosed no answer to the action, inasmuch as the decision and order were made without jurisdiction, and were of no effect and were contrary to natural justice.

The facts as found by the learned judge at the trial are fully stated in the judgment.

The naval court was convened by the acting British Consul-General at Yokohama, and was held at the British Consulate-General, Yokohama, on the 16th April 1904, to inquire into a complaint made by the master of the British steamship *Ras Bera* against twenty-one of the crew of the ship, including the plaintiff Hutton.

The summons which was issued and signed by the acting British Consul-General on the 15th April 1904 was as follows:

Whereas a naval court has been summoned by the acting British Consul-General at Yokohama for the purpose of hearing a complaint against you by the master of the British steamship *Ras Dera* that at the port of Yokohama on the 12th April 1904 and subsequent days you were and still are guilty of continued wilful disobedience to lawful commands and continued wilful neglect of duty and of general insubordination subversive of discipline on board the ship and prejudicial to the owners' interests. And whereas the offence of which you are accused as aforesaid is that of continued wilful disobedience to lawful commands and continued wilful neglect of duty, an offence against sect. 225 of the Merchant Shipping Act 1894, which is punishable on summary conviction: These are therefore to command you to be and appear on Saturday, the 16th April 1904, at ten o'clock in the forenoon, before the said court to answer to the said accusation and to be further dealt with according to law.

A statement made and signed by the plaintiff was read to the court to the effect that the crew made a complaint to the master in writing stating that they considered their agreement broken, as their ship was chartered by Japanese owners carrying contraband of war, and they considered that they were in great danger of their liberty and lives; that they gave the master forty-eight hours' notice to settle the matter, and, having got no satisfaction, they stopped work, not refusing duty and causing no insubordination; and that as they went up and asked to see the consul, and could not see him, they could not see why they were in the wrong. Statements were also made by some others of the crew.

The finding of the naval court, dated at Yokohama the 16th April 1904, after setting out the names of the seamen and the complaint against them, was as follows:

Having heard and carefully considered the evidence given before the court in the presence of the accused aforesaid, and having considered their statements in defence, the court finds that each of the accused aforesaid at the Port of Yokohama on the 12th day of April 1904 and subsequent days up to date was guilty of continued wilful disobedience to lawful commands of the officers of the ship and continued wilful neglect of duty without good and sufficient cause, which is an offence against the Merchant Shipping Act 1894 punishable on summary conviction, and of insubordination subversive of discipline on board the steamship *Ras Bera*, and prejudicial to the owners' interests. Their plea that the carriage of contraband vitiates the agreement is without force. The voyage remains an ordinary commercial venture; any risk or responsibility that may be incurred is borne by the ship. Having regard to the circumstances of the case, the court, in pursuance of the powers vested in it by sect. 483 of 57 & 58 Vict. c. 60, orders that William Fullerton, carpenter, whose balance of wages is determined by the court to be [Then followed the names of each of the crew, with the balance of wages found by the court to be due to each, the balance found to be due to the plaintiff Hutton being 6*l.* 19*s.* 11*d.*] shall be discharged from the steamship *Ras Bera* the 16th day of April 1904, and their wages as above determined by the court forfeited to the ship. The expenses of this court fixed at 6*l.* 9*s.* are approved. The court, in pursuance of the powers vested in it by sect. 483 of 57 & 58 Vict. c. 60, orders that the sum of 6*l.* 9*s.*, being the costs of the proceedings before the said court, be paid by the master of the steamship *Ras Bera*, and he is hereby ordered to pay the said amount accordingly, but he is hereby empowered to deduct the same from the wages of the aforesaid seamen belonging to the said ship hereby forfeited.

The report was signed by the acting British Consul-General (who was president of the court) and by the masters of two British merchant steamships, who composed the naval court.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 225 (1). If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows; (that is to say)—(*b*) If he is guilty of wilful disobedience to any lawful command, he shall be liable to imprisonment for a period not exceeding four weeks, and also, at the discretion of the court, to forfeit out of his wages a sum not exceeding two days' pay; (*c*) if he is guilty of continued wilful disobedience to lawful commands or continued wilful neglect of duty, he shall be liable to imprisonment for a period not exceeding twelve weeks, and also, at the discretion of the court, to forfeit for every twenty-four hours continuance of disobedience or neglect, either a sum not exceeding six days' pay, or any expenses properly incurred in hiring a substitute; (*e*) if he combines with any of the crew to disobey lawful commands, or to neglect duty, or to impede the navigation of the ship or the progress of the voyage, he shall be liable to imprisonment for a period not exceeding twelve weeks. . . . (2) Any imprisonment under this section may be with or without hard labour.

Sect. 742 (the definition clause). "Court" in relation to any proceeding includes any magistrate or justice having jurisdiction in the matter to which the proceeding relates.

Sects. 480 to 486, inclusive, deal with "Naval Courts on the High Seas and Abroad."

Sect. 480. A court (in this Act called a naval court) may be summoned by any officer in command of any of Her Majesty's ships on any foreign station, or, in the absence of such an officer, by any consular officer, in the following cases—that is to say: (i.) whenever a complaint which appears to that officer to require immediate investigation is made to him by the master of any British ship, or by a certificated mate, or by any one or more of the seamen belonging to any such ship; (ii.) whenever the interest of the owner of any British ship or the cargo thereof appears to that officer to require it; and (iii.) whenever any British ship is wrecked, abandoned, or otherwise lost at or near the place where that officer may be, or whenever the crew or part of the crew of any British ship which has been wrecked, abandoned, or lost abroad arrive at that place.

Sect. 481. (1) A naval court shall consist of not more than five and not less than three members, of whom, if possible, one shall be an officer in the naval service of Her Majesty not below the rank of lieutenant, one a consular officer, and one a master of a British merchant ship, and the rest shall be either officers in the naval service of Her Majesty, masters of British merchant ships, or British merchants, and the court may include the officer summoning the same, but shall not include the master or consignee of the ship to which the parties complaining or complained against belong. (2) The naval or consular officer in the court, if there is only one such officer, or, if there is more than one, the naval or consular officer who, according to any regulations for settling their respective ranks for the time being in force, is of the highest rank, shall be the president of the court.

Sect. 482. (1) A naval court shall hear the complaint or other matter brought before them under this Act, or investigate the cause of the wreck, abandonment, or loss, and shall do so in such manner as to give every person against whom any complaint or charge is made an opportunity of making a defence. (2) A naval court may, for the purpose of the hearing and investigation, administer an oath, summon parties and witnesses, and compel their attendance and the production of documents.

Sect. 483 (as to the powers of naval courts). (1) Every naval court may, after hearing and investigating the case, exercise the following powers—that is to say . . . (*c*) the court may discharge a seaman from his ship; (*d*) the court may order the wages of a seaman so discharged or any part of those wages to be forfeited, and may direct the same either to be retained by way of compensation to the owner, or to be paid into the Exchequer, in the same manner as fines under this Act; (*e*) the court may decide any questions as to wages or fines or forfeitures arising between any of the parties to the proceedings; (*f*) the court may direct that all or any of the costs incurred by the master or owner of any ship in procuring the imprisonment of any seaman or apprentice in a foreign port, or in his maintenance whilst so imprisoned, shall be paid out of and deducted from the wages of that seaman or apprentice, whether then or subsequently earned; (*g*) the court may exercise the same powers with regard to persons charged before them with the commission of offences at sea or abroad as British consular officers can under the 13th part of this Act; (*h*) the court may punish any master of a ship or any of the crew of a ship respecting whose conduct a complaint is brought before them for any offence against this Act, which, when committed by the said master or member of the crew, is punishable on summary conviction, and shall for that purpose have the same powers as a court of summary jurisdiction would have if the case were tried in the United Kingdom: Provided that—(i.) where an offender is sentenced to imprisonment, the senior naval or consular officer present at the place where the court is held shall in writing confirm the sentence and approve the place of imprisonment, whether on land or on board ship, as a proper place for the purpose; and (ii.) copies of all sentences passed by any naval court summoned to hear any such complaint as aforesaid, shall be sent to the commander-in-chief or senior naval officer of the station: (*k*) The court may order the costs of the proceedings before them, or any part of those costs, to be paid by any of the parties thereto, and may order any person making a frivolous or vexatious complaint to pay compensation for any loss or delay caused thereby, and any costs or compensation so ordered to be paid shall be paid by that person accordingly, and may be recovered in the same manner in which the wages of seamen are recoverable, or may, if the case admits, be deducted from the wages due to that person. (2) All orders duly made by a naval court under the powers hereby given to it, shall in any subsequent legal proceedings be conclusive as to the rights of the parties. (3) All orders made by any naval court shall, whenever practicable, be entered in the official log-book of the ship to which the parties to the proceedings before the court belong, and signed by the president of the court.

Sect. 484 (1). Every naval court shall make a report to the Board of Trade containing the following particulars—that is to say: (*a*) a statement of the proceedings of the court, together with the order made by the court, and a report of the evidence; (*b*) an account of the wages of any seaman or apprentice who is discharged from his ship by the court; (*c*) if summoned to inquire into a case of wreck or abandonment, a statement of the opinion of the court as to the cause of that wreck or abandonment, with such remarks on the conduct of the master and crew as the circumstances require. (2.) Every such report shall be signed by the president of the court, and shall be admissible in evidence in manner provided by this Act.

Sect. 486. (1) The provisions of this part of this Act with regard to naval courts on the high seas and abroad shall apply to all sea-going ships registered in the United Kingdom (with the exception, in their application elsewhere than in Scotland, of fishing boats exclusively employed in fishing on the coasts of the United Kingdom), and to all ships registered in a British possession, when those ships are out of the jurisdiction of their respective governments, and where they apply to a ship, shall apply to the owners, master, and crew of that ship. (2.) For the purpose of the said provisions an unregistered British ship shall be deemed to have been registered in the United Kingdom.

Robson, K.C., *B. Wise*, and *M. Morgan* for the plaintiff.

Batten, K.C. and *Bailhache* for the defendants.

Cur. adv. vult.

Dec. 4.—Lord ALVERSTONE, C.J. read the following judgment: This was an action in which the plaintiff, formerly employed as a donkey-man on board the steamship *Ras Bera*, sued to recover wages alleged to be due to him in respect of his employment on board that steamer. The defendants set up as a defence that the plaintiff was dismissed his ship at Yokohama, by the order of a naval court sitting under the Merchant Shipping Act 1894. The case is of importance, inasmuch as there are several other seamen who were dismissed at the same time and who are making similar claims. The facts proved or admitted before me were as follows: The plaintiff shipped at Barry under articles for a voyage for three years for Port Arthur *viâ* Barry and (or) any ports within certain limits which included Japan, and back to a final port of discharge in the United Kingdom. The vessel loaded a cargo of coals at Barry and arrived at Port Arthur on the 18th Jan. 1904 during the siege, and the

coals were there discharged. The vessel was at Port Arthur during a portion of the bombardment. She got away from Port Arthur on the 11th Feb., went in ballast to Moji, a port on the west coast of Japan, from whence she proceeded to Hong Kong. At Hong Kong the *Ras Bera* was chartered by the Nippon Yusen Kaisha, the R.M.S.S. Company of Japan, on a voyage to carry cargo and passengers to all parts of the world except British North America and Magellan, including Japanese ports. The charter provided that the steamer should fly at the mainmast head during her stay in port any private signal or home flag of the charterers. It was also provided by clause 26 of the charter-party that the charterers should not employ the steamer in the carrying of troops and contraband of war. Under this charter she was to proceed to Kobe in Japan, thence to Moji and from Moji to Yokohama. The manifests for the two voyages before her arrival at Yokohama were put in, and it was alleged by the plaintiff that the steamer carried on these two voyages, among other things, rails and other railway material. By Russian proclamation published in the *London Gazette* of the 1st and 22nd March materials for the construction of railways were declared by Russia to be contraband of war. Upon the arrival at Yokohama the plaintiff and others of the crew objected to continuing the voyage on the ground that the vessel was carrying contraband of war, and declined to work until some arrangement was made that in the event of capture they would be indemnified, and their wives and families compensated and cared for. While the question was under discussion the plaintiff and the others who objected declined to do any work, but except in respect of such refusal it was not alleged that they refused to discharge their duty. Upon this question being raised by the men, a naval court was held under sects. 480 to 486 of the Merchant Shipping Act 1894, which court, after hearing the evidence of the plaintiff, the master, and other witnesses, decided that the plaintiff and others were guilty of continued neglect of duty without good and sufficient cause.

The judgment further stated that the sailors' plea that the carrying of contraband vitiated the agreement was without force, the voyage remaining an ordinary commercial venture, any risk or responsibility that might be incurred being borne by the ship. The court further discharged the plaintiff and the other seamen from the steamship *Ras Bera* and forfeited their wages. Evidence was given before me by the plaintiff that at Yokohama the vessel was both taking in and discharging railway materials, and if the matter was for me I should hold upon the evidence that this was the case, as I was not satisfied, from the evidence of the master, that no railway materials were being shipped. Upon the other hand, evidence was also given by the plaintiff that military stores were being shipped and men in uniform carried as passengers; but upon the evidence, as far as it is for me, I do not find either that the vessel was fitted for carrying troops or members of the Japanese navy, or that any were so carried.

The main question in the case, however, is not what was in fact on board, but whether, having regard to the provisions of sect. 483 of the Merchant Shipping Act 1894, the plaintiff is entitled to maintain this action. It was contended on behalf of the defendants that they had not dismissed the seamen, that their discharge from the ship was the act of the court, and therefore no question of wages subsequent to the date of discharge could possibly arise. It was contended on behalf of the plaintiff that the order of the naval court was bad and not binding upon the plaintiff, and that, inasmuch as he had been only discharged from the ship thereunder his wages continued to run under the provisions of the Merchant Shipping Act. The main ground of contention of the plaintiff was that the decision and order of the naval court were made without jurisdiction, and that the offence in respect of which the men were charged, being an offence under sect. 225, having regard to the provisions of that section, the court had no power to discharge the plaintiff from the ship. They further contended that the passage of the judgment with regard to carrying contraband of war above quoted showed that the judgment was contrary to natural justice, and therefore could not be enforced. In order properly to appreciate these arguments it is, in my opinion, necessary to consider in the first place what is the position of a court held under sects. 480 and 486 of the Merchant Shipping Act, and on what grounds, if any, the decision of such a court can be impeached. It is, in my opinion, a British court sitting by virtue of the authority of a British statute and administering British law. It summons the parties before it, and has jurisdiction to investigate any charges, made under the sections of the Act, which can be entertained by courts having summary jurisdiction; this is clearly provided by sect. 483, sub-sect. 1. But in my opinion the powers of the court, so far as punishment is concerned, are not confined to sect. 225 or earlier sections of the Act; express power is given by sect. 483 (1) (*c*) to discharge seamen from the ship, and by sect. 483 (1) (*d*) the court has power to forfeit wages. These powers are in excess of those given by sect. 225. Sect. 483 (2) provides that all orders duly made by a naval court under the powers of that section shall, in subsequent legal proceedings, be conclusive of the rights of the parties. In my judgment this provision was required in order to give orders of the court the effect of judgments *inter partes*; the court was a new court created by statute, and but for this section some question might have arisen as to whether its decisions were final and conclusive, as those of a court of record. In my opinion, therefore, unless the plaintiff could have successfully maintained that the order of the court was made without jurisdiction, it is an answer to the plaintiff's claim. It was contended by Mr. Robson that the word "duly" in sub-sect. 2 of sect. 483 implies "correctly made in point of law," and that the statement in the order in question as to the way in which the court dealt with the plea that the carriage of contraband vitiated the agreement showed that the order was not duly pronounced. I cannot accede to this argument as to the meaning of the word "duly." At the outset it seems to me that it enacts that the proceedings must be regular—that is, the parties summoned on some definite charge, the parties and witnesses heard, and the case determined. I have, however, looked through the evidence which was before the court, and I am not satisfied that the passage which has been so

much criticised bears the construction which the plaintiff puts upon it. Whatever may have been the true facts, there was no substantial evidence before the court that the vessel was carrying contraband of war. And in my opinion it is quite consistent with the above passage that the court rejected the plea upon the ground that they were not satisfied with the allegations made by the witnesses called on behalf of the seamen. In the view I take it is unnecessary to consider what the rights of the plaintiff would have been if the question for decision were the effect upon the contract of service of the carrying of contraband of war. Some claim was made on behalf of the plaintiff in respect of the seamen's effects, but no facts were proved before me to show that the defendants were responsible for the loss of the seamen's effects, and inasmuch as the action was really brought to try the question of whether the seamen were entitled to their wages, notwithstanding that they had been dismissed from the ship, I think that this action must be dismissed with costs.

Judgment for the defendants.

Solicitor for the plaintiff, *John T. Lewis*, for *Robert Jones* and *Everett*, Cardiff.

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

Feb. 28, *March* 1, 2, *and* 12, 1906.

(Before Phillimore, J.)

Von Freeden *v.* Hull, Blyth, and Co.; G. P. Turner and Co. and others, Third Parties. (*a*)

Co-owners—Equitable ownership—Contribution to expenses of voyage—Foreigner equitable owner of a share in a British ship—Unregistered bill of sale.

A person who has a contract with the registered owner of a ship under which the latter is a mere nominee bound to act as the former directs, bound to pay him the profits, bound to transfer upon demand, is an equitable owner. A person who has a bill of sale, and has only to register it, is an equitable owner.

It does not matter whether the equitable owner has obtained his bill of sale from the legal owner or whether he has not advanced so far. Any declaration of trust by the legal owner, any state of facts acquiesced in by both parties which establishes the relation of trustee and cestui que trust *as to a specific share or shares makes the* cestui que trust *equitable owner, and as such part owner liable to contribute to the expenses of a voyage.*

If the so-called trustee merely has a duty to find a share when the agreed conditions are complied with, or where there is a mere contractual relation as to profits, or where the trustee has active duties to perform, while behind him there are persons who have various beneficial interests in the profits, there is no equitable ownership, and the so-called trustee is the owner.

A foreigner who has paid in full for a share in a British ship, and has received but not registered a bill of sale, is an equitable owner, and as part owner liable to contribution for the expenses of a voyage.

(*a*) Reported by Trevor Turton, Esq., Barrister-at-Law.

Action tried by Phillimore, J. in the Commercial Court, sitting without a jury.

The defendants claimed that the third parties were liable jointly and severally to contribute to discharge a claim for 1381*l.* 15*s.* 10*d.* for disbursements and commission in respect of the steamship *Dovedale*, which the plaintiffs had recovered against the defendants.

The defendants, who were the owners of one sixty-fourth share in the British steamship *Dovedale*, alleged that the third parties were at all material times part owners of or beneficially interested as owners in the ship to the following extent: G. P. Turner and Co., two shares; Captain Morgan, half share; Max Holtzapfel, one share; J. Dooley, one share; W. Dixon, two shares; Leon Dens, one share; E. Armstrong, half share; W. Stockdale, half share. G. H. Elder, the defendants alleged, was the owner of or beneficially interested as owner in the ship to the extent of fifty-four and a half sixty-fourth shares, and by or with the authority or consent of the other part owners, was the managing owner of the ship. Alternatively, the defendants alleged that the third parties were partners with G. H. Elder in the employment of the ship. G. H. Elder had been adjudicated bankrupt.

The plaintiffs claimed 1381*l.* 15*l.* 10*d.* for disbursements made and commissions earned in respect of the ship at Buenos Ayres, on the instructions of G. H. Elder as managing owner and agent on behalf of the defendants and the third parties. The defendants alleged that they were liable to pay, and, with the consent of the three parties (but without prejudice to the question of the respective liabilities of the third parties to the defendants) had paid to the plaintiffs the amount of the claim, and were liable to pay the taxed costs, and as defendants in this action had reasonably incurred costs and expenses in connection with the same. The defendants claimed that the said third parties were jointly and severally liable with them to contribute to the discharge of the claim, or that they were entitled to contribution from the third parties to the extent of their respective shares of the claim and the costs and expenses paid or incurred by the defendants; or, in the alternative, that the defendants were entitled to an indemnity from the third parties for such proportion of the claim and costs and expenses which the defendants had paid or incurrred in excess of their proper or proportionate share thereof.

The third parties—G. P. Turner and Co., Morgan, Holtzapfel, Dixon, Stockdale, and Dens respectively—alleged that they were never part owners of or beneficially interested as owners in the steamship *Dovedale*. G. H. Elder had no authority or consent from them to be the managing owner of the vessel. They were not partners with G. H. Elder in the employment of the ship. G. H. Elder gave no instructions as agent for them and had no authority from them to act for them or pledge their credit in any way. The defendants were not entitled to any contribution or indemnity from them. Turner and Co. alleged that if they (Turner and Co.) were under any liability to the defendants, G. H. Elder as agent for and on behalf of himself and the other part owners of the *Dovedale*, including the defendants, and by and with the authority or approval and ratification of the defendants and the other

owners, instructed Turner and Co. as insurance brokers to effect certain insurances on the *Dovedale* on their behalf, and that there was due to them from the defendants jointly and severally with the other owners of the *Dovedale* 1378*l.* 1*s.* 11*d.* for premiums, and alleged that they were entitled to credit for that sum against the defendants, and to set off that sum against any claim of the defendants for contribution or indemnity.

The third party, Dooley, did not appear.

The facts appear in the following considered judgment.

Scrutton, K.C. and *Dunlop* for the defendants.

Carver, K.C. and *Leck* for Turner and Co. (third parties).

J. A. Hamilton, K.C. and *Adair Roche* for Morgan, Holtzapfel, Dixon, and Stockdale (third parties).

J. A. Hamilton, K.C. and *Maurice Hill* for Dens (third party).

March 12.—PHILLIMORE, J.—This was originally an action brought against the defendants, who trade as Hull, Blyth, and Co., to recover 1381*l.* 15*s.* 10*d.*, being the plaintiff's claim for disbursements and commissions in respect of services rendered in a foreign port to the steamship *Dovedale* upon the authority of the managing owner, Elder, trading as G. H. Elder and Co. The defendants were sued as the registered and true owners of one sixty-fourth share in the ship, and as having given authority to the managing owner to navigate her on their behalf. The defendants appeared and defended up to a point, and delivered third party notices claiming contributions from other alleged owners. Then being satisfied that the amount was due, and having obtained orders under which the third parties were to be bound by the judgment to be signed by the plaintiffs, they consented to the judgment. The several questions of liability as between the defendants, whom I shall in future call the claimants, and the third parties are now to be determined. The ship *Dovedale* was built by Short Brothers (Limited), of Sunderland, for Elder, under an agreement dated the 11th June 1901, whereby the ship was to be complete and ready for transfer in or about August 1902. The price was to be 38,000*l.* on the basis of net cash on the transfer of the vessel, but Elder was to have the option of paying 33,000*l.* by deferred payments on condition that he endorsed over the shareholders' acceptances to the builders. Provision was made for these acceptances being six months' bills renewable, but so that one-tenth of the balance was paid off at every six months. Interest at five per cent. was to be given for money, if any, paid before the completion of the vessel, and to be due at the same rate on unpaid instalments. Clause 12 of the agreement was as follows: "The vendors to transfer shares to the purchasers as they are paid for, and to hold security on the remainder of the shares for the deferred payments until the same are fully paid." Two or more steamships had been already built by Short Brothers (Limited) for Elder under similar agreements, and the way in which Elder had raised money for their purchase had been by getting friends or tradesmen who might expect to supply the ship to take shares, or a share, or half a share in the ship, paying their proportion of the cost. The balance Elder had to raise as best he could. Some part he may have paid out of his own money; the rest would be borrowed from the bankers, or left due on mortgage to the builders. As to the *Dovedale*, the same course was pursued. No doubt it was known to the builders and contemplated by both parties. The provision that Elder was to endorse over the shareholders' acceptances to the builders shows this. The ship was complete and ready for delivery on the 10th Jan. 1903. A supplemental agreement was then made between the builders and Elder whereby the builders were to retain possession of fifty-six shares as collateral security for 33,000*l.*, but were not to participate in the profits or to be liable for the debts of the ship. They agreed not to deal with or realise the shares until default, and to transfer shares from time to time as bills were paid off. At the same time, apparently, Elder paid them 5000*l.*, which is rather more than the price of eight shares. The ship was registered the same day in the name of Elder alone, and he appointed himself managing owner. On the 13th Short Brothers (Limited) were registered as owners of fifty-six sixty-fourths, and remained so during all material times. On the 19th the claimants were registered as owners of one sixty-fourth. The other seven sixty-fourths remained in Elder; but on the 22nd Jan. 1904 a banking company was registered as mortgagee of these seven shares under a mortgage executed long before—namely, on the 7th Feb. 1903. As Short Brothers (Limited), though apparently the owners, were really only mortgagees of fifty-six sixty-fourths, and as they had given no authority to Elder to sail the ship on their behalf, the claimants could not call upon them for contribution: (see *Frazer and Co.* v. *Cuthbertson*, 1880, 6 Q. B. Div. 93; 50 L. J. 277, Q. B.; 29 W. R. 396; *The Innisfallen*, 2 Mar. Law Cas. 470; 16 L. T. Rep. N. S. 71; 1866, L. Rep. 1 Ad. & E. 72). Elder is insolvent, and this exhausts the registered owners. The claimants, however, suggest that the various third parties are owners in equity of eight and a half shares and are as such liable to contribute. The cases of the third parties are in many respects identical, but each has some peculiarity. On the 21st Oct. 1902 Elder issued a printed circular inviting people to take shares in the ship on the terms of approximately one-seventh cash down, and the balance in six monthly instalments, with interest at 5 per cent. They had issued a similar sort of circular for their previous ships. I notice that, whereas the builders were to be paid in ten instalments, and in five years, Elder's proposed arrangements in the circular would make the instalments larger and the periods of payment shorter. It is difficult to see why this was done; but it may have afforded scope for some financing. Under the original agreement with the builders the builders were to have the shareholders' acceptances, and, I presume, instalments. It is not very clear in the circular whether Elder proposed to receive from the shareholders and, if received, to keep their instalments, or whether the builders were to have them, and whether the shares were ultimately to be transferred to the purchasers by Elder or by the builders. In practice Elder received all the payments made by the third parties, and kept them, and did not even carry them to separate accounts. He did from

time to time, though always too late, make further payments to the builders to the amount of 3500*l.*, which would have entitled him to six more shares; but he never got them. Of the third parties, Morgan received the circular and applied on the form for half a share. He paid in full, and before the ship was complete. Dixon received the circular, and though there is no proof that he signed the application form, he was treated as having taken one share and accepted the position, and, in my opinion, took it upon the terms in the circular. He paid by instalments and had not completed his payments at the material date. Turner, trading as G. P. Turner and Co., took two shares upon the terms of certain letters and an oral agreement that he should pay by instalments; in fact, in the same way as in the circular, but without reference to it. He was expressly promised that his acceptance for instalments should be in the builders' hands. He completed his payments on the 27th Dec. 1904, but never got a bill of sale. As to Holtzapfel, Dooley (who did not appear), and Armstrong (who was not represented before me, but agreed to be bound by the cases of the others) the evidence was not so full. But the conclusion is that they took their shares substantially on the terms of the circular, paid for them by instalments, and had not completed their payments. Holtzapfel and Dooley bought each one share, Armstrong bought a half-share. Dens bought one share in peculiar circumstances which I must deal with separately. Stockdale was in Elder's books as holder of a half-share, and was credited with certain payments and profits and debited with his unpaid instalments. He had agreed to take a similar interest in one of Elder's other ships; but upon hearing his evidence I came to the conclusion that he had never authorised this transaction and knew nothing about it, and that the entry in Elder's books was a mere book-keeping transaction of his own. So I gave judgment for Stockdale. But Elder's entry of this half-share further complicates the accounts. He by his books purports to have transferred or agreed to transfer nine and a-half shares whereas fifty-six sixty-fourths were in the names of Short Brothers (Limited), leaving Elder only eight. It would have been possible for the third parties to have made certain of their interests in their shares either, as I suggested in the course of the argument, by taking transfers from Elder and mortgaging back for the unpaid instalments; or, as it has occurred to me since, by taking mortgages from Elder to secure payments made. I am not sure that under the circular they might not have claimed to be secured in this latter form on paying the necessary expense. But these steps would have cost money and been troublesome. The parties do not seem to have contemplated them, and in fact they were not taken. Each of the third parties, therefore (putting aside Dens), was without any specific share allotted to him, or secured in any way other than by Elder's contract. As I have said, it is not very clear whether under the printed circular Elder undertook to transfer shares himself, or only that the builders should transfer shares. He had only seven shares, and had contracted for eight or eight and a-half; and the purchasers had no right to transfers till they had paid in full. It was suggested on behalf of some of the third parties that I should set aside all their contracts as having been obtained by fraud. A difficulty in the way of such a contention is that the contracts would not then be void but voidable only, and that no steps have been taken to avoid them. But I do not think that the contracts were obtained by fraud. Elder did not necessarily represent that he had eight or eight and a-half shares, but only that he would have them or could call for them when the purchasers had fully paid for them. Between the 10th Jan. and the 7th Feb. 1903—and all the contracts of which I know the dates were made before the 7th Feb.—he had seven shares unencumbered. Even after the 7th Feb. the bank allowed him to remain in the position of being able to transfer these shares unencumbered until the 22nd Jan. 1904. He raised somehow further money to pay to the builders enough to get him six more shares. There was fraud upon Turner after the contract had been made in not handing his acceptances to the builders. Possibly it might be deemed fraud upon the other purchasers to mix their payments with Elder's own money. But, if so, these frauds come after the contracts had been made.

The contracts, therefore, standing, I have to consider what interests in the ship, if any, were thereby conveyed to the third parties, and what authority, if any, the third parties must be deemed to have given to the managing owner. Here the great point for the claimants is that each of the third parties received at the conclusion of the first voyage an account of the profits and a proportionate dividend in respect of the share or shares which they bought. The first voyage was a prosperous one; there was enough to pay all the disbursements and a dividend of 15*l.* a share. The second voyage was also prosperous, but was not completed till about the date of Elder's bankruptcy. Elder received the profits, but did not apply them in payment of the disbursements, and hence it comes that the plaintiffs in their action had to sue. Each of the third parties received his dividend from the first voyage, and I think that, as between Elder and himself, he was clearly entitled to it by the terms of his contract; but this leaves the question open whether he received it as the owner of, say, one sixty-fourth from Elder as managing owner or whether he received it from Elder as vendor of one sixty-fourth under an uncompleted contract of purchase. The liability of a part owner to contribute to the expenses of a voyage has been often discussed and stated. For the purpose of this case it is sufficiently expressed in a few words taken from Bucknill, J.'s edition of Abbott on Shipping: "Each part owner who does not effectually withdraw authority from his co-owners to sail the ship on his behalf is liable as a partner for the whole of the expenses of that adventure": (Abbott on Shipping, 13th edit., p. 103). Now that the law requires that every ship should have a registered managing owner, a registered part owner or a legal part owner (if these words do not mean the same thing) being also the true owner, who knows or ought to know that the ship is sailing the seas, and does not express his dissent, is liable for her expenses. It may be—but it is not necessary to decide that in this case—that he must effectually express his dissent by bringing an Admiralty action of restraint. A registered or legal part owner,

however, who is not the true owner is not so liable: (see *Frazer and Co.* v. *Cuthbertson*, already cited). What is the law as to a true owner who is not the registered or legal owner? If the court can look behind the register and the bill of sale so as to discover that a legal owner is not the true owner and not liable, so it can look behind the documents, find the true owner and make him liable. Or, in other words, if a ship is being sailed without the expressed dissent of any part owner, every part owner is deemed to have authorised the voyage, and must pay his share; and if A. B., who is on the register for one or more shares, escapes liability on the ground that he is a mere nominee, agent, or trustee, or on the ground that his interest is that of a mortgagee, then the nominator, principal, *cestui que trust*, or mortgagor must take his place. If a mortgagee cannot bring an Admiralty action of restraint, as was decided in *The Innisfallen*, already cited, and in several subsequent Admiralty cases, his mortgagor must be able to do so. Whether a purchaser who has obtained a bill of sale but has not registered it is to be deemed a legal owner, or, rather, as the Court of Exchequer and Dr. Lushington called him, and as I incline to call him, an equitable owner, his right to the specific property and his title as against all the world has been recognised by the courts. The Court of Exchequer so held in *Stapleton* v. *Haymen* (9 L. T. Rep. 655; 1864, 2 Hurlston & Coltman, p. 918). Sir Robert Phillimore so held in the parallel case of an unregistered mortgagee in *The Two Ellens* (1 Asp. Mar. Law. Cas. 40, 208; 1871, 24 L. T. Rep. 592; L. Rep. 3 Ad. & E. 345). Dr. Lushington, in *The Spirit of the Ocean* (12 L. T. Rep. 239; 1865, Browning & Lushington, 336; 34 L. J. 74, Adm.), treated such a man as an owner entitled to limit his liability under the Merchant Shipping Acts, and that notwithstanding that the collision occurred by the actual fault of the registered owner. If I thought *Hughes* v. *Sutherland* (4 Asp. Mar. Law Cas. 459; 45 L. T. Rep. 287; 1881, 7 Q. B. Div. 160) had really been decided on this ground, it would carry the proposition very much further. But, putting this last case aside, I am prepared to go the formal step beyond the three cases already cited. Having regard to sect. 57 of the Merchant Shipping Act 1894, I do not think it matters whether the equitable owner has got his bill of sale from the legal owner or whether he has not advanced so far. Any declaration of trust by the legal owner, any state of facts acquiesced in by both parties which establishes the relation of trustee and *cestui que trust* as to a specific share or shares makes the *cestui que trust* equitable owner of such shares, and as such a part owner liable to contribute to the expenses of a voyage.

This brings me back to the question, Are these third parties equitable owners of shares? Or, putting it another way, did they receive their dividends from the managing owner and as part owners, or from the part owner under contract with him? It is not enough to say that in fact the ship was sailed for their benefit. An executor who comes on the register in lieu of his testator, and allows the ship to sail, receives the profit for the legatees; and the ship in that sense sails for their benefit. But these legatees could not be sued directly by the other part owners. The executor would have to be sued, and might in turn indemnify himself out of the estate if there was sufficient. So if shares were held by trustees of a marriage settlement, or by a trustee in bankruptcy, or under a deed of assignment for the benefit of creditors, there must, in my opinion, be such a state of things that the court can see that there is some share which the trustee has got, and which the true owner can either unconditionally, or upon redemption by payment of a fixed sum, call upon the trustee to assign to him out and out. Where, however, the so-called trustee merely has a duty to find a share when the agreed conditions are complied with, or where there is a mere contractual relation as to the profits, or where the trustee has active duties to perform, while behind him there are persons who have various beneficial interests in the profits, there is no equitable ownership, and the so-called trustee is the owner. I think that the positive half of this formula embraces all the instances which occur to me in which there should be deemed to be ownership. (1) A man has a bill of sale and has only got to register it. (2) A man has a contract with the registered owner under which the latter is a mere nominee bound to act as the equitable owner directs, bound to pay him the profits, bound to transfer upon demand. (3) A registered owner holds a specific share as security for a sum of money, but otherwise on behalf of someone. In all these cases there is an equitable owner who is liable as a part owner. This being so, I think that the third parties, other than Dens, are not such equitable owners. I have been referred to passages in Fry on Specific Performance and to Cozens-Hardy, J.'s decision in *Cornwall* v. *Henson* (82 L. T. Rep. 735; (1900) 2 Ch. 298), which help me. I think that these were contracts *in fieri*. The purchasers, except Morgan, Turner, and Dens, had still money to pay. Morgan's case may seem difficult; but he had paid before ever the ship was in existence and when no share could have been transferred to him. The stronger point in his favour is that there cannot be a transfer of half a share. Two people may hold a share; but they hold it as joint tenants, if I may borrow an expression from the law of real property, and not as tenants in common. Morgan could only get his holding through the interposition of a trustee or trustees, and such a trustee or trustees would be, in my opinion, like the executor whom I have already described, or the trustees of a marriage settlement. Armstrong, not having paid in full, is in a better position than any. Turner's case is also difficult. He paid in full on the 27th Dec. 1904, but never got his bill of sale, nor could he have got an unencumbered share, because at that time the mortgage to the bank was upon the register. In the result it is fortunate for him. The matter still remained *in fieri*. He was entitled to two shares, but had not got them, and he did not become an owner.

I have not hitherto mentioned the case of *The Bonnie Kate* (1887, 57 L. T. Rep. 203; 6 Asp. Mar. Law Cas. 149). The facts are very like those in this case, and I have arrived at the same conclusion; but I am not sure that I have travelled the same road. The judge in that case found fraud in the making of the contract. I have not so found. He stated in a compendious form that the defen-

dant in that case gave no authority to the managing owner to sail the ship. If he so concluded because of fraud it does not help me. If otherwise, I do not know whether his analysis of the law applicable would or would not be the same as mine. There remains the case of Dens. He is a foreigner, and should not take any interest in a British ship; and if he takes it it is liable to forfeiture. He paid in full for his share on the 4th July 1903, and received a bill of sale for one share in the ordinary form on the 7th July. At that time Elder had shares standing in his name. It is true that they were mortgaged, and that by the bill of sale he covenanted against encumbrances; but the mortgage was not registered, and if Dens had chosen he could have put himself on the register and acquired an unencumbered share. Why he did not I do not know. It may be because he is described in the bill of sale as of Antwerp, and though a British subject may live at Antwerp, *primâ facie* he would be thought to be (as he was) a foreigner. It may be that he knew that he could not make the declarations required by sect. 9. It may be that he feared discovery, and knew that his share would be forfeited under sect 71; or it may be that he did not know the English law, and was simply careless. His counsel did not call him as a witness; so I do not know. But it seems to me to be precisely the case of the equitable owner in *Stapleton* v. *Haymen*, *The Spirit of the Ocean*, and *The Two Ellens*. There was a share to give him; he had a bill of sale of it, and it only remained with him to register when he pleased. That his registration would have worked a forfeiture if the true facts had been discovered makes no difference. He could take, and, having taken, he would hold until proceedings for forfeiture: (see sect. 76). In my judgment he is liable. The result is that there will be judgment for all the third parties except Dens, and, further (except Dooley), with costs; that there will be judgment against Dens for half the amount which the plaintiffs have paid, with such costs as may be appropriate to his case. But it is not my intention that he should pay more costs than in the strictest sense fall upon him, and care should be taken to this effect on the taxation.

Solicitors for defendants, *Pritchard* and *Son*.

Solicitors for Turner (third party), *W. A. Crump* and *Son*.

Solicitors for Dens (third party), *Botterell* and *Roche*.

Solicitors for Holtzapfel, Dixon, and Stockdale (third parties), *King*, *Wigg*, and *Co.*, for *Wilkinson* and *Marshall*, Newcastle-on-Tyne.

April 25 *and* 26, 1906.

(Before Lord ALVERSTONE, C.J., RIDLEY and DARLING, JJ.)

SIVEWRIGHT (app.) *v.* ALLEN (resp.). (*a*).

Seaman—Capture and destruction of neutral ship by belligerent—"Loss"—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 158.

The respondent was a seaman serving on board the British steamship O., *of which the appellant was the owner. On the* 10*th March* 1905 *the respondent signed the articles of the* O., *then at N. Y., to serve as an A.B. on the vessel, and the articles contained provisions by which he agreed to serve for a voyage not exceeding three years in specified latitudes, Japan, Manchurian, and Siberian ports included.*

At the time the articles were signed a state of war existed between Russia and Japan.

The O. *left N. Y. on the* 26*th March* 1905, *and her first port of call was stated to be Hong Kong for orders.*

There was no evidence of what the cargo of the O. *consisted, nor that the subsequent capture by the Russians was justified, nor that her destination was to any belligerent port. The respondent did not in fact know of what her cargo consisted, or her destination beyond Hong Kong.*

On the 18*th May* 1905 *the* O. *was proceeding through the China Sea, and when north of Hong Kong and approaching the Straits of Formosa was captured by the cruiser* Oleg, *belonging to the Russian Baltic Fleet, and the crew attached to the* O., *including the respondent, were taken on board the Russian cruiser* D., *and the* O. *steamed away, being manned by a Russian prize crew.*

On the 2*nd June* 1905 *the* O. *was destroyed by the Russians.*

Held, on a claim for wages by the respondent that the ship was lost within sect. 158 *of the Merchant Shipping Act* 1894 *when she was destroyed; per Darling, J., when she was captured.*

CASE stated on a summons taken out by the respondent against the appellant under sect. 164 of the Merchant Shipping Act 1894 claiming wages in respect of his services as seaman on the *Oldhamia* from the 23rd March to the 14th Sept. 1905. The following facts were proved or admitted:—

The respondent was a seaman serving on board the British steamship *Oldhamia*, of which the appellant was the owner.

On the 10th March 1905, at the British Consulate at New York, the respondent signed the articles of the *Oldhamia*, then at New York, to serve as an A.B. on the vessel at the rate of 4*l.* per month.

The articles, which were read over to and attested by the respondent, contained provisions by which he agreed to serve for a voyage not exceeding three years in specified latitudes, Japan, Manchurian, and Siberian ports included.

At the time the articles were signed a state of war existed between Russia and Japan.

The *Oldhamia* left New York on the 26th March 1905, and her first port of call was stated to be Hong Kong for orders. There was no evidence of what the cargo of the *Oldhamia* consisted, nor that the subsequent capture by the Russians was justified, nor that her destination was to any belligerent port. The respondent did not in fact know of what her cargo consisted, or her destination beyond Hong Kong.

On the 18th May 1905 the *Oldhamia* was proceeding through the China Sea, and when north of Hong Kong and approaching the Straits of Formosa was captured by the cruiser *Oleg*, belonging to the Russian Baltic Fleet, and the crew attached to the *Oldhamia*, including the respondent, were taken on board the Russian

(*a*) Reported by W. DE B. HERBERT, Esq., Barrister-at-Law.

cruiser *Dneiper*, and the *Oldhamia* steamed away, being manned by a Russian prize crew.

On the 2nd June 1905 the *Oldhamia* was destroyed by the Russians. On the 5th June the respondent was landed at Swatow, taken thence to Hong Kong, and finally sent to England as a distressed seaman, arriving on the 5th Sept. 1905.

It was contended before the magistrate on behalf of the respondent that he was still on the articles, and that, not having been discharged, he was entitled to wages under sect. 134 until final settlement.

On behalf of the appellant it was contended that the respondent's right to wages terminated with the capture of the vessel on the 18th May 1905, she then being lost within the meaning of sect. 158 of the Merchant Shipping Act, or at latest on the 2nd June 1905, when the vessel was destroyed.

The magistrate held that the vessel was not lost within the meaning of sect. 158, and that consequently the respondent was entitled to wages until the 5th Sept. 1905.

The question for the court was whether the magistrate was right in holding that the *Oldhamia* was not lost within the meaning of sect. 158.

By sect. 158 of the Merchant Shipping Act 1894:

> Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship . . . he shall be entitled to wages up to such termination, but not for any longer period.

Hamilton, K.C. and *Dawson Miller* for the appellant.

S. T. Evans, K.C. and *Morgan Morgan* for the respondent.

Lord ALVERSTONE, C.J.—This case raises an important and, from one point of view, a novel question under sect. 158 of the Merchant Shipping Act of 1894, which is in exact terms with sect. 185 of the Act of 1854. The ship *Oldhamia*, which started originally on her voyage from Cardiff, was at the time that she was seized by the Russian fleet upon a voyage from America to Hong Kong. No question arises as to any shipment of contraband of war, or of any action by the owners themselves, which would give a right to the seaman to say that his contract had been broken either by the action or by some conduct of the owner which justified the seaman in declining to continue the venture. Therefore no question arises of the same kind as was discussed in either the case of *Austin Friars Steam Shipping Company* v. *Strack* (10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315) or in the case of *Lloyd* v. *Sheen* (93 L. T. Rep. 174; 10 Asp. Mar. Law Cas. 75 (1905). In the course of her voyage on the 18th May she was captured by the *Oleg*, a Russian cruiser, one of the ships forming part of Admiral Rodjestvenski's fleet, and on the 2nd June she was destroyed by the Russians, and, I suppose, sunk. Her crew had been taken off her between the 18th May and the 2nd June, and were subsequently landed at Swatow, and came home; and this claim was brought under sect. 134 of the Merchant Shipping Act, which would, as was admitted in the course of the argument, entitle the seaman to recover wages up till the arrival in England but for the question, if any, being decided in favour of the shipowner under sect. 158. There was another clause in the articles to which Mr. Evans, who appeared for the respondent, attached importance — viz., a clause stating that if the above trading ends from any cause except wreck or loss or such time expires while the vessel is abroad the crew may be shipped in any other British vessel. I cannot see that it has any direct bearing upon the question we have to consider. Mr. Evans ingeniously suggested that that involved an implied obligation upon the shipowner to find the ship. I think that is going a very long way, but, even assuming that it were the fact, which is not my present view, that would involve an obligation upon the owner to find a ship in the event of his terminating the adventure. It does not, in my judgment, throw any light on the question we have to decide. Sect. 158 provides that where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship he shall only be entitled to wages up to the time of such termination. We have, therefore, to put a construction upon the words "wreck or loss." The learned magistrate seems to have rather assumed (and I think the report rather justifies that view) that he was bound to act upon the passage in the case of *Austin Friars Steam Shipping Company* v. *Strack* (*sup.*), in which the considered judgment of the court delivered by my brother Ridley was in these terms: "It seems to us very doubtful whether the word 'loss' would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such terminations of a voyage as are brought about by the perils of the sea." But a consideration of the rest of the judgment in the case, and the nature of the point that was being argued there, prevents in my opinion it being contended that that was either intended to be, or can in any way be, regarded as being an exhaustive statement. What it was, was a preliminary statement leading up to the ultimate part of the judgment, and showing—I think quite rightly—that *prima facie* the words "wreck or loss" referred to that kind of occurrence. Certainly I do not in this case intend to attempt what would be an impossible task, and a very undesirable task in any case of giving an exhaustive definition of the word "loss." It is quite plain that there is one common cause of loss which would be included —viz., the loss of a ship by fire. I am not prepared to go so far as Mr. Hamilton put it originally, and to say that in deciding that any outside cause which renders the completion of the contract in that ship impossible is to be regarded as a loss. My present impression is that something narrower than that is intended. I think that the words have reference to the existence of the ship as a ship physically. Whether or not there may be a loss when the ship still exists as a ship, and could complete her voyage, which would come within that section, I do not think it is necessary to consider. It is a very difficult question, and in all probability must be decided whenever it arises on the facts of the particular case, and I do not think any general definition can be laid down. But taking the narrower view I come to the conclusion that by an event which was practically contem-

poraneous with the capture of this ship—because very properly the learned counsel do not rely upon the difference between the 18th May and the 2nd June, or if they did it might be adjusted by the payment of a few shillings—the ship is destroyed and ceases to exist. It seems to me it would give no effect to the word "loss" in the Act of Parliament if we held that where the ship was in fact destroyed by a cause for which the owners were in no way responsible there was no loss of the ship within the section. On the facts before us it cannot be suggested that they have directly or indirectly contributed so as to give the seamen a right of a kind that was enforced in the case of *Austin Friars Steam Shipping Company* v. *Strack* (*sup.*) and *Lloyd* v. *Sheen* (*sup.*). We were referred by Mr. Miller—I am very much obliged to him for referring us to it—to a case of *The Woodhorn* (92 L. T. Jour. 113), which in the note of Mr. Temperley's edition of the Merchant Shipping Act 1894, at p. 77, would appear to have been an authority to some extent in favour of Mr. Hamilton's view, and possibly if the sort of case I have indicated was there considered a similar question might have arisen. But I have sent for the papers to the Admiralty Court, and I have looked at the report of the short judgment, which is in print, of the then President, Sir Charles Butt, who undoubtedly did decide the case on the grounds that the circumstances brought the condition of the ship within the word "wreck." Whether or not another question might have arisen it is not material to consider. That case does not help us as it was in fact decided. The subsequent dealing with the ship, if referred to at all, to my mind was not touched upon by the learned judge; and, that being his opinion on this matter, it does not help us, although I need not say it would have been of very great assistance to us when one remembers his great authority on such questions. I come to the conclusion, therefore, that this ship was lost within the meaning of sect. 158, and that the appeal must be allowed. I am not prepared at the present moment to decide that if there had been only capture there would have been of necessity a loss.

RIDLEY, J.—I agree with the judgment of my Lord, and I do not think it is necessary to go over the ground again. I think in the result that the destruction of the vessel in this case was a loss within sect. 158 of the Merchant Shipping Act. I do not, on the other hand, think that the mere capture by enemies or seizure by pirates in itself must be considered as a loss within that section. In this particular case, if nothing had taken place except the taking possession of the *Oldhamia* by the Russian cruiser there would not have been a loss necessarily. It depends on what took place afterwards, and it was the event of the destruction of the vessel which in my opinion constitutes the loss. A vessel, of course, may be retaken. One may consider a number of cases of capture followed or not by a recapture in the case of war which give rise to various considerations. There was a French-built ship in the British line at Trafalgar. She had been taken from the enemy and fought on the British side. Nobody could say she was a lost ship. She was lost to the French, but she was not a lost ship within the meaning of this section. There are many other cases such as that of recapture which must have occurred, and did frequently occur, in the long war which took place between us and the French which would give rise to very difficult considerations if we were to say that the mere capture of the vessel in itself was a loss. The truth is that it may be a loss to the owner, but it is not a loss within the meaning of this section, which means something equivalent to the destruction of the ship. In the case of *Austin Friars Steam Shipping Company* v. *Strack* (*ubi sup.*), which has been alluded to in the argument, the vessel in question had been confiscated by the prize court at Vladivostock. It was in relation to that that the phrase was used upon which Mr. Evans relied in the argument of this case, and Mr. Hamilton also, I think, drew attention to it. But that was not the point in that case. We had not to decide whether that ship had been lost within the meaning of sect 158. If we had now to decide it I can only say that the doubt which was expressed by myself and my brother Kennedy in that judgment is very strongly accentuated by the present case, and I do not think she was lost merely by the confiscation of the court at Vladivostock. I agree, however, with the observation that has been made upon the phrase already quoted by my Lord, when he said, "It seemed to us very doubtful whether the word 'loss' would in any case include a capture such as this, which is not in the same category as wreck, fire, or stranding, or such termination of a voyage as are brought about by the perils of the sea." I do not think that the phrase "which is not in the same category" is a very fortunate one. It is one that is capable of misleading, I think, and which possibly did mislead the magistrate in the present case. I think, on the other hand, the real question being whether the loss is within this section, whether what is relied upon as being the loss is equivalent to the destruction of the ship, the mere taking possession by a hostile power or a pirate for the time being, followed by nothing else, did not constitute such a loss. For these reasons, I agree with what my Lord has said.

DARLING, J.—I arrive at the same conclusion as the other members of the court, but I go further than they do. If this were an academic question I would not trouble to give judgment upon it, but it makes a difference in this: That the amount which the man would be entitled to if the loss occurred when the *Oldhamia* was destroyed would be more than that to which he is entitled if the loss occurred when she was captured, and, therefore, it makes a difference in the amount of money payable to him; and for that reason it seems to me that I ought to express my opinion upon the point upon which I have come to a different conclusion to that expressed by my Lord and my brother Ridley. The question arises on the words in sect. 158 of the Merchant Shipping Act 1894: "Where the service of a seaman terminates before the date contemplated in the agreement by reason of the wreck or loss of the ship then he shall be entitled to his wages up to the time of such termination, but for no longer period," and the whole question we have to decide is whether there was a loss of the ship to the owners within sect. 158. What happened was this. The ship was a British ship. There was no evidence to show that she was carrying contraband, no evidence to show

that she was a proper subject of capture by any belligerent. There happened to be belligerents upon the seas at the time, and if she had been the proper subject of capture she might have been arrested, taken to a prize court, and, after the proper proceedings, either released or condemned. But that was not done. She fell in with some ships upon the sea. As a matter of fact, they were commanded by persons bearing the commission of Russia, and they were at war with Japan. But, according to the facts before us, that gave them no such right as they exercised with regard to this ship. What they did was this. They took the crew out of their ship, they put them on board the Russian ship, and they took their ship away. They took the ship with them for some days and then they destroyed her, and the judgment of my Lord and my brother Ridley would give the seamen their wages during the time the ship was in possession of the Russians but not destroyed. My decision, if it prevailed, would say that the loss took place as soon as the ship was taken by the Russian ship. Now, what we have to find out is, what was the loss, when she was lost? The word "wreck" is used. We all understand what is a "wreck." But then another word is used, "loss." I think that means loss by the owner of the ship being permanently deprived of her; whether when he was permanently deprived of her she still existed or she ceased to exist as a ship, I do not think enters into the question; the loss to him is the same; in fact, it may be that the loss if she existed would be a greater loss to him, because it is perfectly plain that the person who had got her might use her to the disadvantage of the person from whom he had taken her, and in the case mentioned by my brother Ridley that actually happened, because at the battle of Trafalgar, as we all know, not only did Lord Nelson possess himself of a French ship, but he actually used that ship and fired shots from her into the people from whom the ship was taken. But there are cases nearer than that. We all know very well that the other belligerents in this case took several of the ships from the ships of Admiral Rodjestvenski and used them against them. To my mind, those ships were just as much lost as if they had been sunk in battle. They were lost to the owner to whom they belonged. They were of no further advantage to him; so far their case is common to their having been destroyed. But if, in addition to that, they become a positive disadvantage to the person from whom they have been taken, I cannot bring myself to say they are not lost, and lost within the meaning of this Act of Parliament.

Mr. Evans called our attention to sect. 157, sub-sect. 1, which says: "The right to wages shall not depend on the earning of freight, and every seaman and apprentice who would be entitled to demand and recover any wages if the ship in which he has served had earned freight shall, subject to all other rules of law and conditions applicable to the case, be entitled to demand and recover the same notwithstanding that freight has not been earned; but in all cases of wreck or loss of the ship proof that the seaman has not exerted himself to the utmost to save the ship, cargo, or stores shall bar his claim to wages." Mr. Evans argues that if the ship were simply taken away from the owners and the seaman did not exert himself to save her he ought to have his wages. To my mind, this tells distinctly the other way. It seems to me that if persons hostile to the owner come and are about to capture the ship and take her away and make her their own, that the owner could fairly call upon the seamen to get up sails or to get up steam and to do all they could to avoid the permanent loss to the owner by the ship being taken by those people who were coming up, and if the seamen refused to do it, common justice demands that they should from that moment be treated as being disentitled to wages altogether. I do not care to use the word piracy, for very obvious reasons, but I cannot distinguish the case, as far as all the incidents of it go, from a case where a pirate, an utterly unauthorised person, comes and captures a ship. If goods are lost by reason of the dangers of the sea the carrier is no longer responsible for them, and it is no loss. Now, it has been held over and over again—I need not go into the cases, as they are perfectly well known—that the acts of pirates come within the exceptions to dangers of the sea, and I should like to call attention to this passage from Storey on Bailments, because the word "lost" is used in it. "The phrase 'perils of the sea,' whether understood in its most limited sense, as importing a loss by natural accidents peculiar to that element, or whether understood in its more extended sense, as including inevitable accidents occurring upon that element, must still in either sense be understood to include such losses only to the goods on board as are of an extraordinary nature or arise from some irresistible force, or from inevitable accident or from overwhelming power which cannot be guarded against by the ordinary exertions of the human skill and prudence," and among other cases coming within the loss by accident there alluded to come cases of a ship or goods being taken by pirates. Now, I think it is necessary to note what piracy is, and the definition of "piracy" is to be found in the case of *Attorney-General for Hong Kong* v. *Kwok-a-Sing* (L. Rep. 5 P. C. 199), and in Nesbit and Lushington and Palmer and Naylor there is authority. The definition is this: "The essential element (of piracy) is that they violently dispossess the master and afterwards carry away the ship itself or any of the goods with a felonious intent." Now, this was not piracy in the strict sense of the word, because there was not what would be called a "felonious intent." I think, myself, it is very probable that the ship was taken because it was possible if she were not taken she would carry information; she might have been seized by the Japanese, and information gained, and therefore the felonious intent would be absent, and that is why I will not call it piracy, but there are all the same incidents except that which makes it an act of piracy. I do not find that it is necessary, in order to be a pirate that you should destroy the ship, and my recollection of when I used to enjoy reading the acts of pirates was that, if they did get hold of a ship they were much too wise to sink her; they sank the crew, and then they painted the ship so that she was not easily recognised, and used it for their own purposes. But they were pirates. It seems to me that when that was done the owner lost his ship just

as much as though the ship had been wrecked, and I do not find that in this statute the word "loss" is used in any technical sense. It seems to me to be used in its ordinary sense. used in the same sense in which it is used with regard to the loss of goods by dangers of the sea, and so on, the loss of goods by that danger of the sea called piracy. Here I think there is one element making this a loss when the ship was seized, it being ascertained that she was never given back. If she had been seized and held in some sort of suspense and afterwards came back into the possession of the owners, either by diplomatic representations or by use of force or anything of that kind, I do not go to the length of saying that would have been a loss; but, seeing that she was seized by force and that she never got back into possession of the owners, I think that that was a loss within the Act of Parliament quite irrespective of whether she afterwards floated, or whether she was destroyed.

Appeal allowed.

Solicitors: *Botterell* and *Roche*; *Chivers* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, Feb. 13, 1906.

(Before BARGRAVE DEANE, J.)

THE POLTALLOCH. (*a*)

Salvage — Co-salvors—Consolidated suits—Separate representation—Counsel—Costs.

The P., *a four-masted steel barque of* 2138 *tons register, while on a voyage from Belfast to Antwerp in tow of the tug* H., *which was under contract to tow her to Flushing, met with heavy weather, and, while running for shelter, broke adrift from the* H., *but managed to bring up near Pladda Island with a full scope of chain out on both her anchors. When the* H. *came up to the* P. *it was found that the anchor chains of the latter were foul, that the anchors could not be raised, and that they would have to be slipped. The master of the* P. *then sent the* H. *for further assistance, and the* H. *brought back the tug* F. S. *The* H. *and* F. S. *then took the* P. *to Greenock, where she was safely moored. The owners, masters, and crews of both tugs instituted proceedings for salvage, the owners of the* H. *claiming that the towage contract had been superseded by the events which had happened. The salvage suits were consolidated, the conduct of the action being given to the owners of the* F. S. *At the trial of the action the* H. *was represented by a leading and junior counsel. The* F. S. *was also represented by two counsel. The court awarded each salvor* 300*l. Counsel for the* H. *asked for a certificate for the separate representation of the* H. *by two counsel.*

Held, that as the defendants had alleged that the H. *was not entitled to salvage, but was only fulfilling her agreement, the owners of the* H. *were entitled to be separately represented by two counsel.*

ACTION of salvage.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Flying Swallow* and *Hibernia*; the defendants were the owners of the steel barque *Poltalloch*.

The *Flying Swallow* is a steel screw tug of 185 tons gross register, with engines of 99-horse power nominal, is manned by a crew of nine hands, and is worth 8000*l.*

The *Hibernia* is an iron screw tug of 214 tons gross register, with engines of 120-horse power nominal, is manned by a crew of eleven hands, and is worth 8000*l.*

The *Poltalloch* is a steel four-masted barque of 2138 tons register, and when the services were rendered to her was on a voyage from Belfast to Antwerp in ballast, manned by a crew of sixteen riggers, and is worth 11,500*l.*

On the 29th Dec. 1905 the *Poltalloch* left Belfast Lough in tow of the *Hibernia*, the owners of the *Hibernia* having entered into a contract to tow the *Poltalloch* to Flushing.

About 4 a.m. on the 30th Dec. the tug and her tow, when near the Calf of Man, encountered a strong gale from the S.S.E. The barque, which was in ballast, drove broadside to leeward, and the towage became so dangerous that an attempt was made to return to Belfast. The *Hibernia* turned the *Poltalloch* round and towed her towards the land, but, as the weather moderated later in the day, the voyage to Flushing was resumed. In the evening the wind again increased to a gale from the S.S.E., and the *Poltalloch* took charge of the tug, both vessels driving to leeward.

The tug then got the *Poltalloch* round, and attempted to make Loch Ryan, but the gale increased until on the morning of the 31st Dec. it was almost of hurricane force, and the tug and her tow were driven near Ailsa Craig.

The tow rope then parted, and the *Poltalloch* managed to clear Ailsa Craig, but, in order to avoid running on to Arran Island, had to drop both her anchors and pay out both cables to the end, and finally brought up about four cables' length to windward of Pladda Island and exhibited signals of distress.

The *Flying Swallow* then came up and offered her services, but they were at that time declined. The *Hibernia*, which had in the darkness lost sight of the *Poltalloch*, then came up and stood by her during the night.

The weather moderated a little at daybreak on the 1st Jan. 1906, and, as the *Poltalloch* was unable to heave in her cables and get her anchors, her master sent the *Hibernia* away to get further assistance.

The *Hibernia* proceeded towards Greenock to get another tug, but met the *Flying Swallow*, which had remained in the neighbourhood, and both tugs then returned to the *Poltalloch*. The tugs then held the *Poltalloch* while she slipped her cables, and then towed her to Greenock, where she was safely moored about 9 p.m.

During the towage, which began about 11 a.m., the tugs and barque met with very bad weather.

The defendants admitted that the services rendered by the *Flying Swallow* were salvage, but alleged that the services rendered by the *Hibernia* were no more or different to the services that her owners had agreed that she should perform.

Pickford, K.C., *R. H. Balloch*, and *H. C S Dumas* appeared for the *Flying Swallow*.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Aspinall, K.C. and *C. R. Dunlop* appeared for the *Hibernia*.—The services rendered by the *Hibernia* were outside the scope of the towage contract:

The Minnehaha, 1 Mar. Law Cas. O. S. 111 (1861); 4 L. T. Rep. 810; 15 Moore P. C. 133.

Laing, K.C. and *Dawson Miller* for the defendants, the owners of the *Poltalloch*.

BARGRAVE DEANE, J.—This case is peculiar in one respect—in this, that there is not a single fact in dispute. I need not begin the story of this vessel earlier than the 31st Dec. It is quite clear that one of her chief difficulties was that she was very light. She was a large vessel of 2000 tons, and was only drawing 10ft. of water, which exposed a great surface to the wind, and gave very little holding power on the water. That showed itself very soon after starting on the 29th, and then on the 31st the tow rope parted. By great good luck and by good seamanship, she was able to clear Ailsa Craig, but under her lee there was still the Island of Arran, and being adrift, and going right to leeward, she could do nothing but drop both her anchors within a very short distance of the shore of the Island of Arran. I wish at this stage of my judgment to say this, that in my opinion, and also in that of the Elder Brethren, the captain of the *Poltalloch* showed excellent seamanship in being able to clear Ailsa Craig, and in laying out both anchors and their chains to their full extent to get this tremendous scope out, with a play on the chains, which enabled him to ride out the worst part of the early part of this gale. I think a good deal of credit is due to him for the way he handled his ship in the difficulties which were inherent in the condition of the ship. The salvage services, in our opinion, began when these two tugs took this vessel in tow about noon on the 1st Jan. The *Flying Swallow* had not been engaged up to that time; the *Hibernia* was under a towage contract to tow this vessel from Belfast Lough to Flushing, but, although the towage contract was still continuing, this condition of things supervened outside the towage contract, that the vessel was anchored close under this land with the land close under her lee, she could not get her anchors, and the chains were jammed in some way. I do not think, nor do the Elder Brethren, that this was entirely due to the windlass; it may also have been partly due to the crew which was on board, but in our opinion it was more due to the fact that the chain had got caught in some way in the rocks. The result was the master could not get his chains, and he could not get his anchors, and he was obliged to slip them. Ought he to have been content with the services of the *Hibernia*? In my opinion he certainly ought not. It would have been very unwise—in fact, it would have been wrong of him—to have taken the services of the *Hibernia* alone at that time. If he had slipped his chains and been in tow of one tug when this heavy gale sprang up half an hour after he started, the probability is that the tug's rope would have parted again, he would have been adrift in that heavy gale, with this land under his lee, and absolutely nothing to bring him up. In our opinion, he was, at the time when he let go his chains, in a condition of imminent peril, and it was very wise of the captain to refuse to slip his chains until he had got the assistance of a second tug. The two tugs got fast and then he slipped his chains, and within half an hour the wind increased to what has been described as a heavy gale from the E.S.E. We have got the documents, which were written at the time, and it is perfectly clear from them that it was with the very gravest difficulty that these two powerful tugs were able to hold the vessel and to tow her from the place of danger. It is true the towage was only some thirty-nine miles, but we are told, and it is perfectly clear it must be so, that it was a difficult towage. The property salved is 11,500*l*., that is the value of the *Poltalloch* alone, she being in ballast, and in my opinion each tug should have 300*l*. I think this was a case which was properly brought in the High Court.

Aspinall, K.C.—As the defendants in this case denied the *Hibernia's* right to any salvage, and raised the point that what was done was done under the agreement, it is submitted that the court should certify for two counsel for the second plaintiffs although they had not the conduct of the action.

BARGRAVE DEANE, J.—I think in this case the plaintiffs, the owners of the *Hibernia*, were entitled to the best assistance they could get, so I will certify.

Solicitors for the plaintiffs the *Flying Swallow*, *Hollams, Sons, Coward*, and *Hawksley*.

Solicitors for the plaintiffs the *Hibernia*, *Lowless* and *Co.*

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

Monday, March 5, 1906.

(Before BARGRAVE DEANE, J.)

THE LOUISA. (*a*)

Salvage — Action by default — Derelict vessel — Amount of award.

The L., *a derelict barque on fire in the North Sea, was taken in tow by the tug* D. *The tug beached her, and, with the assistance of another tug, extinguished the fire.*

The owners of the D. *instituted proceedings to recover salvage, and arrested the* L. *No appearance was entered on behalf of the owners of the* L., *and the action proceeded by default. Before the trial of the action the* L. *was appraised and sold by the marshal and realised* 255*l*. *The marshal's expenses amounted to* 108*l*. 14*s*. 6*d*., *and the net proceeds,* 146*l*. 5*s*. 6*d*., *were paid into court. The salvors had paid* 88*l*. 18*s*. 6*d*. *for assistance rendered to them in salving the vessel, and were liable for harbour dues amounting to* 21*l*. 17*s*. 9*d*.

Held, that under the circumstances the salvors were entitled to the balance of the fund as salvage.

ACTION *in rem* for salvage.

The plaintiffs were the owners, master, and crew of the steam-tug *Dauntless*. The action was brought against the barque *Louisa*, her cargo and freight, and, as no appearance was entered, the action came before the court on motion for judgment in default of appearance.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The *Dauntless* is a steel screw tug of 109 tons gross register, fitted with engines of 90-horse power nominal and 650 horse power actual, manned by a crew of seven hands all told, and is of the value of 6500*l.*

On the evening of the 1st Aug. 1905 the *Dauntless* was lying in Harwich Harbour, when word was brought to her master that a vessel was in distress off the Gabbards, in the North Sea.

The *Dauntless* at once went in search of the *Louisa*, and, after proceeding about twenty miles to the southward and eastward, found her about midnight abandoned by her crew and on fire, with her masts and rigging hanging over the side. There was a fresh south-westerly wind and some sea. The *Dauntless* lowered a boat, and, after some difficulty, a wire hawser was made fast to the bobstay of the *Louisa*. The towage was very difficult, and very slow progress was made, Harwich not being reached till 8 p.m. on the 2nd Aug.

The *Louisa* was at first made fast to a Government buoy, but on the 3rd Aug. was beached, when those on the *Dauntless*, assisted by the crew of another tug, then managed to extinguish the fire, and the *Louisa* was afterwards taken into dock, the *Dauntless* being in attendance on her till the evening of the 5th Aug.

The plaintiffs then instituted proceedings for salvage, and, no appearance having been entered, a claim was filed on the 9th Jan. 1906 in which they alleged that they had saved the *Louisa* from inevitable destruction, and removed her from a position in which she was a danger to vessels navigating in that locality.

The plaintiffs had paid 88*l.* 18*s.* 6*d.* for assistance rendered them by others in performing the services, and were liable for dock and harbour dues amounting to 21*l.* 17*s.* 9*d.*

The vessel and her cargo had been appraised and sold by the order of the court and realised 255*l.*; the cost of the appraisement and sale amounted to 108*l.* 14*s.* 6*d.*, and the balance, 146*l.* 5*s.* 6*d.*, had been paid into court.

A. E. Nelson for the plaintiffs.—It is submitted that the court should award the plaintiffs the total sum in court as salvage. The plaintiffs have had to pay 88*l.* 18*s.* 6*d.* for the assistance rendered them in completing the service, and are liable for dock dues amounting to 21*l.* 17*s.* 9*d.* Even if the total amount is awarded them, they will only receive about 35*l.* as salvage for services which employed the tug for five days, and by means of which the *Louisa* was saved from being totally lost. A large percentage has been awarded in such a case as this:

The Boiler ex Elephant, 64 L. T. Rep. 543.

BARGRAVE DEANE, J.—In this case the services were valuable, and I shall award the total sum.

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

March 27 and 28, 1906.

(Before BARGRAVE DEANE, J.)

THE ANSELM. (*a*)

Collision—Steam vessels meeting end on—Absence of whistle signals—Impossibility of contributing to the collision—Regulations for Preventing Collisions at Sea 1897, *art.* 28.

Two steamships, the A. *and the* C., *when two miles apart, were meeting each other end on in the Para Estuary, river Amazon. Those on the* A. *ported their helm, but did not sound a port helm signal on their whistle until they saw the* C. *was starboarding. Thereupon those on the* A. *sounded a port helm signal, and shortly afterwards, as the* C. *sounded a long blast and continued to starboard, the engines of the* A. *were stopped and reversed, but a three-blast signal was not sounded on her whistle.*

Held, that the C. *was to blame for starboarding when the vessels were approaching each other end on, and that the* A. *was not in fault for not sounding a three-blast signal when she reversed or a helm signal when she first ported, for those on the* C. *could have seen the* A. *was porting, and the absence of signals could not by any possibility have contributed to the collision.*

ACTION of damage.

The plaintiffs were the owners of the cargo laden on the steamship *Cyril*; the defendants were the owners of the steamship *Anselm*.

The collision between the two vessels, which were owned by the same company, occurred about 7.15 a.m. on the 5th Sept. 1905 off Carnaticu Island, Para Estuary, river Amazon. The wind at the time was easterly light, the weather was fine and clear, and the tide was flood of the force of about a knot.

The case made by the plaintiffs was that the *Cyril*, a screw steamship of 4380 tons gross and 2556 tons net register, was, whilst on a voyage from Manaos to Liverpool, carrying passengers, mails, and cargo, in the Para Estuary, Brazil, between Correlinho and Carnaticu Island. The *Cyril*, manned by a crew of 101 hands all told and a duly licensed Para pilot, was proceeding through the estuary towards the sea with engines working full speed ahead, and a good look-out was being kept on board of her. In these circumstances those on the *Cyril* observed several miles off and a little on their starboard bow the *Anselm* approaching in a position to pass the *Cyril* all clear starboard to starboard. The *Anselm* continued to approach, but instead of passing to the southward of the *Cyril* as she could and ought to have done, and although the helm of the *Cyril* was starboarded and her engines were reversed full speed astern and a long blast sounded on her steam whistle, she came on at a high rate of speed, apparently under a hard-a-port helm, and with her stem struck the starboard side of the *Cyril* abaft the fore rigging a heavy blow, doing her so much damage that she shortly afterwards foundered.

The plaintiffs charged those on the *Anselm* with not keeping a good look-out, with improperly porting, with failing to slacken her speed or to stop and reverse her engines, and with failing to

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

indicate by appropriate whistle signals the course she was taking.

The case made by the defendants was that the *Anselm*, a screw steamship of 5442 tons gross and 3213 tons net register, manned by a crew of 102 hands all told, was proceeding up the Para Estuary, river Amazon, on a voyage from Para to Manaos, with passengers and general cargo. The *Anselm* was heading on an up-river course, making about twelve and a half knots over the ground, and a good look-out was being kept on board her. In these circumstances those on the *Anselm* observed the *Cyril*, whose smoke had been seen earlier, about right ahead, and about seven miles distant. The *Cyril* was coming down the river end on, or nearly so, and, as the vessels approached, the helm of the *Anselm* was ported. The *Cyril*, however, instead of also porting, seemed to be starboarding, so the helm of the *Anselm* was ported more, and one short blast was sounded on her whistle. To this the *Cyril* replied with a long blast, and instead of going clear, as she could and ought to have done, persisted in starboarding, and, although the engines of the *Anselm* were reversed full speed with her helm hard over, the *Cyril* came on, and with her starboard bow abaft the fore rigging struck the bluff of the *Anselm's* port bow.

Those on the *Anselm* charged the *Cyril* with neglecting to port, with trying to cross ahead of the *Anselm*, with failing to slacken her speed or stop and reverse her engines, and with neglecting to keep to her starboard hand side of the fairway.

The defendants also alleged that the plaintiffs were not the owners of the cargo, and alleged that, if they were, it was carried on the terms of a bill of lading which excepted the following perils: "Collision, peril of the seas, rivers, or navigation, of whatever nature or kind soever, and however such collision or peril may be caused, the wrongful act, negligence, default, or error in judgment of the pilot, master, mariners, engineers, crew, stevedores, or persons whomsoever, or by any other cause whatever."

As both vessels were owned by the same company the plaintiffs called no witnesses, but they put in the log and scrap log of the *Anselm*, a report made by the master of the *Anselm* to his owners, and the bills of lading under which the goods were carried.

Pickford, K.C., *Aspinall*, K.C., and *R. H. Balloch* for the plaintiffs.—Both ships are in fault, even though the *Cyril*, the ship on which their cargo was carried, is to blame, the plaintiffs are entitled to recover half their loss:

The Milan, 5 L. T. Rep. 590; Lush. 388.

Upon the logs and the evidence given on behalf of the *Anselm*, it is clear that she infringed art. 28 of the Collision Regulations. She failed to whistle when she ported and reversed. She is therefore to blame, for she cannot show that the breach could by no possibility have contributed to the collision:

The Fanny M. Carvill, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455.

Laing, K.C. and *A. D. Bateson* for the defendants, the owners of the *Anselm*.—The defendants are not to blame; it is true there was a statutory duty on them to signify their course on their steam whistle (*The Uskmoor*, 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250), but it has never been laid down that they are to do it the instant they take helm action, and, although they did not sound their whistle when they began to port, they sounded it at a time which gave those on the *Cyril* plenty of time to act. If they had sounded their whistle when they reversed their engines, it would only have been for the purpose of informing those on the *Cyril* that the latter might keep on and attempt to cross the bows of the *Anselm*. Those on the *Cyril* did keep their speed, and so the absence of the three-blast signal from the *Anselm* did not effect the conduct of those on the *Cyril*. In neither case could the absence of the whistle signal by any possibility have contributed to the collision, and the defendants are therefore not to blame:

The Duke of Buccleuch, 65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) App. Cas. 310.

Pickford, K.C. in reply.

BARGRAVE DEANE, J.—This is a case of a peculiar character, because it is brought by the owners of cargo on board the *Cyril* for damage sustained by that cargo by reason of the *Cyril* being sunk in collision with another vessel. The case is complicated by reason of both vessels in the collision being owned by the same owners. The evidence, consequently, has been practically all on one side, because the plaintiffs, the owners of the cargo, could not, of course, go into the enemy's camp to get evidence from either of these vessels for the purpose of showing that one or the other of the ships was to blame. Consequently, the log, scrap log, report of the master of the *Anselm*, and some correspondence was put in to support the case that the collision was caused not by one, but by the negligence of both of these two vessels. If that is right, of course the plaintiffs have a claim, as owners of the cargo, against the wrongdoing vessel which did not carry the cargo. As regards the *Cyril*, which was carrying the cargo, I need not go into that part of the matter, because it is said that there was a clause in the charter-party which exempted the *Cyril* from responsibility for the negligence of her servants or her crew. The only question I have to consider is whether the *Anselm* is to blame. It is manifest from documents put in by counsel for the plaintiffs that the 28th rule of the Regulations for Preventing Collision at Sea was not obeyed by those on board the *Anselm*, and therefore, *primâ facie*, there was negligence on the part of those on board the *Anselm*. One has, however, to go a step further, because a vessel may be guilty of negligence in certain respects, but that negligence may have nothing whatever to do with the injury brought about by the collision. As a matter of fact I have first to consider whether there has been a breach of the regulations. The two vessels were proceeding, one up and the other down the Para Estuary of the river Amazon, and they were approaching, according to the evidence which is before me, end on. They were first sighted, one from the other, at some considerable distance apart. I need not trouble as to how far apart exactly they were when first sighted. I will bring it to a distance of something like two miles, because, looking at the little chart put in of the Para, there is a bend at the point of collision. There is an elbow there, and these vessels were approaching that bend, and I think that at about two miles they might

be end on. If the vessels were approaching each other end on, they ought to port in order to pass port to port, but there is also a narrow channel rule which says that each shall keep on her starboard side of the river. Now, the vessel coming down, the *Cyril*, should have ported to keep to her starboard side under one rule, and she should also have ported to pass clear of the other vessel under another rule. She did not port. She starboarded, and therefore clearly she was to blame in that respect. So far as we know from any evidence she blew no whistle at the time she starboarded, but, and this is a material fact in the case, the whole of the events took place in broad daylight, when the movements of each ship were clearly visible from the other vessel. She was seen to starboard, and therefore those on the *Anselm* knew she was starboarding. When did she starboard? The evidence as to that is perfectly clear. I have now to proceed to the evidence which affects the movements of the *Anselm*. The *Anselm* was in charge of the chief officer, but he had left the deck after the *Cyril* had been sighted, and had left the bridge, and the navigation in charge of the fourth officer. When he came back on to the bridge he found that the *Anselm* had ported, under the direction of the pilot, a little and without steadying had continued to port a little more without blowing her whistle. The fourth officer says that before the chief officer returned to the bridge, and after he had ported a little more, he noticed that the *Cyril* was starboarding. The chief officer corroborates that. He says that when he got on to the bridge he asked what they were doing; he was told they had ported, and he then observed that the other vessel was starboarding, and he at once gave a short blast on the whistle to show he was directing his course to starboard under the rule. The first question I have to ask myself is, Did the fourth officer commit a breach of the regulations by not sounding the whistle one short blast when he first ported? I am of opinion that the rule is conclusive on that matter. Counsel for the defendants say there is nothing in the rule to show that you shall sound the whistle at the same time as you commence to direct your course to starboard; but as I read the rule you shall do it as soon as you are directing your course to starboard. My own feeling is that the fourth officer should have sounded that blast when he first ported. He certainly should have sounded it when he decided to continue directing his course to starboard. That was a breach of the regulations. It does not follow that that breach of the regulations had anything to do with the collision. When the chief officer got on deck he at once sounded a short blast. According to the scrap log, which is kept by the fourth officer, that was two minutes, approximately, after he first began to port. It was only a very slight porting, because he only went off two points, but he never steadied, and by that time it was visible to those on board the *Anselm* that the other vessel was starboarding. In my opinion what was visible to those on board the *Anselm* was also visible to those on the *Cyril*, and they must have seen before they starboarded that the *Anselm* was going off to starboard under a port helm. In this matter I am of opinion, and the Elder Brethren agree with me, that in broad daylight, at two miles distance—although the port helm signal ought to have been given—on this occasion what was being done by the *Anselm* was visible to those on the *Cyril*, and that the failure to give the port helm signal did not affect the matter, because, having had the opportunity for the space of a minute and a half to two minutes of seeing the *Anselm* paying off to starboard as much as two points, those on the *Cyril*, after that, starboarded and threw their vessel across the course which the *Anselm* was taking. That disposes of the first breach of the rules.

Both vessels continued—one under hard-a-port, and the other under starboard helm—and three minutes before the collision—that would be a minute after the first signal was given—the chief officer of the *Anselm* determined to reverse his engines, which he did. The only evidence on the point which I have before me is the scrap log, which says that was done at 7.13 a.m. No signal was sounded when the *Anselm's* engines were reversed, although the rule says that when the engines are reversed three blasts shall be given. That, again, was a distinct breach of the rule, and I think it is my duty to say it is a serious breach. Officers must obey the regulations. If they do not they run very serious risk. Here again I have to ask myself whether that breach of the rule had anything to do with the collision. I have had the advantage of the advice of the Elder Brethren, and in our opinion that failure to obey the regulations did not in this case contribute to the collision. That disposes of that part of the case. Then I have to go a step further, and it is a more difficult problem that I have to deal with. Is there any possibility that if this rule had been observed those on the *Cyril* would have avoided the collision? In other words, taking the cases which have been cited, has counsel for the defendants satisfied the court, upon the evidence, that the collision was brought about notwithstanding the breach of the regulations, and that by no possibility in this case could the breach have affected the result? I am of opinion, and the Elder Brethren agree with me—and it is a nautical question—that counsel for the defendants, on the evidence which is before me, have discharged that burden. There is one other point which is important, and that is as to the speeds of the vessels. One was going twelve and a half to thirteen knots and the other fourteen knots. Their joint speed was close upon twenty-seven knots, and that is equal to about a mile in two minutes or half a mile a minute—really 900 yards in a minute. They had come to a certain point. One vessel in that distance when she went off under a port helm went off six points, and the other under starboard helm went off four and a half points. Here again it is a nautical question, and I am advised, and it is impossible not to see, that one vessel must have ported considerably before the other starboarded. It is perfectly plain that the question of the signalling in this particular case had nothing to do with the collision. It was perfectly clear to the people on each of these ships what the other vessel was doing. The only doubt I had in the case was whether as soon as the starboarding of the *Cyril* was seen by those on the *Anselm* they ought not to have stopped and reversed immediately. The Elder Brethren are of opinion that that which was done was the correct proceeding, and they suggest to me as an example what happens in the streets sometimes. The *Anselm*

began by porting, which was the right manœuvre, and then found somebody else starboarding. If she had shilly-shallied in her course she would no doubt have been condemned. She took the right course. She ought to have proceeded and not left the other vessel in any doubt. For these reasons I am of opinion that the *Cyril* is alone to blame, and that the defendants have satisfied the court, upon the evidence, that the non-obedience to the regulations had no possible effect upon the collision.

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

Solicitors for the defendants, *Pricthard* and *Sons*, agents for *Batesons, Warr*, and *Wimshurst*.

HOUSE OF LORDS.

Feb. 23, 26, 27, *March* 1, *and May* 21, 1906.

(Before the Lord Chancellor (Loreburn), Lords Macnaghten, Robertson, and Atkinson.)

Boston Fruit Company *v.* British and Foreign Marine Insurance Company. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Marine insurance—Policy effected by agents of owner—Right of charterer to sue on policy.

The appellants chartered the ship B. *The charter-party, which amounted to a demise of the ship, was made between C. and Sons, "as agents for the owners," and the appellants, and provided that the owners should pay for the insurance on the ship. A policy of insurance was effected on the ship by insurance brokers on the instructions of C. and Sons, who were the agents of the owners, "as well in their own name as for and in the name and names of all and every other person or persons to whom the subject-matter of this policy does or may or shall appertain in part or in all." The name of the appellants was not mentioned in the policy. The policy was a valued policy, and contained a collision clause.*

During the continuance of the policy the B. *came into collision with another ship, and the appellants were compelled to pay damages to the owners of the other ship.*

Held (affirming the judgment of the court below), that the appellants were not entitled to sue on the policy, there being no evidence that it was effected on their behalf, or that they were within the contemplation of the parties at the time when it was made.

Appeal from a judgment of the Court of Appeal (Vaughan Williams, Romer, and Stirling, L.JJ.), reported 10 Asp. Mar. Law Cas. 37; 92 L. T. Rep. 514; (1905) 1 K. B. 637, affirming a judgment of Bigham, J. at the trial of the action.

By a charter-party dated the 10th March 1893, and made between Messrs. R. Craggs and Sons, described therein as agents for the owners and the appellants, the appellants chartered the *Barnstable*, then being built by Messrs. R. Craggs, for thirty-six calendar months from March 1894.

By a policy dated the 4th April 1895 Messrs. John Holman and Sons, on the instructions of Messrs. R. Craggs and Sons, effected an insurance with the respondents on the *Barnstable* on a valuation of 19,000*l.* for the amount of 2500*l.* for the period of twelve calendar months from the 21st March 1895 at a premium of 8*l.* per cent. There was a running-down clause attached to the policy.

On the 13th Jan. 1896 the *Barnstable* came into collision with a ship called the *Fortuna*, and the *Fortuna* was sunk. The collision was caused by the negligence of the master and crew of the *Barnstable*.

On the 15th Jan. 1896 the owners of the *Fortuna* instituted a suit against the *Barnstable* in a District Court of the United States of America, holden at Boston, claiming damages in respect of the collision. On the petition of the owners of the *Barnstable* the appellants as charterers were made parties to the suit. At the hearing the liability of the *Barnstable* was admitted, and the damages recoverable were agreed at sums amounting to 14,575 dollars, with interest at 6 per cent. from the 1st Jan. 1897. The suit thenceforward proceeded as an independent cause between the appellants and the owners of the *Barnstable*, to determine which as between them was the party liable to pay the damages. This question was determined in the appellants' favour by the District Court, and by the Circuit Court of Appeals, but in the owners' favour by the Supreme Court of the United States. The amount which the appellants thus became liable to pay, including interest, was 19,901.19 dollars. This sum the appellants paid on the 3rd Nov. 1902.

The charterers then brought the present action against the underwriters to recover a due proportion of this sum under the policy.

Carver, K.C. and *A. Llewelyn Davies*, for the appellants.—The appellants are entitled to recover on the policy as they have ratified the contract and are persons who could be ascertained at the time when it was made. The proposition used against the appellants is that laid down in Arnould on Marine Insurance, sect. 143 (p. 178, 7th edit.), but it is not altogether in agreement with sect. 173 (p. 214, 7th edit.). The burden is on the respondents to show that there is anything to cut down the general words used in the policy. The Court of Appeal said that the appellants were deprived of their right of ratification by what took place in the proceedings in America, but that is not the case. The policy was effected by persons who were either the agents of the appellants to effect it, or else made a policy by which they are expressly covered. The true test is whether the contract was made on behalf of the person who proposes to ratify it, and such person need not be named in the policy if he is sufficiently described. There is no decision adverse to the appellants' contention, but only dicta in cases and text-books. They referred to

Aira Force Steamship Company v. *Christie*, 9 Times L. Rep. 104;
Crowley v. *Cohen*, 5 B. & Ad. 478;
De Bussche v. *Alt*, 3 Asp. Mar. Law Cas. 584; 38 L. T. Rep. 370; 8 Ch. Div. 286.

Watson v. *Swann* (11 C. B. N. S. 756; 31 L. J. 210, C. P.) and *Byas* v. *Miller* (3 Com. Cas. 39)

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

were not really cases of ratification at all. See also

Routh v. *Thompson*, 11 East, 428; 13 East, 274; Duer on Marine Insurance, vol. 2, p. 38;
Keighley, Maxsted, and Co. v. *Durant*, 84 L. T. Rep. 777; (1901) A. C. 240;
Re Tiedemann, 81 L. T. Rep. 191; (1899) 2 Q. B. 66;
Hagedorn v. *Oliverson*, 2 M. & S. 485.

Scrutton, K.C., *J. A. Hamilton*, K.C., and *Maurice Hill*, for the respondents.—The appellants must prove that the policy was made on their behalf, and either that the person who made it had authority to make it for them, or that they adopted it in due time, which they did not do. In the American litigation it was admitted that the policy was made on behalf of the owners. General words such as these do not include charterers. See

Irving v. *Richardson*, 2 B. & Ad. 193;
Small v. *United Kingdom Mutual Insurance Company*, 8 Asp. Mar. Law Cas. 293; 76 L. T. Rep. 326; (1897) 2 Q. B. 42; affirmed on appeal, 76 L. T. Rep. 828; (1897) 2 Q. B. 314.

Keighley, Maxsted, and Co. v. *Durant* and *Re Tiedemann* are not in point. In *Routh* v. *Thompson* it was found as a fact that the policy was effected on behalf of a particular person. There can be no ratification where the contract is not made on behalf of the person proposing to ratify, and in any case here there was no ratification within a reasonable time. See

Re Portuguese Consolidated Copper Mines, 62 L. T. Rep. 179; 45 Ch. Div. 16;
Clough v. *London and North-Western Railway Company*, 25 L. T. Rep. 708; L. Rep. 7 Ex. 26.

De Bussche v. *Alt* is not in point. All the evidence is that the policy was made on behalf of the owners, and, as to "intention" in marine insurance, see

Williams v. *North China Insurance Company*, 3 Asp. Mar. Law Cas. 342; 35 L. T. Rep. 884; 1 C. P. Div. 757.

There is an unbroken catena of authorities on the point. The right to ratify is conditional on the policy having been made on behalf of the person proposing to ratify. A policy of marine insurance is not a general floating contract of indemnity which anyone may adopt at his pleasure. As to election, see

Smethurst v. *Mitchell*, 28 L. J. 241, Q. B.

Carver, K.C. was heard in reply.

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

May 21.—Their Lordships gave judgment as follows:—

The Lord Chancellor (Loreburn).—My Lords: In this case the charterers of the steamship *Barnstable*, who navigated her under a charter-party amounting to a demise of the ship, were held liable in the United States to pay damages to the owners of another ship with which the *Barnstable* had come into collision. The question now is whether the charterers can recover against the defendant underwriters on a policy not effected by themselves, but effected by brokers instructed by the owners, which includes risk of having to pay damages arising from collision, and contains a description of the assured wide enough to cover the plaintiffs or any others concerned in interest. I have come to the same conclusion as did the Court of Appeal, that this question must be answered in the negative. The substantial contentions of the plaintiffs are as follows: They say that being within the description they are entitled to the benefit of the policy, because the owners were bound to insure, and so must be taken to have insured charterers' risks by virtue of clause 22 of the charter-party. That clause provides "that the owners shall pay for the insurance on the vessel." In my opinion these words do not so bind the owners, and if an action were brought on such a clause for breach of a contract to insure it must fail. If what is suggested had been meant, nothing would have been easier than to say it. Next, the plaintiffs urge that they are entitled to the benefit of the policy because it must be taken to mean what it says—viz, that all "to whom the subject-matter of this policy does, may, or shall appertain in part or in all" are insured. Now I agree that a policy may be made for the benefit of all such persons. But where it has been established that in fact the person claiming the benefit was not such a person as those who effected the policy had in contemplation, the courts have disallowed his claim though he might be within the description. In the present case the plaintiffs and the assignees of the owners agreed in the course of the American litigation that the former had no insurance on the *Barnstable*, and the litigation was for a long time conducted by the plaintiffs on the footing that the owners intended to insure their own interest and no other. In reality, this is the only evidence which we have in regard to intention. It appears conclusive to show that this appeal must fail.

Lord Macnaghten.—My Lords: In this case an American corporation, who were the charterers of the British steamship *Barnstable* under a time charter, claim the benefit of a policy effected by the owners in England on the hull and machinery of the vessel. The policy was in a common form, and purported to be made on the proposal of certain insurance brokers "as well in their own names as for and in the name and names of all and every other person or persons" to whom the subject-matter of the policy did, might, or should appertain in part or in all. There was a running-down clause attached to the policy. The *Barnstable*, owing to the fault of the persons in charge of the navigation, who were the servants of the charterers, ran down and sank another vessel. This disaster gave rise to protracted litigation in America. The *Barnstable* was condemned in damages, and ultimately it was decided that as between the charterers and the owners the loss must fall on the charterers. Having discharged their liability in respect of the collision, the charterers sue the insurance company in this country. Their contention is that the charter imposed upon the owners an obligation to insure on behalf of the charterers as well as on their own behalf, or, in the alternative, that the owners were authorised to insure, and did in fact insure, on behalf of the charterers, or at least in terms wide enough to cover them, and that they had duly ratified and adopted the contract. There is not the slightest evidence of intention on the part of the owners to protect the charterers by insurance, unless such intention can be inferred from the

mere fact of the existence of the policy in question taken in connection with the language of the charter. The main part of the argument was addressed to the construction of the charter. There are only three clauses which can have any bearing upon the question. They are clause 3, clause 17, and clause 22. Clause 3 declares that the charterers shall provide and pay for certain specified charges "and all other charges whatsoever" except for painting and repairs to hull and machinery, and anything appertaining to keeping the ship in proper working order. Clause 17, after declaring, among other things, that should the vessel be driven into port or to anchorage by stress of weather the detention or loss of time should fall on the charterers, ends with this statement: "It is understood in event of steamer from above causes putting into any port or ports other than those to which she is bound, that the charterers are covered as to expenses as the owners are by their insurance." Up to this point there is no reference to insurance to be found in the charter. The next and only other mention of insurance is in clause 22, in the following words: "That the owners shall pay for the insurance on the vessel." Clause 3, if unexplained or unqualified, might possibly have given occasion for an argument to the effect that the expense of insurance was to be borne by the charterers. But clause 22 leaves no room for such a contention. And indeed, as was suggested in the course of the argument, the clause may have been inserted in order to put that matter beyond question. It will be observed that clause 22 does not indicate the amount to be insured or specify the risks to be covered. It merely says that the owners shall pay for the insurance on the vessel. It imposes no obligation on the owners which the charterers could enforce. The meaning, therefore, I think, must be simply this—that if the owners choose to insure they must pay the premiums without recourse to the charterers. The owners are not to trouble themselves about the charterers at all. The insurance contemplated, if effected, is no concern of the charterers. Now, if the matter rested there, it seems to me that the conclusion must be that when the owners proposed to insure, acting as they did without any communication with the charterers, the charterers cannot be regarded as persons within the contemplation of the proposal. They were not persons intended to be covered by the policy or persons for whose benefit the insurance was proposed. They were strangers to the contract altogether. Clause 17 is obscure. Vaughan Williams, L.J. seems to think that under certain circumstances it might give the charterers the benefit of an insurance made by the owners. I cannot think that that can be the meaning. I prefer the suggestion of Mr. Hamilton, that what was meant was only this—that if the charterers should desire protection against the risks contemplated they were to look out for themselves and themselves alone, just as the owners were to do by their insurance on the vessel. If this be the true meaning it would strengthen the view which I have already indicated, as the result of clause 22, that the insurance on the vessel was intended to be for the benefit of the insuring owners and not in any event or under any circumstances for the benefit of the charterers. I am therefore of opinion, notwithstanding the very able argument of Mr. Carver and Mr. Llewelyn Davies, that the order appealed from is right, and that the appeal should be dismissed with costs.

Lord Robertson.—My Lords: I concur.

Lord Atkinson.—My Lords: I concur in the conclusion that the judgment of the Court of Appeal should be upheld, and this appeal dismissed with costs. I think that clauses 17 and 22 of the charter-party, taken singly or together, do not on their true construction amount to a contract between the owners and charterers that the former should insure the ship, nor do they, in my opinion, impose any duty or obligation on the owners so to do, or constitute or appoint them the agents of the charterers for that purpose. I am further of opinion that whether Messrs. Craggs and Son intended to insure on behalf of the appellants or not, or whether or not Messrs. I. Holman and Son professed or intended to insure on their (the appellants) behalf and as their agents, the appellants, with full knowledge of the facts, repudiated, in the American proceedings, the authority of the persons who, as they now contend, acted as their agents, and disclaimed the contract those alleged agents entered into. In the American proceedings a statement of facts was agreed upon between the appellants and the owners. Par. 8 of this statement contains the following allegation: "The appellants had no insurance on the said steamship." The excuse now given for this allegation is that at the time at which it was made the appellants were contesting their liability for the damages caused to another vessel by the negligent navigation of the *Barnstaple*; but if their present contention be well founded they were interested in other risks different from, and in addition to, the risk of having to pay damages for injury caused to other vessels by the negligent navigation of the vessel which they had chartered. And the contention that unless they were held liable in damages for this collision they had no interest in the policy of assurance, and that while that liability was undetermined this allegation in par. 8 could not be treated as a repudiation of the authority of their agents, or a reprobation of the contract of assurance which prevents them now from approbating it, cannot, in my opinion, be sustained. At the time at which this statement of facts was agreed upon the appellants knew all the facts. They insisted, no doubt, upon a construction of the charter-party which would have protected them from liability for the damages then sued for; but the fact that the question of construction was still *sub judice*, and that they did not know that their contention would fail, or that they would be held liable to pay these damages, may show a want of appreciation of the soundness of a legal argument, or the correctness of a legal opinion, but does not, in my opinion, amount to such ignorance of fact as will entitle a party to escape from the consequences of an election between two remedies made by him while that ignorance continued. I think that the allegation in this par. 8 must be treated as an unequivocal expression on the part of the appellants of their determination not to adopt or ratify, or be bound by the contract of insurance which had been entered into, and that, though made in a suit between the appellant and

a third party, it is upon the authority of *Clough* v. *London and North-Western Railway Company* (25 L. T. Rep. 708; L. Rep. 7 Ex. 26) binding in the present case upon those who made it. Upon the true construction of the general clause in the policy of marine insurance so much discussed, I express no opinion. Under the old authorities the governing factor in determining the person or class of persons who came within such a clause, or was or were entitled to ratify the contract contained in it and take advantage of that contract, was apparently the intention, disclosed or undisclosed, existing in the mind of the person who effected the policy with the underwriters at the time he effected it. The underwriter, it would seem, was held to have insured those whom the person who dealt with him intended should be insured, though that intention was never communicated to the underwriter. I doubt very much whether that doctrine can long survive the decision of your Lordships' House in *Keighley, Maxsted, and Co.* v. *Durant* (84 L. T. Rep. 777; (1901) A. C. 240), or whether the rule of construction which was adopted in the case of marine policies from earlier times is not inconsistent with the root principle which lies at the foundation of all the law of contract—namely, that there must always be the consent *ad idem* of the two contracting minds to make a valid contract. Having come to the conclusion which I have mentioned on other points of the case, it is unnecessary for the purposes of this appeal that I should express any opinion upon this point, and I wish to hold myself entirely free, should the necessity arise, to reconsider it upon a future occasion.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Biddle, Thorne, Welsford,* and *Sidgwick.*

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

June 25, 26, *and July* 20, 1906.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, ROBERTSON, and ATKINSON.)

VAN EIJCK AND ANOTHER *v.* SOMERVILLE AND ANOTHER. (*a*)

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

Collision — Limitation of liability — How far valuation binding on cargo owner—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504.

In proceedings under the Merchant Shipping Act 1894, *ss.* 503 *and* 504, *for the limitation of a shipowner's liability, the finding of value in proceedings arising out of a collision between two ships, to which proceedings the cargo owner was not a party, is not conclusive as against him.*

Judgment of the court below reversed.

APPEAL from a judgment of the Second Division of the Court of Session in Scotland, consisting of the Lord Justice-Clerk (Macdonald), Lord Young, and Lord Kyllachy, reported 42 Sc. L. Rep. 439; 7 F. 739, who had affirmed a decision of the Lord Ordinary (Lord Low).

The appellants were the owners of the cargo on the steamship *Anglia,* and the respondents—Somerville and Gibson—owners of the *Anglia,* of Leith.

The question under the appeal was raised in the course of a petition for limitation of liability in respect of a collision at sea presented to the Court of Session by Det Forenede Dampskibs Selskab, Copenhagen, the registered owners of the steamship *Olga,* of Copenhagen.

Messrs. Somerville and Gibson, the registered owners of the steamship *Anglia,* raised an action against Det Forenede Dampskibs Selskab, concluding for payment of 15,000*l.* in respect of a collision which took place between the *Olga* and the *Anglia.* In the collision the *Anglia* was sunk.

Selskab raised an action against Somerville and Gibson, concluding for payment of 387*l.* 10*s.* 11*d.* in respect of the collision.

The Lord Ordinary (Low) found both vessels in fault.

Evidence was led regarding the value of the *Anglia,* and the Lord Ordinary found that the loss sustained by the respondents amounted to 14,687*l.*, and that the loss sustained by the owners of the *Olga* amounted to 387*l.* 10*s.* 11*d.* Accordingly, he decerned in favour of the respondents for 7149*l.* 14*s.* 7*d.*, to which the respondents were entitled upon an accounting with the owners of the *Olga.*

The owners of the *Olga* reclaimed against the interlocutor, and the Second Division adhered thereto.

They then presented a petition craving the court to limit their liability in respect of the collision to 6215*l.* 4*s.*, to stay all actions and suits pending or to be thereafter instituted in that or any other court in relation to their liability therefor, and to ordain all parties having any right or claim in respect of the collision to lodge their claims and answers within such time as the court might fix.

The respondents presented a claim to the court craving (*inter alia*) to be ranked and preferred on the fund for a sum of 7149*l.* 14*s.* 7*d.* in respect of the decree obtained by them.

Thereupon C. A. Van Eijck and Zoon, owners of the cargo on board the *Anglia,* presented a claim craving to be ranked and preferred on the fund to the extent of one-half of the sum standing opposite their names. These sums represented the total value of the cargo carried by the *Anglia* and belonging to the appellants, and amounted to 4669*l.* 12*s.* 3*d.* The appellants refused to admit that the respondents were entitled to rank on the fund for the full amount contained in their decree. They submitted that the true value of the *Anglia* was not 14,687*l.*, but 7000*l.* or thereby, and that, therefore, the respondents fell to be ranked on the fund for 3693*l.* 15*s.* 6*d.*, less 387*l.* 10*s.* 11*d.*, being the damage found to have been sustained by the *Olga* in collision. The appellants maintained that they were entitled to have the damage sustained by the respondents reassessed in the process for the limitation of liability. The Second Division refused the appellants' motion for a proof, and pronounced the interlocutor under appeal.

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

The *Solicitor-General for Scotland* (Ure, K.C.) and *Spens* (of the Scotch Bar) appeared for the appellants.

Pickford, K.C. and *Rankin* for the respondents.

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

July 20.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn).—My Lords: This is an appeal against the decision of the Court of Session in a proceeding under sects. 503 and 504 of the Merchant Shipping Act 1894. A collision took place between the *Olga* and the *Anglia*, and the court held both ships to blame. It was found in the collision actions (for there were cross-actions) that the loss of the owners of the *Anglia* was 14,687*l.*, and that of the owners of the *Olga* 387*l.* 10*s.* 11*d.*, amounting together to the sum of 15,074*l.* 10*s.* 11*d.* Each ship was debited with half that sum, and, after crediting the *Olga* with 387*l.* 10*s.* 11*d.*, the amount of her loss, the court decerned against the *Olga* and in favour of the owners of the *Anglia* for the balance—viz., 7149*l.* 14*s.* 7*d.* This decree was sustained on appeal. Thereupon the owners of the *Olga* petitioned in terms of sects. 503 and 504 of the Merchant Shipping Act 1894 for a limitation of their liability to the sum of 6215*l.* 4*s.*, and in the proceedings that ensued the owners of the *Anglia* claimed to be ranked and preferred on the fund for the full amount of the decree obtained by them against the *Olga*. Then the present appellants, C. A. Van Eijck and Zoon, owners of cargo on the *Anglia* at the time of the collision, claimed to be ranked and preferred on the fund to the extent of one-half of the value of the cargo belonging to them which was lost by reason of the collision. In this claim the appellants, the cargo owners, disputed the value of the *Anglia*. They said that, although in the collision action the court had found that value to be 14,687*l.*, yet they were not parties to that action, and were not bound thereby. They alleged that the true value of the *Anglia* was about 7000*l.*, and suggested that, though not collusive in a dishonest sense, the owners of the *Olga* had failed from error or indifference to disprove the excessive valuation put on the *Anglia* by her owners. Manifestly the appellants had a great interest in reducing the valuation of the *Anglia*, because, if it were reduced, there would be more of the fund left to satisfy their claims for damages.

The short question, therefore, is whether the finding of value in the collision proceedings between owners of the two ships is conclusive on owners of cargo in ulterior proceedings. With all respect to the learned judges of the Court of Session, I cannot think that it is. I do not enter upon the rule applicable to sequestration or the analogous rules of bankruptcy law in England. There is no authority either in Scotland or in England to show that an owner of cargo in proceedings under the Merchant Shipping Act is foreclosed as to the value of ship by findings in an action to which he was no party, and in which no one could be heard who was in the least concerned to protect his interest. I am not prepared to concur in initiating any such doctrine. I do not in the least suppose that there was any collusion or impropriety in the present case. But it would be a dangerous thing to lay down that a man may be precluded from showing the truth to the court in regard to a matter directly affecting his own pocket, merely because in an action between other people a decree had been obtained on such evidence and argument as they thought proper to adduce. It seems to me illusory to justify such a contention by saying that if there were fraud or collusion the decree could be set aside. It is very difficult to prove collusion, and I cannot see why, as regards third parties, a decree should be set aside on that ground and yet be allowed to stand, however unreasonable it may be, when the error is due to carelessness or incompetence or indifference. The innocent third party is equally injured whatever be the cause of error. I have the less hesitation in coming to this conclusion, because I am satisfied that values ascertained as in this case will rarely be disputed without just cause. The power of effectively awarding expenses when a complaint is unfounded will prove a sufficient deterrent. I therefore move that the order appealed from be reversed, and that a declaration be made that the owners of the *Anglia* are bound to try again in this process the amount of the claim against the petitioners. I am desired by my noble and learned friend Lord Macnaghten, who is unable to be present to-day, to say that he concurs in this judgment.

Lord ROBERTSON.—My Lords: The question in this appeal is solely of the effect of the 503rd and 504th sections of the Merchant Shipping Act 1894; and I have come to the conclusion that this appeal must be allowed. The key to the question seems to me to lie in realising the time at which the section operates, and the effect of the non-liability which it declares. Now in the long sentence, of which the relevant part of the section consists, the main proposition is that the owners indicated shall not be liable beyond the specified amounts. The time at which this state of the law is created is, in each case, the occurrence of the loss. The 504th section is one of procedure, but it is correlative to sect. 503. The normal procedure is for the owner at once to petition the court to determine the amount of his liability (which clearly means merely the sum to which his limited liability amounts), and to distribute the amount rateably among the claimants; and it is significant that the court petitioned has power to stay any proceedings in any other court. The court petitioned, be it observed, does not create the immunity, which the 503rd section has done already. And the power to stay proceedings is given to effectuate the immunity declared in the 503rd section. In the present case, when the owner was attacked, he judged it well to dispute liability absolutely, joined issue and was beaten. Now this may have been good policy or bad, but the question is whether his electing to adopt it can alter the rights of third parties. It seems to me that, in the scheme of the statute, it is a correlation or limitation of liability that the rights of participants in the limited fund shall be determined in the presence of those truly concerned. My judgment is rested on the construction of the statute and not on any general notion of the impossibility of a decree obtained against A. by B. availing against C., D., or E., in the event of a deficiency. *Vigilantibus non dormientibus jura subveniunt* is good bankruptcy law; and so

long as A. is allowed by C., D., or E. to stand on his legs as a solvent man, a decree obtained against him by B. for 100*l.* is conclusive, in a subsequent bankruptcy against C., D., and E. (I speak, of course, of decrees which are not collusive, either in fact or by statutory presumption). On the other hand, the moment bankruptcy is declared the bankrupt ceases to be the proper defender of his estate and a decree against him will not conclude other creditors. Now, the decree founded on in the present case was pronounced after the defending shipowner had become immune from absolute liability, and the same principle as rules in bankruptcy points to the decree being inconclusive against competing creditors.

Lord ATKINSON, who was present during the argument, took no part in the judgment.

Interlocutor appealed from reversed. Cause remitted to the Court of Session. Respondents to pay to the appellants their costs in this House, and in the court below.

Solicitors for the appellants, *Waltons, Johnson, Bubb,* and *Whatton,* for *Boyd, Jameson,* and *Young,* Leith.

Solicitors for the respondents, *Thomas Cooper* and *Co.,* for *Beveridge, Sutherland,* and *Smith,* Leith.

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, June 12, 1906.

(Before COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.)

JAMES NELSON AND SONS LIMITED *v.* NELSON LINE (LIVERPOOL) LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Practice—Discovery — Action by cargo owners against shipowners—Partial insurance by cargo owners—Payment by underwriters—Subrogation—Documents in possession of underwriters—Nominal plaintiffs.

The owners of a cargo of frozen meat brought an action against the shipowners for damage done to the cargo during the voyage through the alleged unseaworthiness of the vessel.

The plaintiffs had insured, but not to the full value of the cargo, and after the action had been brought the underwriters paid to the plaintiffs the amount for which they were liable, which was about three quarters of the plaintiffs' actual loss.

On receiving this payment, the plaintiffs handed over the conduct of the action to the underwriters, who thereupon employed their own solicitors to conduct the action in the place of the solicitors originally acting for the plaintiffs.

Before the commencement of the voyage the underwriters had employed an agent to make for them a written report on the condition of the vessel.

This report had never been in the possession of the plaintiffs, but was in the custody of the underwriters' solicitors.

Upon an application by the defendants for a stay of the action until the plaintiffs should make discovery of this report:

Held, that these facts did not justify the court in making the order that was asked for.

APPEAL by the defendants from the refusal of Bigham, J. at chambers to order the discovery asked for by them.

The action was brought by the owners of a cargo of frozen meat to recover damages from shipowners for injury done to the cargo, in the course of a voyage from Buenos Ayres to England, arising from the unseaworthiness of the vessel.

The plaintiffs had insured, but not to the full value of the cargo.

After the action had been brought, the underwriters came to terms with the plaintiffs and paid them a sum equal to about three-quarters of the loss actually suffered by the plaintiffs.

The underwriters thereupon took over from the plaintiffs the conduct of the action, and their own solicitors were substituted on the record in the place of the solicitors who had been acting for the plaintiffs.

It appeared that before the commencement of the voyage the underwriters, acting upon information received, had employed a surveyor at Buenos Ayres to inspect the refrigerating machinery in the vessel.

Under the terms of the contract between the plaintiffs and the defendants, the plaintiffs were entitled to inspect this machinery, and it was alleged that, when the surveyor employed by the underwriters came on to the vessel, the defendants raised no question as to his right to carry out an inspection.

The surveyor sent in to the underwriters a report of what he had seen, and this report, which never came into the possession or under the control of the plaintiffs, was in the custody of the underwriters' solicitors.

The defendants had obtained from the plaintiffs an affidavit of documents, but were desirous that the plaintiffs should be compelled to include in their affidavit this report and certain other documents in the underwriters' possession.

The defendants therefore applied at chambers for an order that the plaintiffs should make a further and better affidavit, or that the action should be stayed.

Bigham, J. refused the application.

The defendants appealed.

Danckwerts, K.C. and *Bailhache* for the defendants.—If the underwriters had been plaintiffs on the record, it is obvious that they would have been obliged to include in their affidavit of documents this report of their surveyor on the condition of the refrigerating machinery. They are none the less obliged to make discovery because the action is being carried on in the name of someone else. The underwriters are conducting the action, and their solicitors are now the solicitors for the plaintiffs on the record. The true position is this: The cargo owners are merely the nominal plaintiffs. The real plaintiffs are the underwriters, who are suing for the whole sum claimed in respect of the damage to the cargo. As to a small part of that claim the underwriters, it is true, are suing as trustees of the cargo owners, and in the event of their obtaining a verdict they will hand

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

over something to the cargo owners; but that is a minor point. If the interest of the cargo owners had passed in its entirety to the underwriters, the case would be exactly analogous to a reported case in the Court of Appeal:

Willis and Co. v. *Baddeley*, 67 L. T. Rep. 206; (1892) 2 Q. B. 324.

In that case the plaintiffs on the record were merely nominal plaintiffs as they were suing as agents of foreign principals, and the court stayed the action until the foreign principals should make discovery of documents in their possession. It would have been immaterial there if the agents had been interested to some extent by way of a commission in the success of their foreign principals' claim. If the present action were one on a policy of marine insurance, there is a case which would be exactly applicable here:

West of England and South Wales District Bank v. *Canton Insurance Company*, 2 Ex. Div. 472.

In that case the action was brought by the mortgagees of thirty-two sixty-fourths of the ship, and it was held that the defendants were entitled to an order requiring the mortgagors and all persons interested in the proceedings and in the insurance of the ship to produce the ship's papers. They referred also to the following cases:

Republic of Liberia v. *Roye*, 34 L. T. Rep. 145; 1 App. Cas. 139;

Republic of Costa Rica v. *Erlanger*, 1 Ch. Div. 171;

Wilson v. *Raffalovich*, 7 Q. B. Div. 553;

London and Provincial Marine and General Insurance Company Limited v. *Chambers*, 5 Com. Cas. 241.

Rufus Isaacs, K.C. and *F. D. Mackinnon* for the plaintiffs.—There is no precedent for the defendants' application. At the time when the writ in the action was issued the underwriters had refused to pay anything to the cargo owners, and it cannot be denied by the defendants that at that time the plaintiffs on the record were the only persons interested in the claim in the action. The cargo owners are even now substantially interested to the extent of one-quarter of their claim. They are real plaintiffs, not merely nominal plaintiffs, as in *Wilis and Co.* v. *Baddeley* (*ubi sup.*). The cargo owners are still the only persons who are able to sue in this action. They have not assigned their cause of action to the underwriters, who are only interested by way of subrogation. Moreover, a part of a cause of action cannot be assigned. That is the law in the case of a debt, and *à fortiori* in the case of a claim for damages, which is the cause of action here:

Durham Brothers v. *Robertson*, 78 L. T. Rep. 438; (1898) 1 Q. B. 765.

The action in *Willis and Co.* v. *Baddeley* (*ubi sup.*) was upon a policy of marine insurance, a class of action in which different considerations apply from a case such as the present, which is an ordinary action for damages for breach of contract. In that case, too, the action was originally brought by a mere nominal plaintiff, and it was held that the real plaintiff could not by that means avoid making discovery. Here the defendants seek discovery of a document which the plaintiffs have never had in their possession, and which they know nothing about. The document is in possession of the underwriters or their agents. Even in a case where a document is in the joint possession of a party to the action and a stranger the court has held that to be a sufficient reason for not making an order for inspection of the document:

Kearsley v. *Philips*, 48 L. T. Rep. 468; 10 Q. B. Div. 465.

They also referred to

Harding v. *Bussell*, 92 L. T. Rep. 531; (1905) 2 K. B. 83.

Danckwerts, K.C., in reply, referred to

Hadley v. *McDougall*, 26 L. T. Rep. 379; L. Rep. 7 Ch. 312.

Collins, M.R.—This is an appeal from a decision of Bigham, J. refusing to make an order for discovery of a certain class of documents of which one has been singled out for the purposes of argument as typical of them all. The action is brought by cargo owners against shipowners in respect of injury to the cargo in the course of the voyage. The cargo owners were insured with underwriters for a considerable part of the value of the cargo. When the writ of summons was issued, the underwriters had not come to terms with the cargo owners, but soon after they settled with them, and the cargo owners received from the underwriters in settlement of this claim a sum equal to about three-quarters of their entire loss. As to the remaining quarter of their loss, therefore, the cargo owners are still claiming damages from the shipowners. Now, during the process of loading the cargo something happened which put the underwriters, or their agents at Buenos Ayres, on inquiry, with the result that they had an inspection made of the refrigerating machinery of the ship that was to carry the plaintiffs' cargo of meat, and the person employed to inspect made a written report. The action which was begun by the cargo owners is now being carried on by the underwriters who are interested, as I have stated, to the extent of about three-quarters, in the claim made against the defendants, and the underwriters are employing their own solicitors to conduct the case for them. The question now arises whether the defendants are entitled to have included in the affidavit of documents made by the plaintiffs the report made by the person employed to inspect the machinery, this report being in the custody of the underwriters' solicitors, who now have the conduct of the action. Now, whatever may be the form of the action, the underwriters are interested in the claim against the defendants to the extent of three-quarters, the cargo owners being only interested in one-quarter of the claim, and the defendants contend that, this being so, and solicitors of the underwriters having been substituted for the solicitors originally on the record, the plaintiffs ought to give discovery of this document.

The question is, therefore, whether the rules as to discovery, as interpreted by decided cases, entitle the court to make the order which the defendants ask for. Bigham, J., who has very great experience in cases of this kind, declined to make the order. It seems to me that we are not at large to do what may seem to us to be abstract justice in this case. We are limited by the express provisions of the rules. The whole matter of discovery has been the subject of legislation, and we must look at that legislation to see if we are not being asked

to take a step beyond the limits there laid down. I think that is what we are being invited to do, and I do not think that we should be justified in taking such a step and departing from the statutory enactments and cases decided thereon. The cargo owners have a real and substantial interest in the cause of action, and are not merely nominal plaintiffs. To a certain extent the underwriters are interested in the claim, but their interest arises by way of subrogation. That is not the same as if they were assignees of the cargo owners' cause of action, and it is clear that there would be difficulties here in making an assignment to the underwriters limited to the interest that they have in the claim made in the action. It is only by subrogation that the underwriters can put in a claim in this action. They only have the right to stand in the shoes of the persons whom they have indemnified. The right of action is still the cargo owners' right as against the defendants, though, if money is recovered from the defendants in respect of the loss, the underwriters will be entitled to share in it. The cargo owners are not merely nominal plaintiffs. They have a real and substantial interest in the action. The case is therefore outside that class of cases in which discovery has been ordered against a person not nominally a party to an action, on the ground that in reality he was so. The basis of the rules as to discovery seems to me to be that the rights of discovery are between parties to an action, and *primâ facie* it would be an answer to an application for discovery that the person against whom it is sought is not a party to the action. The right has, no doubt, been extended as against persons who are in truth and in substance parties to actions, though not so in form. Those decisions do not seem to me to apply to underwriters in such a case as the present, where the claim is being enforced directly for the benefit of the assured, though the underwriters will be benefited if anything is recovered in the action. No authority cited on behalf of the defendants seems to me to go beyond what I have said. The one which was especially relied on in their behalf was *Willis and Co.* v. *Baddeley* (*ubi sup.*), which appears to me to be clearly distinguishable. That was an action upon a policy of reinsurance. The present is an action by cargo owners against shipowners for breach of warranty of seaworthiness, and is not a case of the assured suing the insurer. In *Willis and Co.* v. *Baddeley* (*ubi sup.*) persons living abroad had effected an insurance through their agents, who were the plaintiffs in the action. The plaintiffs were, in truth, acting as a mere conduit pipe on behalf of the persons abroad, and had no rights of their own at all against the defendants. The defendants applied for an order directing the plaintiffs' foreign principals to make discovery of documents in their possession or power relating to the matters in question in the action. Under the circumstances of that case, the plaintiffs having no rights whatever personally against the defendants, the court held that the persons on behalf of whom the action had in truth been brought ought to be ordered to give discovery. That case is very unlike the one which we have now to decide. The underwriters here are not the real plaintiffs in the action. They are only entitled to make use of the rights of the plaintiffs on the record, who have real and substantial rights of their own against the defendants. Discovery can only be ordered as against persons who are really and truly parties to the action, and I do not think that in the present case the underwriters can be regarded as the real plaintiffs. For these reasons I think that the appeal fails.

Cozens-Hardy, L.J. — I am of the same opinion. The notice of appeal does not seem to me really to raise the question that has been argued. It simply asks that the plaintiffs may be ordered to give a further and better list of documents. What has been argued by the defendants has been that the action may be stayed unless the underwriters who are interested in the plaintiffs' cause of action produce a document which the plaintiffs swear they have not, and never had, in their possession. I think that that cannot be regarded as anything but a novel experiment for which no authority can be cited. No trace has been discovered by counsel for the defendants of any such order having been made in the Court of Chancery, where one would expect to find it if such an order was in accordance with the practice of that court. It would be dangerous for us to make a new departure in this matter. The plaintiffs were only partially insured with the underwriters, and I wish to keep an open mind as to what would have happened if the underwriters had paid the plaintiffs the whole of the loss suffered by them. When the action was begun, the plaintiffs were undeniably the real and only plaintiffs in the action. Even now, as the Master of the Rolls has pointed out, they are still real and substantial plaintiffs, though the underwriters may be entitled to claim from them part of what may be recovered from the defendants. I do not see how the underwriters could maintain an action in their own name against the defendants. I agree with Chitty, L.J., who said in *Durham Brothers* v. *Robertson* (*ubi sup.*) that sub-sect. 6 of sect. 25 of the Judicature Act 1873 "speaks of an absolute assignment of any debt or other *chose in action*. It does not say 'or any part of a debt or *chose in action*.' It appears to me, as at present advised, to be questionable whether an assignment of part of an entire debt is within the enactment." That remark applies *à fortiori* to such a case as the present, where the plaintiffs' original claim against the defendants was not for an ascertained amount. The rights of the underwriters do not here depend upon assignment. They can only claim by way of subrogation, and the principles of the law of subrogation do not make the underwriters the real plaintiffs in the action, especially when the persons under whom they claim have a substantial interest in the sum that may be recovered.

Farwell, L.J.—I agree. If the defendants succeeded in this appeal, the effect would be to upset the practice as to discovery. This is an action by cargo owners against shipowners for breach of a warranty as to seaworthiness. It is not an action upon a policy of marine insurance, and authorities on that class of action are not applicable to the present case. The arguments put forward on behalf of the defendants are so widespreading that, if successful, they would give the judge a discretionary power of dispensing with all limitations upon the rights of a defen-

dant to obtain discovery. Discovery is an old head of equity jurisdiction, and the Court of Chancery granted that relief only within well-defined limits which are now embodied in Order XXXI. Mr. Danckwerts relied on some observations made by Lord Hatherley in *Republic of Liberia* v. *Roye* (*ubi sup.*), but I think those observations were not intended to extend beyond the circumstances of the particular case. The real ground of the decision was thus put by Lord Cairns in a few lines: "I hold it to be clear and well established that the Court of Chancery has, in the first place, jurisdiction to stay all proceedings in a cause until the plaintiff has made any discovery which he is called upon by the order of the court to make." That means an order which the court has jurisdiction to make. The suggestion that the court must find a means of escaping from the stringency of the rules in order to avoid doing what it considers is an injustice seems to me to be answered by Cotton, L.J. in *Wilson* v. *Raffalovich* (*ubi sup.*). Speaking of the order made by the Divisional Court that the plaintiffs be absolved from making any further discovery of documents, he said: "It seems to have been based by the judges who gave their opinion in the court below on this, that an injustice would be suffered by those whom they call the actual plaintiffs unless the order which they then made was made. Now, I venture to say that the use of the word 'injustice' is unfortunate; probably they meant it for hardship. No man can be said to suffer an injustice if when he comes to sue in a court the rules of the court applicable to suitors who seek to enforce their rights are enforced in his case, and the only question which I have to consider, and that I approach without any prejudice either one way or the other, is whether according to the rules applicable to the conduct of litigation the plaintiffs here are right and can sustain the order." Those observations apply whether the applicants for an order are the plaintiffs or the defendants. The only real question, therefore, now is whether or not the plaintiffs are merely nominal plaintiffs and the underwriters the real plaintiffs. That is the view which I understand was taken in *Willis and Co.* v. *Baddeley* (*ubi sup.*). Lord Esher said: "I am prepared to decide that where it is made known to the court that there is a foreign principal residing abroad who is the real plaintiff in the action and is only suing through his agent here, and that the agent was dealt with by the other side as agent and not as principal, then, in order to prevent palpable injustice, the court by reason of its inherent jurisdiction will insist that the real plaintiff shall do all that he ought to do for the purposes of justice as if his name were on the record. It is true that the court cannot make an order on him such as is here asked for, because he is not a party to the action; but it can say that the nominal plaintiff shall not proceed with the action till the real plaintiff has done that which, had he been a party to the action, he might have been ordered to do." And Smith, L.J. said: "It seems to me that the principle inherent to the jurisdiction of every court as regards this practice is that it should be framed so as to do justice, and that if we did not stay this action until the discovery sought is made, as the action is brought by a nominal plaintiff for and on behalf of and as agent for the Trieste Company, we should be doing that which is not justice between the parties." A person cannot by putting forward another person as a mere shadow to cover his own identity for the purposes of litigation escape from liabilities to which he would have been subject if he had been a party on the record. The only ground for any suggestion that the plaintiffs are only nominal plaintiffs is the change of the solicitors on the record from those originally acting for the plaintiffs to those who are employed by the underwriters. We cannot rely on that as evidence of *mala fides*. The principle acted on in *Willis and Co.* v. *Baddeley* (*ubi sup.*) seems to me similar to that on which an insolvent nominal plaintiff is ordered to give security for costs in a court of first instance, as mentioned in *Cowell* v. *Taylor* (53 L. T. Rep. 483; 31 Ch. Div. 34). If it had been shown that the plaintiffs were a mere shadow, the result might have been different; but the defendants have not shown that, and I agree that the appeal must be dismissed.

Appeal dismissed.

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

Solicitors for the defendants, *Rawle, Johnstone, and Co.*, for *Hill, Dickinson, and Co.*, Liverpool.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, April 2, 1906.

(Before KENNEDY, J.)

DARLING AND SON *v.* RAEBURN AND VEREL. (*a*)

Charter-party—Charter for voyage—"A full and complete cargo not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture"—Shipowner during voyage loading more bunker coal than necessary for voyage causing charterer expense of a second lightening—"Lighten at receiver's expense"—Implied term not to use vessel in manner prejudicial to charterer.

A charter-party provided that the vessel should load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture," and proceed to a certain port and "there lighten at the receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port."

The charterer at a port lightened in anticipation of the difficulty in getting into the next port. The shipowner then loaded a larger amount of bunker coals, after allowing a reasonable margin, than was required for the chartered voyage, necessitating a second lightening outside the port of discharge.

The shipowner threatened to exercise his lien on the cargo for the expense of the second lightening; thereupon the charterer under protest paid the amount.

In an action to recover the amount so paid:

Held, that the charterer was entitled to recover the amount so paid from the shipowner. The essence

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

of a contract to carry by sea from one port to another port or set of ports is, in the absence of an agreement to the contrary, that the charterer shall have the full advantage of the ship, subject only to that which is necessary for the shipowner to perform his part of the contract in keeping his ship seaworthy and keeping such fuel on board as is necessary for the vessel's progress on the voyage and the safety of those on board.

ACTION tried before Kennedy, J. in the Commercial Court without a jury.

The plaintiffs claimed 181*l.* 15*s.* as money paid on account of the defendants, or, alternatively, for damages for breach of a charter-party dated the 27th Dec. 1904.

The material part of the charter-party was as follows:

Adelaide charter-party for grain cargoes (steam). It is . . . agreed between Maxwell Gavin Anderson for and on behalf of the owners of the good screw steamer called the *Balmoral* . . . now in Australian waters . . . and John Darling and Son, charterers. . . . That the said steamer . . . shall . . . proceed to Sydney and for Melbourne and for Geelong—last two counting as one port—and (or) one or two safe ports in South Australia, but not to load in more than two ports in all . . . and there load . . . a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture. And, being so loaded, shall forthwith proceed to two or three ports in South Africa between Delagoa Bay and Cape Town, both inclusive—first port of discharge to be named on signment of bills of lading, or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port, according to its custom, and there deliver the same. . . . If the steamer be ordered to load or discharge at more than one port, such ports to be in geographical order from east to west for loading ports and north to south for discharging ports. . . . Freight being payable at and after the rate of twenty-three shillings and ninepence (23*s.* 9*d.*) if the steamer is discharged at two ports, or twenty-five shillings (25*s.*) if the steamer is discharged at three ports. . . . All per ton of 2240lb. net weight delivered at Queen's beam for wheat and (or) flour. . . .

The vessel left Australia, and was ordered to Durban as the first port of discharge. On arrival there was on board about ninety tons of coal.

The charterers, anticipating difficulty in crossing the bar at East London, the second port of discharge, lightened, at Durban, the vessel to the extent of about 660 tons, which reduced the vessel's draught to 21ft. 1in. At Durban, however, the shipowner took 800 tons of bunker coal on board. When the vessel left Durban she drew 23ft. forward and 23ft. 1in. aft. When the vessel reached East London the vessel had to be further lightened. When the vessel arrived at the wharf the draught was 21ft. 7in. forward and 21ft. aft.

About 120 tons of coal would have been sufficient to take the vessel to Algoa Bay, her port of destination, and on to either Durban or Cape Town.

If 150 tons had been taken on board at Durban the vessel's draught would have been 21ft. 6in., and with that draught the vessel could have reached her wharf at East London without a second lightening.

The defendants threatening to exercise a lien for the cost of lightening off East London, the plaintiffs under protest paid the expense so incurred, and claimed in the action to recover that amount (181*l.* 15*s.*) from the defendants, alleging that the second lightening at East London was due solely to the defendants taking an excessive amount of coal on board at Durban, and that there was a breach of an implied term in the charter-party to make the voyage and utilise the vessel for the plaintiffs' purposes, and not to render the proper and economical employment of the vessel by the plaintiffs impossible or onerous. The vessel was to have proceeded to the Plate after she had discharged at Algoa Bay, but a voyage to Australia was substituted.

Scrutton, K.C. and *Adair Roche* for the plaintiffs.—The clause in the charter-party, "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture," means that the shipowner can reserve space for everything that is necessary for the chartered voyage and for the purposes which customarily follow on that voyage. "Stow" refers to the cargo space, and "carry" to the lifting power of the ship, which the charterer is entitled to. A shipowner may reserve space for ballast and coals for the voyage, but not for the following voyage. The shipowner was entitled to take sufficient coal, allowing a reasonable margin to enable the vessel to be taken from Algoa Bay, which was the last port under the charter, to Durban or Cape Town. The shipowner carried more furniture, apparel, &c., than he was entitled to. There was an obligation to carry a full and complete cargo, reserving sufficient space to carry the apparel, tackle, furniture, &c., necessary for the voyage. Coal comes within those words; but not coal for a future voyage. The charter-party must be read in reference to the chartered voyage. Since the shipowners solely caused the expense of lightening the second time, the clause which throws the expense of lightening on the charterers cannot apply.

J. A. Hamilton, K.C. and *M. N. Raeburn* for the defendants.—The shipowner did not fill more than his bunker space. The shipowner had the right to fill the space at the commencement of the voyage with 800 tons, and therefore he was entitled to do so during the voyage. Shipowners often bunker for two voyages. The charterer was not deprived of any space for cargo to which he was entitled. There has been no breach of any terms express or implied of the charter-party. This was a voyage charter. Provided the shipowner performs his express contract to carry the goods to their destination, there is no reason why he should not prepare for a subsequent voyage. The shipowner can take bunker coals on board for a future voyage provided there is no provision to the contrary in the charter-party—*e.g.*, the Black Sea Ore Charter and the River Plate Charter (Coals). The charterers were the receivers, and no implication can arise under the express clause "lighten at the receiver's expense." There can be no implied condition that the shipowner is bound to consider from the commercial point of view the interests of the charterer. The case of *Carlton Steamship Company* v. *Castle Mail Packets Company* (8 Asp. Mar. Law Cas. 325; (1897) 2 Com. Cas. 173) is in point.

Kennedy, J.—The point raised is of considerable difficulty. It is a question which must depend upon the construction of the charter-party. I have felt throughout that there is a great deal to be said for the view expressed by Mr. Hamilton upon behalf of the defendants—namely, that there is in this charter-party an express provision that the lightening is to be done, when the vessel has arrived at one of the ports which is a charter-party port, at receiver's expense, of "as much of the cargo as may be found necessary to allow a steamer to enter at all times of high water such port according to its custom." There is also a great deal to be said for the view that, where parties enter into elaborate contracts such as this charter-party is, the party who seeks to construe the contract as implying something beyond that which is actually expressed ought to make out a strong case in support of his construction. But I cannot help thinking that in a charter-party of this kind, a contract to carry by sea from one port to another port or set of ports, the essence of the transaction, in the absence of an agreement to the contrary, is that the person who is the charterer should have the full advantage of the ship, subject only to that which is necessary for the shipowner to perform his part of the contract in the way of keeping his ship seaworthy and keeping such fuel on board as is necessary for her progress on the voyage and the safety of those on board, and that the rest is to be for the benefit of the charterer, that the ship is to be used and managed in such a manner as may be necessary for the best advantage of the charterer. That is to be the supreme consideration subject to safety. At the port of Durban a quantity of coal was taken on board which was admittedly not necessary for the particular voyage to which the charter-party related, and, indeed, far exceeded it. It was taken on board to such an extent as to create the necessity of doing a certain amount of lightening before the vessel could enter the port at East London, although the charterer had at Durban discharged a large quantity of the cargo which had been brought across from Australia. It is admitted that if, with a very fair margin, coal had been taken merely sufficient to complete that voyage no lightening would have been necessary. I think that Mr. Scrutton upon behalf of the plaintiffs has put forward a point, in regard to which I do not at present see a sufficient answer in anything that has been said on the other side—namely, that if the defendants' contention is right, then as to all the space that was not wanted for cargo, irrespective of what might happen with regard to lightening when the vessel got to a port where lightening was required, the shipowner might have claimed to go on putting the fuel for another voyage, or, for aught I know, for future voyages, into this space, on the ground that, as far as present user of the vessel was concerned, he was not interfering with the fulfilment of the contract as regards the cargo the charterer wanted to put on board; that the charterer was then keeping on board all he wanted; that there was an express provision in the charter-party that, if lightening was necessary in order to enter a port, the charterer was to pay for it; and that the shipowner could use his vessel's hold for the purposes of his future voyage. I cannot believe that this is in accordance with what I think is the contract which is illustrated by the terms that the cargo is to be provided by the charterer "not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture." That clause shows to what extent the shipowner is entitled to load. During the time the shipowner is fulfilling his engagement under the charter-party with the charterer, he is not so to use his ship for his own convenience in future voyages as to deprive the charterer of advantages which he should have if in the use of the ship as a receptacle for coal or ballast the shipowner merely did that which is reasonably necessary not only for the purposes of the voyage, but for the safety of the ship on that voyage. As far as I know, there is no authority to guide me, but, construing this by what seems to me to be the reasonable nature of the engagement—by "reasonable" I mean what the law would call reasonable—I think that the plaintiffs are entitled to succeed. A good deal has been said about *Carlton Steamship Company* v. *Castle Mail Packets Company* (8 Asp. Mar. Law Cas. 325; (1897) 2 Com. Cas. 173), in which Mathew, J. expressed an opinion which is said by counsel for the defendants to be different from that which I now express. I need hardly say that I should not have ventured to differ from so great an authority had it been a decision in point, but I do not think it is. In that case there was a finding of fact as to it being perfectly well known, and, indeed, the ordinary course, that the vessel in question should take from the place where she loaded her cargo of coal, not sufficient only for that voyage, but for something beyond; and, further than that, although that may not perhaps be important, the fact is that in that case the loading was before the time when any cargo was put on board. In the present case there is a loading of coal which is done neither in view of any recognised custom or practice nor for the needs of the voyage, nor at the beginning of the voyage, after which the charterers give the order for the vessel to proceed here or there, but done in the middle of the voyage, in a way which prejudiced the charterers in getting possession of the cargo at East London, which they could only do by lightening. I think that they were entitled to say, "As you have caused expense by breach of your contract we must now be paid."

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Botterell* and *Roche*.
Solicitors for the defendants, *Lowless* and *Co.*

Wednesday, May 2, 1906.

(Before Lord Alverstone, C.J., Ridley and Darling, JJ.)

Rex *v.* Lewis. (*a*)

Pilotage authority—Appeal by pilot to stipendiary magistrate—Extension of time — Jurisdiction of magistrate to grant—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 610, *sub-ss.* 1, 7—*Pilotage Appeal Rules* (*Stipendiary and Metropolitan Police Magistrates*) 1890, *r.* 1.

By sect. 4, *sub-sect.* 1, *of the Merchant Shipping* (*Pilotage*) *Act* 1889—*now repealed and re-enacted*

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

in sect. 610, *sub-sect.* 1, *of the Merchant Shipping Act* 1894—*a pilot who was aggrieved by the decision of a pilotage authority with respect to the matters therein specified might appeal either to a County Court judge or to a metropolitan police or stipendiary magistrate having jurisdiction within the port for which the pilot is licensed. and by sub-sect.* 6—*now sub-sect.* 7 *of sect.* 610 *of the Act of* 1894—*power was given to a Secretary of State to make rules of procedure as respects metropolitan police and stipendiary magistrates, and by rule* 1 *of the Pilotage Appeal Rules* (*Stipendiary and Metropolitan Police Magistrates*) 1890, *made under those provisions, notice of appeal to a magistrate from the decision of any pilotage authority must be given to such magistrate or his clerk, and to the pilotage authority, by the person aggrieved within seven days after the receipt by him from the pilotage authority of a notification of their decision, "or within such further time as may be allowed by the magistrate."*

Held, that the magistrate has power under this rule to extend the time for giving notice of appeal both to himself and to the pilotage authority, although the application for such extension of time is not made until after the expiration of the seven days within which the notice ought, according to the rule, to be given.

RULE calling on the stipendiary magistrate for the city of Cardiff, and the Cardiff Pilotage Board, to show cause why he should not proceed to hear and determine, pursuant to the statutes in that behalf, the matter of an appeal by one Jonathan Lewis against the decision of the pilotage board granting him an annuity of 36*l.* 8*s.*, upon the surrender of his licence authorising him to act as a Bristol Channel pilot.

The rule was granted on the affidavit of the solicitor acting for the applicant (Jonathan Lewis), setting out the facts as follows:—

Jonathan Lewis had been for upwards of thirty-four years a Bristol Channel pilot, holding a licence from the Cardiff Pilotage Board. During that period he had contributed to the fund of the Cardiff Pilotage Board for the benefit of licensed pilots, which fund provides (*inter alia*) for the payment of an annuity to a pilot upon his resignation as a pilot and the surrender of his licence.

Lewis, being desirous of giving up his occupation as a pilot, on the 14th June 1905 wrote to the pilotage board saying that he desired to resign, inclosing a medical certificate as to his health, and asking the board to fix the amount of his retiring pension.

On the 5th July 1905 the board replied that, in view of the statement made in the medical certificate, the board would accept his resignation as pilot and would grant him an annuity of 36*l.* 8*s.* per annum, upon surrender of his licence. Lewis was dissatisfied with the amount of the annuity, and a correspondence took place between his solicitor and the board, and finally on the 6th Sept. 1905 the board wrote to Lewis' solicitor that they could not alter the decision already arrived at as to the amount of the annuity.

Lewis, being aggrieved by this decision of the pilotage board, decided to appeal therefrom to the stipendiary magistrate of Cardiff in accordance with sect. 610 of the Merchant Shipping Act 1894, and on the 20th Sept. 1905 (being more than seven days since the date of the receipt by Lewis on the 6th Sept. of the notification of the decision of the board) he applied *ex parte* to the deputy stipendiary magistrate (in the absence of the stipendiary magistrate) for an order under the rules made in pursuance of sect. 610, sub-sect. 7, of the Merchant Shipping Act 1894, allowing further time within which to give notice of appeal. The deputy stipendiary magistrate upon such application allowed seven days further time, and notice of appeal was served on the 23rd Sept. on the clerk to the stipendiary magistrate and on the 25th Sept. on the clerk to the pilotage board.

On the 29th Dec. the applicant's solicitor attended before the stipendiary magistrate and applied to him to proceed with the appeal, but he declined to proceed or to act upon the order of the deputy stipendiary magistrate, or to exercise his discretion upon an application for further time, stating that the appeal was out of time, and that the court had no power to allow further time for giving notice of appeal.

The above rule was then obtained.

In the affidavit of the learned magistrate in answer to the rule, he stated that on the 29th Dec. an application was made to him to appoint a day for hearing the appeal; and that, having regard to the facts that the decision of the board was communicated to Lewis on the 5th July 1905, and that Lewis did not apply to the magistrate for further time to appeal against the decision of the pilotage board until the 20th Sept., he decided that he had no jurisdiction to hear the appeal and declined to fix a day, being of opinion that further time for giving notice of appeal under rule 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates) 1890 could only be allowed by a magistrate if applied for within seven days after the day on which the person aggrieved had received from the pilotage authority a notification of their decision. He was also of opinion that, if it were competent for a magistrate to grant further time on an application not made until after the expiration of seven days, there would be no limit as to the time of appealing, and it would be competent for all persons aggrieved by decisions of the pilotage board in the past to apply for leave to appeal, irrespective of the time that had elapsed since the decisions were made known to them; and that, if it had been intended to confer upon a magistrate an unlimited discretion with regard to the time at which it would be competent for him to grant or refuse further time for appealing, express words would have been used, such as the words in Order LXIV., r. 7, of the Rules of the Supreme Court. He was further of the opinion that the decisions in the cases of *Huntingtower* v. *Sherborn* (5 Beav. 380), *Whistler* v. *Hancock* (37 L. T. Rep. 639; 3 Q. B. Div. 83), *Burke* v. *Rooney* (4 C. P. Div. 226), *Carter* v. *Stubbs* (43 L. T. Rep. 746; 6 Q. B. Div. 116), and the dicta of Williams and Romer, L.JJ. in *Re Macintosh, Dixon, and Co.* (88 L. T. Rep. 820, at p. 823; (1903) 2 Ch. 394, at pp. 405 and 407) were clear authorities for his decision.

Sect. 4 of the Merchant Shipping (Pilotage) Act 1889 (52 & 53 Vict. c. 68), in sub-sect. 1, provided that if a pilot were aggrieved by the

decision of a pilotage authority, or of a pilotage committee, or of any commissioners or sub-commissioners for a pilotage district, with respect to his suspension or dismissal, or (amongst other things) the application of any pilotage fund to which he had contributed prejudicing his rights in respect of the fund, he might appeal therefrom either to a judge of County Courts having jurisdiction within the port for which the pilot is licensed, or to a metropolitan police or stipendiary magistrate having jurisdiction within that port; and sub-sect. 6 provided:

> Rules with respect to the procedure under this section (including costs and the remuneration of assessors) may from time to time be made, as respects judges of County Courts, by the authority having power to make rules of practice under the County Courts Act 1888, and as respects metropolitan police and stipendiary magistrates by one of Her Majesty's Principal Secretaries of State, but in either case with the concurrence of the Commissioners of Her Majesty's Treasury as to fees.

This Act was repealed by the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60), but sect. 4 of the Act of 1889 was substantially re-enacted in sect. 610 of the Act of 1894, and sub-sect. 1 of sect. 610 gives the same right of appeal to the aggrieved pilot, and sub-sect. 7 gives the same power to make rules of procedure under the section.

Certain rules were made by the Secretary of State (dated the 14th March 1890) "for the hearing by stipendiary magistrates and metropolitan police magistrates of appeals under sect. 4 of the Merchant Shipping (Pilotage) Act 1889," called the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates) 1890.

Rule 1 of these rules provided:

> Notice of appeal to a magistrate from the decision of any pilotage authority shall be given in writing to such magistrate or his clerk, and to the pilotage authority, by the person aggrieved within seven days after the day on which he shall have received from the pilotage authority a notification of such decision, or within such further time as may be allowed by the magistrate.

Although the Act of 1889 was repealed by the Act of 1894, the latter Act, in sect. 745, provided a saving clause for rules made under the repealed Acts.

Herman Cohen, for the pilotage board, showed cause.—The stipendiary magistrate was right in holding that he had no jurisdiction to extend the time for giving notice of appeal. Rule 1 expressly provides that the aggrieved pilot must give notice of appeal within seven days after the day on which he receives notification from the pilotage authority of their decision, or within such further time as may be allowed by the magistrate. So that the notice must be given within the seven days unless the time is extended, and the application to extend the time must be made before the expiration of the seven days. If not made within this period of seven days it cannot be made afterwards, and the magistrate would have no jurisdiction to grant it afterwards. If the notice of appeal is not given within the seven days, and if within that time no application is made to the magistrate for an extension of the time for giving such notice, then the right of appeal lapses altogether, as the condition of the right to appeal has not been fulfilled. It is, no doubt, true that in *Re Macintosh, Dixon, and Co.* (88 L. T. Rep. 820; s.c. *Re Macintosh and Thomas*, (1903) 2 Ch. 394) it was held that a taxing master had power to grant an extension of time after the expiration of the time appointed by the order for taxation for the making of his certificate. That, however, proceeded upon the express words of Order LXV., r. 27, sub-r. 57, which expressly provided that the time could be extended although the application for the extension was not made till after the expiration of the time appointed. There are dicta of Vaughan Williams and Romer, L.JJ. in that case which would seem to show that, apart from the express words of the rule, there would have been no power to grant the extension after the time had expired. In the rule applicable in this case there is no such express power given.

Inskip, for the applicant, in support of the rule.—There is power under the rule to apply for an extension of time for giving notice of appeal whether the seven days have expired or not. The rule does not limit an application for further time to the period of the seven days; it is quite general in its terms, and the application for extension of time for giving notice of appeal may be made to the magistrate after the expiration of the seven days. The learned magistrate, as stated in his affidavit, relied upon the case of *Whistler* v. *Hancock* (*ubi sup.*) as supporting his decision; but that case is different from the present, as there there were no parties before the court as to whom an order could be made. In that case an order had been made dismissing an action for want of prosecution unless a statement of claim were delivered within a week No statement of claim was delivered within the week, and the court held that the action was then at an end, and that there was no jurisdiction after that to make an order extending the time for delivering the statement of claim; but even in that case the plaintiff could have applied to enlarge the time for appealing against the order dismissing the action, after the order had taken effect and the action had become dismissed:

Carter v. *Stubbs* (*ubi sup.*).

The appeal could have been brought under sect. 610, sub-sect. 7, of the Merchant Shipping Act 1894 to the County Court instead of to the stipendiary magistrate, in which case the applicant would have had, under Order L., r. 22, of the County Court Rules, thirty days within which to bring his appeal. Having regard to that, a wider construction ought to be placed upon the rule than that contended for by the pilotage board. [The case of *Burke* v. *Rooney* (*ubi sup.*) was also referred to.]

Lord Alverstone, C.J.—In my opinion we ought not to give effect to this objection that the appeal cannot be heard. As to what may be the true view of the pilot's rights on the merits, I express no opinion. If it be the fact, as counsel for the pilotage board in showing cause against the rule has indicated, that upon the merits the stipendiary magistrate has no jurisdiction, that is a point which can be raised when the matter comes to be further discussed. The only ground of the present application is that the learned

stipendiary magistrate has stopped it upon the ground that it is too late. With regard to the suggestion that if the application is not made within seven days the time will be extended without limit, and, therefore, any number of appeals may be brought, I think that is answered in the way counsel in support of the rule has answered it by saying that, after all, the leave of the magistrate has to be obtained, and that in the case where there has been great delay, or where the matter is a very stale matter, the application for extension of time would not be granted by the magistrate. In the present case, for the purpose of that particular point, it is not immaterial to observe that the actual delay was from the 6th Sept. to the 20th Sept., quite a short time.

The question really turns on the terms of rule 1. Are we to hold that the principle which has been held to prevail as to extension of time after the original limit has expired in some cases applies to this particular rule? Take, for example, the case most strongly in favour of the contention of the pilotage board, the case of *Re Macintosh and Thomas* (*ubi sup.*). There the question arose with regard to the words "extending the time," and both Vaughan Williams and Romer, L.JJ. seem to have considered that, but for further power, the time could not have been extended after it had expired, and they relied upon the general power of extension after the expiration of the original time limit as curing all difficulties. I do not quite agree with the contention of counsel in support of the rule that the decision of Lord Coleridge, C.J. in *Burke* v. *Rooney* (*ubi sup.*) is an authority in his favour beyond what I may call a very indirect expression of opinion. There, again, the ultimate decision was based upon the existence of another rule.

Now, in the present case we have to deal with a code of rules which is a code by itself; the rules are stated in somewhat less precise language than is generally the case, and undoubtedly give rise to an ambiguity. Rule 1 provides: "Notice of appeal to a magistrate from the decision of any pilotage authority shall be given in writing to such magistrate or his clerk, and to the pilotage authority, by the person aggrieved within seven days after the day on which he shall have received from the pilotage authority a notification of such decision, or within such further time as may be allowed by the magistrate." Except in the one case to which I referred in the course of the argument that a person was doubtful in his own mind as to whether he was going to appeal or not, and went to the magistrate and said: "I do not know whether I am going to appeal or not; extend the time so that I can think the matter over a little more," no one has attached any meaning to those words, unless the argument in support of the rule is correct. It seems to me that the notice which must be given to the magistrate and the pilotage authority must be contemporaneous, and it was intended that the magistrate should have power to extend the time for giving notice to himself. It is scarcely reasonable to suppose that that could only apply to the first period of seven days, because if the person aggrieved is there within the seven days, he can give notice to the magistrate at once. Therefore the construction that I put upon this rule, applying the rules of construction as they seem to me to apply, is that in this rule it was intended that the magistrate might extend the time for giving notice to himself, and, if so, he might extend the time for giving notice to the pilotage authority. If I am wrong upon this point as to the construction of the rule, of course my holding this view will not prevent the point being raised if any attempt is made to enforce the award. But, on the best consideration I can give to the construction of this rule, after hearing the argument, I think the objection taken by the learned magistrate was wrong, and that leave to appeal was rightly given by the deputy stipendiary magistrate. In my opinion, therefore, the stipendiary magistrate ought to hear and determine this application.

Ridley, J.—I agree. I must say I have been rather puzzled by what I understand to be the effect of Order LIV., r. 21, of the Rules of the Supreme Court, in which the words are very similar to those in this rule—namely, the words "such further time as may be allowed by a judge or master"; and I have been under the impression that but for Order LXIV., r. 7, there would not be, under the former rule, power to give longer time after the first period of time for application had expired. I think, however, that my Lord has given sufficient reasons for saying that rule 1 of these rules ought to have the larger construction applied to it, and therefore I agree with the judgment which he has delivered.

Darling, J.—I am of the same opinion. I come to this conclusion because I think that this rule, which we are asked to construe, is a very peculiar one and bears hardly any resemblance to the rules in the cases which have been cited to us. It is a rule which provides that the pilot who is dissatisfied with the decision of the pilotage authority shall give notice, not only to the pilotage board, with whose decision he desires to quarrel, but also to the magistrate who is to hear the appeal, and if counsel for the pilotage board is right in his contention, if the magistrate can only enlarge the time provided application is made to him before the period of the seven days has elapsed, the result would be this: the pilot who desired to appeal would come, first of all, within the seven days and say to the magistrate that he desired the magistrate to extend his time for appealing and he would give his reasons why he wanted the time extended, and the magistrate would say, "No, I shall not extend your time"; then the pilot would immediately say, "Very well, I do not care whether you do or not; I give you notice that I shall appeal," and he would go off and give notice to the pilotage board of his intention to appeal. If that were the proper construction it would really reduce this rule to so little that it would be hardly worth making it.

Rule absolute.

Solicitors for the pilotage board, *Bower, Cotton, and Bower*, for *Stephens, David, and Co.*, Cardiff.

Solicitors for the applicant, *Downing, Middleton, Handcock, and Lewis*, for *Downing and Handcock*, Cardiff.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

March 26, 27, *and April* 11, 1906.

(Before BARGRAVE DEANE, J.)

THE CRAFTSMAN. (*a*)

Collision—Measure of damage—Underwriters' surveyor acting for owners—Expenses of underwriters' surveyor—Cost of repatriating Norwegian crew—Payment by Norwegian Consul—Norwegian Maritime Code 1893, *ss.* 6, 91, 98.

A Norwegian steamship, the Congal, *was run into by the steamship* Craftsman *and sank in deep water at Port Said. The owners of the* Craftsman *admitted liability. The owners of the* Congal *treated her as a constructive total loss, and abandoned her. The Norwegian Consul at Port Said provided the money for the repatriation of the officers and crew. On the reference before the registrar and merchants, the owners of the* Congal *claimed the cost of repatriating the crew.*

Held, that, by the Norwegian maritime code, if a ship is "lost," the cost of repatriating the crew is borne by the State, and therefore the owners of the Congal *could not recover that sum from the owners of the* Craftsman.

MOTION in objection to registrar's report.

The plaintiffs were the owners of the *Congal*.

The defendants were the Charente Steamship Company Limited, the owners of the steamship *Craftsman*.

About 2.50 p.m. on the 9th Feb 1905 the Norwegian steamship *Congal*, a vessel of 1412 tons gross register, was lying moored to the buoys in the harbour at Port Said, on a voyage from Cardiff to Hong Kong with coals.

The *Craftsman* in coming out of the canal and manœuvring to a berth ran into the *Congal*, and did her such serious damage that she sank in about 30ft. of water.

On the 10th Feb. and again on the 14th Feb. divers examined the *Congal*, and recommendations were made by surveyors that a contract should be entered into with salvage contractors to raise her, and that tenders should be invited.

On the 24th Feb. the owners of the *Craftsman* admitted liability for the collision, subject to the claim of her owners being assessed by the registrar and merchants.

On the same day the underwriters of the *Congal*, who carried on business in Christiania, sent out Captain Pharo, who was their agent in London, to Port Said, to inquire into the position on behalf of the owners and underwriters, and to report on the best course to be adopted for raising her.

On the 1st March Captain Pharo arrived at Port Said, but, as no salvage contractor would make a reasonable tender and the defendants refused to be parties to any contract to raise her, he recommended that the vessel should be treated as a constructive total loss, and, acting on behalf of both owners and underwriters, he abandoned the *Congal* to the Suez Canal Company.

On the 12th March the Norwegian Consul at Port Said sent the officers and some of the crew of the *Congal* back to Norway and incurred expenses in doing so.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

On the 12th March Captain Pharo left Port Said, and on the 19th March the master of the *Congal* left for Norway.

The canal company served a notice on the captain of the *Congal* before he left Port Said to remove the wreck as it was an obstruction, and then commenced salvage operations on the 14th May and raised the vessel on the 19th June.

On the 3rd Aug. the canal company accepted 3000*l.* from the owners of the *Craftsman* in settlement of their charges for raising the *Congal*, and the vessel was then sold and realised 2571*l.* net, the cargo that had been salved realising about 1000*l.*

The claim by the owners of the *Congal* in respect of the loss of their vessel, coals, provisions, stores, agency and consular expenses, surveying fees, and loss of charter, and the claim of the master and crew for their lost effects, amounted to 16,573*l.* 18*s.* 2*d.*, and 10,020*l.* 18*s.* 1*d.* was allowed and, subject to the deduction of the net sum realised by the sale of the vessel, was paid by the defendants.

The owners of the *Congal* also claimed the two items following:

Repatriating captain, officers, and crew, Norwegian Consul, 124*l.* 1*s.* 4*d.*

Captain Pharo's travelling expenses to and at Port Said, 199*l.* 5*s.* 6*d.*

But they were disallowed by the registrar on the ground that by Norwegian law the cost of repatriating the master and crew was borne by the State, and that when the expenses of Captain Pharo were incurred he "was acting as agent for underwriters."

The owners of the *Congal* appealed.

The following are the sections of the Norwegian Maritime Code 1893 which were relied on by the owners of the *Congal*:

CHAPTER 1.—SHIPS.

Sect. 6. A ship shall be deemed unfit for repair in the sense of this law if by a survey according to law it is decided that the ship cannot be repaired at all, or that, at any rate, the repair cannot take place where the ship is then present, or at any other place to which it can be removed, or if, in like manner, it is decided that the ship is not worth repairing.

CHAPTER 2.—SHIPOWNER.

Sect. 7. Provided it is not otherwise determined in this law, a shipowner is personally liable, *i.e.*, to the extent of his entire estate, for all liabilities incurred by himself, or on his behalf by other parties. For claims arising from the omission of the master to perform a contract entered into by the owner or owners directly, or by his or their authority, and which it was the duty of the master to carry out, as well as for engagements which the master in his capacity as such, and not in consequence of any special authority from the owner or owners, has entered into, the owner or owners shall be liable only to the extent of the state of the ship, *i.e.*, the ship and the freight; but the owner or owners are always personally liable for the seamen's claims under the articles and contracts of service. In the event of the bankruptcy of the owner or owners, these latter claims shall have the same priority as those of servants for wages due.

CHAPTER 3.—THE MASTER.

Sect. 40. When in consequence of any occurrence at a place of loading or discharge, or during the voyage, the ship or cargo has suffered any material damage, or

when there is good reason to suspect that such damage has been caused, or when any death by accident has occurred on board, or when by collision such damage or misfortune as aforesaid has been caused to any other ship, the master shall make a maritime declaration thereof. When in this kingdom (Norway) he shall, within the expiry of the day after the occurrence or discovery of the misfortune took place, notify the same to the president of the court. If it happened at sea such term of grace shall be reckoned from the time of the ship's or shipwrecked seamen's arrival at any roads or harbour. An exact copy of the contents of the log-book in respect to such misfortune shall be handed in with the notification or, if no log-book has been kept, or if it be lost, a written statement of the affair, together with a list of the crew of the ship and other persons who might be supposed capable of giving information in respect to the matter, and, if possible, a list of all persons interested in the case of their representatives. The president of the court shall thereupon call a meeting of the court to take the declaration and adopt what further measures may be necessary in the case. The master shall produce the log-books in court. When abroad the master shall, as early as possible, make the maritime declaration before the local authority competent to take such declarations at the place, or before the Norwegian Consul, if the declaration, when made before him, will have sufficient legal effect. In all cases the consul must be warned in good time to be present, and the log-book shall be produced to and indorsed by him.

Sect. 41. If during the voyage the ship has sustained damage necessitating any material repairs, or causing any protracted delay, the master shall cause a survey according to law to be held, at which the injury shall be inspected and an opinion be given as to what measures shall be taken for its repair, the cost of such repair, and the value of the ship in its damaged condition. On the completion of the repairs it shall be decided by a new survey whether the ship is in such condition that it can perform the intended voyage. If during the voyage the cargo has sustained any considerable damage, or if there be reason to believe that it is in such a condition as to necessitate its discharge, or the adoption of other measures for its preservation, or if such discharge is necessary for the sake of the ship, the master shall cause a survey and estimate according to law to be held. If the goods are found to be damaged, the surveyor shall express an opinion on the circumstances supposed to have caused the damage, and on the measures it were best to adopt in consequence of such damage. When beyond the realm the surveyors shall be appointed according to the law or custom in force at the place, or by the Norwegian Consul where no special considerations require their appointment by the local authorities. At places where the appointment of surveyor is not customary, the master ought to take the opinion of experts.

CHAPTER 4.—THE CREW.

Sect. 91. If the voyage is abandoned on account of war, blockade, embargo, prohibition of importation or exportation, ice, or damage, by which the ship is rendered unfit for the voyage, or if the voyage, or the continuation thereof, is suspended from such reason for any considerable period, the crew may be dismissed on payment to them of their wages up to the date of their dismissal. If the ship is lost, or declared to be incapable of repair, in consequence of damage sustained at sea, or if it is captured, or condemned as a prize, or taken by pirates, the services of the crew, and their right to further wages, shall terminate. In case of shipwreck the crew must, however, at a fair remuneration, assist in salvage operations, and remain at the place in order to make the maritime declaration required.

Sect. 98. If, in any such cases as are referred to in sect. 91, the service of any Norwegian seaman terminates abroad, or if a Norwegian seaman when left behind abroad on account of any injury or illness is entitled by virtue of sect. 90 to maintenance at the expense of the owners, such seaman shall be entitled to a free passage home, with subsistence, to the place to which he belongs. If the ship is lost, or, on account of damages sustained, is declared to be unfit for repairs, or is captured by pirates, the expenses shall be paid by the State, and this shall likewise hold good if the ship is captured and condemned as a prize, provided the master was not aware of the outbreak of war when he last put to sea, and such was also unknown at the port of departure. In all other cases the expenses shall be defrayed by the owners. . . . If a situation can be obtained for a seaman thus entitled to a passage home on board any Norwegian, Swedish, or Danish ship bound for the country to which the seaman is to be conveyed, or any port conveniently situated for the sending home of the seaman, he shall be bound to accept such engagement if in a capacity not inferior to the rank he last held under the agreement.

Sect. 270. If a ship has been lost or damaged, or if freight has been entirely or partly lost under such circumstances as entitle the owner to compensation from any person responsible for the damage or under the rules of general average, any creditor having a maritime lien upon the ship, or the freight, shall have the same lien on the amount to be paid as indemnification. On the other hand, the amount to be paid by any insurer on a lost ship or freight cannot be recovered in place of the insured pledges (the ship or the freight).

March 26 and 27.—Pickford, K.C. and *C. R. Dunlop* for the owners of the *Congal*.—The sum of money advanced by the consul for the repatriation of the crew should be paid by the wrongdoers, the owners of the *Craftsman*, for they constitute a charge on the *Congal*, and diminish the value of the vessel. The passage money of a foreign crew who have to be sent home in consequence of the wrongful act of another has been allowed to rank as wages:

The San José Primeiro, 3 L. T. Rep. 513; 1 Asp. Mar. Law Cas. 5.

Before the cost of repatriating the Norwegian seamen falls on the State a "survey according to law" must have been held, and the ship must have been "deemed unfit for repair" under sect. 6 of the code, but no such survey has been held. In fact, she was not unfit for repair, for the surveys of the 10th and 14th Feb. 1905 recommend that she should be raised. Before "a survey according to law" takes place the formalities prescribed by sects. 40 and 41 must be followed, and they were not followed. Under sects. 91 and 98 of the Norwegian Code the crew may only be dismissed with their wages up to date and their passage defrayed by the State if the ship is lost or is unfit for repair; in all other cases the cost of the passage home and the cost of subsistence falls on the owners. The sum, therefore, paid by the consul to send the men home was in this case only an advance to the owners, and might be recovered from them under sect. 7. The crew have a lien on the vessel under sect. 270 of the code, and, as the consul has paid this money, he is entitled to stand in their shoes:

The Livietta, 49 L. T. Rep. 411; 5 Asp. Mar. Law Cas. 15; 8 P. Div. 209.

With regard to Captain Pharo's expenses, they were reasonably incurred in the interests of all concerned; the fact that he was the London agent of the underwriters who had insured the *Congal* ought not to prevent the owners from recovering the amount from the wrongdoer.

Horridge, K.C. and *F. E. Smith* for the owners of the *Craftsman*.—The owners of the *Congal* thought their vessel was worth 10,800*l.*; if she was worth that, she was not lost within the meaning of sect. 98, for she was worth repairing. The registrar held that she was worth 7000*l.* On that figure she was not worth repairing. The result, therefore, is that the ship is lost, and her owners can only recover from the owners of the *Craftsman* what they would themselves be liable for. They are not liable for the cost of sending home their crew, and so cannot recover that sum from the owners of the *Craftsman*. The fact that the surveys were not strictly held is the fault of the owners of the *Congal*, and cannot change the sum paid by the Norwegian Government into an advance to the owners. There is no evidence that Captain Pharo's expenses were incurred on behalf of the owners of the *Congal*.

Pickford, K.C.—When the money was paid by the consul for the purpose of sending the crew home the value of the *Congal* was not known. It was therefore impossible to tell whether she was or was not worth repairing, and until that was known no one could tell if she was or was not lost, so the consul could not have paid the sums he did because the ship was lost.

Cur. adv. vult.

April 11.—BARGRAVE DEANE, J.—In this case the steamship *Craftsman* ran into and sank the steamship *Congal* in the harbour at Port Said, and the *Congal*, with her cargo of coal on board her, was sunk in deep water. The question then arose whether it would be possible to raise her, considering what her value was, and considering what it would cost, also, to repair her. Ultimately her owners determined to abandon her, and they did so, and she was subsequently raised by the Suez Canal Company. As far as I understand, she was more or less a constructive total loss. The result was that the voyage which she was engaged upon had to be abandoned, and her crew were discharged and were sent home to Norway. The owners of the *Craftsman* admitted liability for the collision and for the loss occasioned thereby, and the claim of the owners of the *Congal* came before the registrar and merchants for them to ascertain the amount of damages to be paid by the owners of the *Craftsman* in respect of the loss. The registrar made his report, and upon that report this case came before the court on motion, the owners of the *Congal* objecting to the disallowance by the registrar of two items of their claim. One was an item of 124*l.*, which was the cost of repatriating the crew of the *Congal*, and the other was an item of 199*l.* 5*s.* 6*d.*, the travelling expenses of Captain Pharo, who was employed by the underwriters to go out to Port Said to take what steps he could to get the matter dealt with at Port Said. The registrar has reported that in his opinion the cost of the repatriation of the master and crew of the *Congal* should be borne by the State of Norway under the Norwegian Maritime Code. With regard to Captain Pharo's expenses, he says he did not deal with that item at all, because he was under the impression that the two counsel who appeared in the case had arranged something with regard to it, and that therefore the matter was no longer before him. Those are the two questions which have been argued before me, and upon which I have to give a decision.

With regard to Captain Pharo's expenses, I have spoken to the registrar about that, and in his view that is a claim which should be allowed, in accordance with the practice of the registry—if there had been no suggestion of an arrangement he would have allowed it. As to the question of amount, the registrar has been good enough to look into it, and he thinks the amount claimed is right. The other point is a question of Norwegian law, and the sections which have been referred to particularly are sects. 6, 91, and 98 of the Norwegian Code. I have considered those various sections. Sect. 6 seems to me only to apply in case there has been a survey; and provides that that survey shall be taken in a particular way. If there is no survey then sect. 6 does not apply. Sect. 91 is as follows: "If the voyage is abandoned on account of war, blockade, embargo, prohibition of importation or exportation, ice, or damage, by which the ship is rendered unfit for the voyage, or if the voyage, or the continuation thereof, is suspended from such reason for any considerable period, the crew may be dismissed on payment to them of their wages up to the date of their dismissal. If the ship is lost"—*perdu*, that is the word I rely upon—"or declared to be incapable of repair, in consequence of damage sustained at sea, or if it is captured, or condemned as a prize, or taken by pirates, the services of the crew, and their right to further wages, shall terminate. In case of shipwreck the crew must, however, at a fair remuneration, assist in salvage operations, and remain at the place in order to make the maritime declaration required." I have said that in my opinion this ship was lost. She was either a total loss or a constructive total loss, and, as I have said, I do not think it makes much difference in this particular case which it was. She was lost, and the result, if she was lost, was that the services of the crew and their right to further wages terminated, and it was necessary they should be sent back to their own country. As a matter of fact they were sent back, except the master, who remained at Port Said some little time, and the Norwegian Consul at Port Said found the money which enabled them to go home. It is now said that although the Norwegian Consul found that money for the purpose of repatriation, he only did it as agent for the owners—that they are liable to repay the money and are entitled to recover it against the wrongdoer in this collision. The question I have to decide is whether that is the right view, or whether the Norwegian Code, in such a case as the present, puts a liability on the State to find that money. I am of opinion that the code does put the liability on the State. Sect. 98 says this: "If in any such cases as are referred to in sect. 91, the service of any Norwegian seaman terminates abroad, or if a Norwegian seaman when left behind abroad on account of any injury or illness is entitled by virtue of sect. 90 to maintenance at the expense of the owners, such seaman shall be entitled to a free passage home, with subsistence, to the place to which he belongs. If the ship is lost, or, on account of damages sustained, is declared to be unfit for repairs, or is captured by pirates, the expenses shall be paid by the State. . . . In all other cases the expenses shall be defrayed by

the owners." I find as a fact in this case that this ship was lost; that, therefore, these men had their voyage not only interrupted, but absolutely put an end to, and were entitled to a free passage, and that they were by sect. 98 entitled to get the cost from the State. I am therefore of opinion that the costs of sending these seamen home to Norway are not costs which are liable to be charged against the wrongdoer, but that the money which the consul has found he must recover from the State under Norwegian law. The result is that so far as this particular item is concerned I find that the registrar's report is right. So far as the other item is concerned the registrar did not deal with it, and I have been asked to do so, and have done so. I think that in the circumstances the motion will have to be dismissed, with costs, because I have found that the matter which the registrar has decided is rightly decided.

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

Solicitors for the defendants, *Pritchard* and *Sons*, for *Simpson, North, Harley*, and *Co.*, Liverpool.

Monday, May 7, 1906.

(Before Sir GORELL BARNES, President.)

THE VELOX. (*a*)

Salvage—Different risks to ship, cargo, and freight —Separate awards.

The steamship Velox, *while on a voyage from G. to H. with a cargo of herrings, ran short of coal and had to take towage assistance to enable her to reach her port. If the cargo of herrings on board her had remained at sea forty-eight hours longer than they in fact did they would have become valueless. The owners, master, and crew of the* Vulcan *instituted proceedings to recover salvage for the services rendered to the* Velox, *her cargo, and freight, which were valued at* 1875*l.*, 1060*l.*, *and* 136*l. respectively. The defendants tendered* 300*l. in satisfaction of the claim.*

Held, overruling the tender, that, as the risk to which the cargo was exposed was more serious than the risk to which the ship was exposed, separate awards should be made, and that in the circumstances 180*l. would be awarded against the* Velox, *and* 420*l. against her cargo and freight.*

ACTION for salvage.

The plaintiffs were the owners, master, and crew of the steam fishing vessel *Vulcan*.

The defendants were the owners of the steamship *Velox*, her cargo, and freight.

The *Vulcan* was a steam fishing vessel of the port of Grimsby of 205 tons gross and 75 tons net register, fitted with engines of 400-horse power effective, and manned by a crew of nine hands.

The *Velox* was a steamship of the port of Haagersund of 312 tons gross and 177 tons net register, fitted with engines of 186-horse power indicated, and manned by a crew of eleven hands all told. At the time the services were rendered to her she was on a voyage from Gravningsund to Hull with a cargo of 2011 boxes of fresh herrings.

In consequence of heavy weather and strong head winds the *Velox* during the course of her voyage consumed an abnormal quantity of coal, and about 2.30 p.m. on the 17th Jan. 1906 found herself in the North Sea, on the edge of the Dogger Bank, with only about three tons of coal on board. She proceeded on her way under sail; the weather continued bad, the wind being strong from the west-south-west, and, on sighting the *Vulcan*, she hoisted the signal X U, "Can you take me in tow?"

The *Vulcan* was at this time fishing with her gear down on the edge of the Dogger Bank, and, when those on board her sighted the signals, they at once hove up their gear and proceeded to the *Velox*. On reaching her, the mate of the *Vulcan* went on board the *Velox*, and it was arranged that the *Vulcan* should tow the *Velox* to Hull, but that the vessels should not attempt to make fast till the following morning.

After standing by through the night, the *Vulcan* managed at the third attempt to get a line on to the *Velox*, and by this means a wire warp was hove on board the *Velox* and made fast. The towage began about 8 a.m. on the 18th Jan., the vessels being then about 160 miles east-north-east of the Spurn. During the day the wind increased until about 4 p.m., when it blew a gale from the north-east accompanied by sleet, hail, and snow. The Newsand was made about noon on the 19th Jan., the Bull Lightship was passed about 2.30 p.m., and about 5 p.m., the vessels having got into the Humber, a pilot came on board the *Velox*. In bringing the *Velox* to an anchorage the hawser parted, but the *Velox* immediately anchored and the *Vulcan* lay by until a tug got hold of the *Velox*. The tug then towed the *Velox* safely to Hull, the owners of the *Vulcan* paying the tug 29*l.* for her services.

The plaintiffs alleged that they had rescued the *Velox* and her cargo from a position of great danger, and that by rendering the services they had lost six days' fishing, which they estimated at 125*l.*, and had incurred other expenses by reason of loss of warps, consumption of extra coal, and wastage of ice, amounting to 60*l.* They also called evidence to prove that if the cargo of herrings had remained longer at sea than they in fact did they would have been valueless.

The defendants tendered 300*l.* in satisfaction of the claim, and alleged that the *Vulcan* had only lost two days' fishing.

The value of the *Vulcan* was 6000*l.*; the value of the *Velox* was 1875*l.*, of her cargo 1060*l.*, and of her freight 136*l.*

Aspinall, K.C. and *Dawson Miller* appeared for the plaintiffs.—The service in this case is a meritorious one, and saved this property from considerable danger. [THE PRESIDENT.—The danger to the vessel and the danger to her cargo and freight are not in the least the same.] That is so, for, if the cargo had remained on board any longer, the cargo and freight, which is worth 1196*l.*, would have been totally lost. That was saved from total loss; the vessel herself was saved from great peril. The tender is inadequate.

Batten, K.C. and *E. C. Treherne* (*A. E. Nelson* with them) for the defendants.

THE PRESIDENT.—The claim in this case is by the owners, master, and crew of the steam fishing vessel *Vulcan* against the owners of

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

the steamship *Velox*, her cargo, and freight for salvage services rendered on the 17th, 18th, and 19th Jan. of this year to the defendants' property in the North Sea. The *Vulcan*, on the 17th Jan., fell in with the *Velox* on the edge of the Dogger Bank, and it turned out that the *Velox* had practically no coal—or a very trifling quantity of coal—left in her, and she asked the *Vulcan* to tow her to Hull. The importance of the towage, according to the evidence, and according to the log-book, also, of the *Velox*, was that the defendants' vessel had on board a quantity of herrings, of considerable value, and that if that cargo was kept out at sea for any lengthened period beyond that time it would deteriorate, probably, so as to become valueless. The *Vulcan* accordingly made fast to the *Velox*. One or two men had gone on board the *Velox* from the *Vulcan*, but I am not at all clear even now why they did so, because it was not proposed to use those gentlemen as fuel, or anything of that kind, and they do not seem to have been of any use on the ship, towage being what was required. After the vessels were made fast the towage proceeded to off Grimsby. It is said that the distance towed was 160 miles. I do not know that it makes very much difference whether the distance was a little more or a little less. There is no doubt that during a part of the time the weather was very bad, and this service was the means of bringing this vessel into port, and more particularly of saving her cargo. In doing this the owners of the *Vulcan* have sustained loss. They have put down, I think, a somewhat excessive claim for loss of fishing, because they do not seem at that particular time and previously to have done quite so well as this claim would make out. At any rate there was loss of fishing, though the exact value would depend upon the markets. There was also damage to warps and some damage to the engines, and there was a payment for the towage by the tug from Grimsby Roads to Hull. Certainly there was a considerable amount of expenditure. There has been a tender in the case of 300*l.*, and that leads one to consider the risk to which the defendants' property was exposed. When one has stated the nature of the services, and the weather, it is not difficult to form an opinion of the difficulty of rendering the services; but the actual danger to the defendants' property requires consideration. The *Velox* was tight enough, and I suppose that the real difficulty she was in was that of drifting about, and possibly incurring a greater amount of salvage, because she could not have got into port by herself. It is impossible to be certain where she would have sailed or drifted to, and this is the class of peril she was rescued from.

With regard to the cargo it is very different. It was a perishable cargo, and as far as the evidence put before us goes—and it is not contradicted—if this cargo had not been brought into port on the Saturday, and had been kept out even a couple of days more, it would have become useless. Therefore the risk to the cargo was in my view really more serious than the risk to which a derelict is exposed, because a derelict is floating about and may be picked up, though she has no one on board her. This cargo was in danger of becoming absolutely lost unless it were taken into port. The log-book says, that with a view of saving the cargo they wanted to be towed into Hull. This brings one back to the consideration of the tender, and the amount which ought to be paid. The value of the salving property is 6000*l.*, and that of the salved property 3071*l.*, made up of ship 1875*l.*, cargo 1060*l.*, and freight 136*l.* One hundred and seventy-nine boxes of herrings were condemned on the Saturday. The tender, as I have said, is 300*l.*, and it appears to me that would be sufficient if we were considering the case of the ship alone. We are not. We are considering the case of the ship and cargo, and I propose to take a course in this case, which is not perhaps common, but which seems to me to be in accordance with sound principles. I propose to base my award on the real danger—I mean partly based on the real danger from which the different properties were rescued. The ship was not rescued from anything like the same danger as the cargo, because she was rescued from the possibility of floating about and getting ashore, or of being picked up by somebody else. The cargo was rescued not merely from that particular risk, but also from the risk of floating about until it became rotten and perfectly valueless. Giving this matter the most careful consideration I can, I think the proper award to make is to award separately against the ship 180*l.*, and against the cargo and freight—because the freight would have perished with the cargo—420*l.* That makes 600*l.* altogether.

Solicitors for the plaintiffs, *Stokes* and *Stokes*, agents for *Bates* and *Mountain*, Grimsby.

Solicitors for the defendants, *Stanton* and *Hudson*, agents for *Jackson* and *Co.*, Hull.

Monday, May 14, 1906.

(Before Sir GORELL BARNES, President.)

THE JASSY. (*a*)

Collision—Foreign public vessel—Damage action—Undertaking to give bail — Appearance — Exemption from arrest.

The J., *a vessel owned by the State of R., on the 30th April* 1905 *collided with the Greek steamship* C. *at Sulina. On the* 18*th March* 1906 *the owners of the* C. *arrested the* J. *in an action* in rem. *The* J. *was then at Liverpool, and a firm of solicitors, acting under instructions of agents for the State of R., undertook to give bail and so procured the release of the* J., *and an appearance was entered for the owners of the* J.

The owners of the J. *moved to have the action dismissed.*

Held, that the action should be dismissed as no action in rem *lay against a vessel owned by a sovereign State and intended for public service, and that the giving of bail to procure the release of the vessel and the entry of appearance under a misapprehension were not a waiver of the privilege of freedom from arrest.*

MOTION to dismiss an action *in rem* for damage by collision on the ground that the vessel proceeded against was the property of a foreign sovereign State.

On the 30th April 1905 the Greek steamship *Constantinos* was run into and damaged by the steamship *Jassy* at Sulina, in Roumanian waters.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

On the 6th March 1906 the owners of the steamship *Constantinos*, who carried on business at Athens, started proceedings *in rem* against the owners and parties interested in the steamship *Jassy*, of the port of Braila, claiming "damages arising out of a collision between their steamship *Constantinos* and the defendants' steamship *Jassy* at Sulina on the 30th April 1905, which was solely caused by the negligence of the defendants or their servants."

On the 18th March, while the *Jassy* was at Liverpool, the owners of the *Constantinos* had her arrested in the damage action which they had instituted, but she was released when a firm of Liverpool solicitors undertook to put in bail for 1000*l*. The solicitors acted upon the instructions of William Johnston and Co. Limited, who were the Liverpool agents of the Roumanian Government.

On the 22nd March an appearance was entered on behalf of the owners of the *Jassy* by the London agents of the Liverpool firm of solicitors.

On the 12th April the London agents wrote to the solicitors for the plaintiffs informing them that the *Jassy* was owned by the Roumanian Government, and suggesting that the plaintiffs should withdraw from the further prosecution of the action. The solicitors for the plaintiffs declined to fall in with the suggestion.

On the 5th May the Roumanian Chargé d'Affaires in this country addressed a communication to the Secretary of State for Foreign Affairs setting out the above facts, and stating that the *Jassy* was a public vessel of the State of Roumania, held and worked by the State for its public purposes, including the carriage of mails, passengers, and cargo in connection with the national railways of the Roumanian State, that she was only in this country by chance, and that he ventured to trust that, in bringing the matter to the notice of the Secretary of State, proper steps would be taken to put an end to the proceedings against the *Jassy*. He also stated that the local agent for the Roumanian Government at Liverpool had instructed solicitors to give an undertaking to put in bail to secure her immediate release, but that this had been done under a misapprehension and without the knowledge or authority of the Roumanian Government, and that as soon as the facts had come to the knowledge of the Roumanian Government they had instructed him to intervene.

On the 10th May a copy of this communication was forwarded by the Secretary of State for Foreign Affairs to the registrar of the Admiralty Court for the information of the President of the Admiralty Division of the High Court of Justice.

Aspinall, K.C. and *L. Noad* in support of the motion.—This action should be dismissed. It is now proved that the *Jassy* is the property of His Majesty the King of Roumania in his sovereign capacity, and that the vessel is employed in the public service, so the vessel ought not to have been arrested:

The Parlement Belge, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 234; 5 P. Div. 197.

The immunity of ships belonging to foreign States from arrest is clear:

The Constitution, 40 L. T. Rep. 219; 4 Asp. Mar. Law Cas. 79; 4 P. Div. 39.

The privilege has been held to extend to a ferry boat owned by the Crown:

Young v. *Steamship Scotia*, 89 L. T. Rep. 374; 9 Asp. Mar. Law Cas. 485; (1903) A. C. 501.

D. Stephens for the owners of the *Constantinos*.—The owners of the *Jassy* should have entered an appearance under protest if they wished to object to the jurisdiction of the court. The unconditional appearance entered by them is a waiver of their privilege. The case is distinguishable from *The Parlement Belge* (*ubi sup.*), for in that case no appearance had been entered. Neither had an appearance been entered in *Mighell* v. *Sultan of Johore* (70 L. T. Rep. 64; (1894) 1 Q. B. 149), where objection was taken to the jurisdiction.

Aspinall, K.C.—The appearance was entered under a misapprehension and without the knowledge of the Roumanian Government, which never intended to waive its privilege.

THE PRESIDENT.—It appears that the vessel in question in this case is the property of the Roumanian State, and, from a letter forwarded by the representative in this country of the Roumanian Government to the British Minister for Foreign Affairs, it seems that she is employed for the public purposes of the State in connection with the national railways in Roumania. The statements in that letter are verified by a communication from the Foreign Office to the registrar, and in that way the facts have been brought to the notice of the court. The result is that the principle laid down in *The Parlement Belge* (*ubi sup.*) applies, in spite of the undertaking to put in bail and the appearance entered on the authority of some agent in Liverpool without the knowledge of the Roumanian Goverment, and under a misapprehension as to the privilege enjoyed by a sovereign State in respect of the immunity from arrest of its public vessels. The action will be dismissed with costs.

Solicitors for the plaintiffs, the owners of the *Constantinos*, *Holman*, *Birdwood*, and *Co.*

Solicitors for the agents of the Roumanian Government, *Thomas Cooper* and *Co.*, for *Hill*, *Dickinson*, and *Co.*, Liverpool.

Monday, May 14, 1906.

(Before Sir GORELL BARNES, President.)

THE WESTERN BELLE. (*a*)

Collision—Barge moored in barge roads—Necessity for watchman—Test of negligence.

A ketch negligently caused a barge moored in the barge roads in the river Thames near Greenwich Pier to get adrift. She was unattended and ultimately caught under a dolphin, and some of her cargo was lost and some damaged.

In an action for damage to cargo:

Held, that the question whether it was negligent to leave a barge unattended was a question of fact, but that it was not negligent to leave a barge unattended in a river or a dock if there was no reasonable ground to anticipate danger to the barge.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The Scotia (63 *L. T. Rep.* 324; 6 *Asp. Mar. Law Cas.* 541), The Hornet (68 *L. T. Rep.* 236; 7 *Asp. Mar. Law Cas.* 262; (1892) *P.* 361), *and* The Dunstanborough (1892) *P.* 363, note, 3) *commented on.*

THE plaintiffs were the owners of the cargo on the barge *Gratitude*; the defendants were the owners of the sailing ship *Western Belle*.

The case made by the plaintiffs was that about 4 p.m. on the 13th Nov. 1905 the *Gratitude*, an iron dumb barge of eighty-five tons burden, partly laden with a cargo of hemp in bales, was lying securely moored to and outside of the barges lying in Ward's Roads, a short distance above Greenwich Pier, in the river Thames.

In these circumstances the ketch *Western Belle* left Deptford Creek in tow of a tug, and after she got out in the river she was cast off from the tug and came down athwart the river towards the craft at Ward's Roads, fouling the mooring chains. As the tide fell the *Western Belle* grounded upon the moorings and broke them, and so caused the *Gratitude* and several other barges to break adrift.

The *Gratitude* and the other barges were then carried up the river upon the following flood tide and fouled Deptford Dry Dock dolphin and the *Gratitude* was pinned underneath it, and as the tide made she was swamped and her cargo floated out of her, some of it being lost and the rest damaged.

The plaintiffs charged the defendants with not keeping a good look-out, with failing to keep clear of Ward's Roads, with failing to take proper or sufficient steps to get clear of the roads, and with failing to obtain tug assistance.

The case made by the defendants was that the *Western Belle*, a wooden ketch of sixty-nine tons register, laden with a cargo of sleepers and paraffin oil in barrels, in order to avoid the barges lying at Ward's Roads, towards which the wind and tide were taking her, had to drop her anchor, and, when she was swinging to the ebb tide, her stern fouled the ebb mooring chain of the roads. The *Western Belle* lay brought up by her anchor and the mooring chain which ran up her heel. At low water the *Western Belle* and the barges at the roads took the ground, and, when the tide had receded sufficiently, the mate of the *Western Belle* went on to the shore and, having unshackled the mooring chain, released it from the heel of the *Western Belle* and then reshackled it. On the flood tide the *Western Belle* swung to her anchor, but did not at any time come in contact with any of the barges at the roads or part, or cause to part, any of their moorings. From the time the stern of the *Western Belle* fouled the mooring chain until the flood made sufficiently to float the *Western Belle* the barges at the roads, most of which were light, remained at their moorings, and the barges in the first tier directly connected with the mooring chain did not break adrift at any time.

The defendants denied that they had been guilty of any negligence, or that they had caused the *Gratitude* to break away. They also alleged that the *Gratitude* had no stern mooring, and that she had no one on board to tend her head moorings when the tide made, and that the breaking adrift and damage to her cargo were due to her being left unattended. Alternatively they alleged that, if they caused the *Gratitude* to break away, the damage to the cargo would have been avoided if someone had been in attendance on her.

Laing, K.C. and *Balloch* for the plaintiffs.—The fouling of the barge roads by the *Western Belle* caused the *Gratitude* to break adrift; the plaintiffs are therefore entitled to recover.

Stephens for the defendants.—The evidence does not show that the *Western Belle* caused the *Gratitude* to break adrift. Even assuming that the *Western Belle* did cause the *Gratitude* to break adrift, the damage was caused by the fact that the barge was unattended. If anyone had been on the barge the loss might have been averted. It is negligence to leave a barge unattended in the river:

The Dunstanborough (*ubi sup.*).

This case is therefore distinguishable from the case of *The Hornet* (*ubi sup.*).

Laing, K.C. in reply.—Even if a man had been on board the barge he could not have prevented the damage. There was no necessity for a man to be on board. The cases do not draw any such distinction as is suggested between barges left unattended in a river and left unattended in a dock. It has been held to be negligent to leave a barge unattended in Tilbury Dock:

The Scotia (*ubi sup.*).

The question of whether it is negligent to leave a barge unattended is a question of fact, and depends on whether the owners ought to have anticipated danger. No danger was to be anticipated in this case.

May 14.—THE PRESIDENT.—The plaintiffs in this case are the owners of cargo on the barge *Gratitude*. She was an iron dumb barge of eighty-five tons, and was laden with a cargo of hemp in bulk, and before this occurrence on the 13th Nov. at ten o'clock in the morning she made fast to some barges in Ward's Roads, which is a short distance above Greenwich Pier, in the Thames. She made fast on the flood or just about the time of low water, and the barge she made fast to was the outermost barge of the uppermost tier, and then there were five or six other barges between her and the shore, and about the same number below stretching from about a line level with her in towards the shore again. The uppermost barges were made fast to chains, which have been termed ebb chains, to the Conservancy chains, and the flood barges were made fast in a similar way to flood chains, and then those two sets of barges were fastened together with wire ropes—one of the witnesses said a bass rope—so they were lashed alongside more or less, and were held both on the ebb and the flood to the respective chains. In that position of things the *Western Belle*, a wooden ketch of sixty-nine tons register, with a cargo of sleepers and paraffin oil on board, came out of Deptford Creek, and when she got down she drifted inside the barge roads straight for these barges, against which the *Gratitude* was fastened, and the result was, although there is a conflict of evidence about it, that she came down right on the top of the upper barge, more or less towards the outside of them, and there she stuck on the ebb tide and

grounded, and finally about the same time that she floated and got away the barge *Gratitude* and three other barges which were in those roads came adrift. Having no one on board them they drifted up the river until the barge *Gratitude* became jammed under the dolphin further up the river, a little above Deptford Creek, and as the tide rose she shot her cargo, which must have been either lost or largely damaged.

The plaintiffs say that was all the fault of the *Western Belle*. The *Western Belle* really says, "We had nothing on earth to do with it." That is really the defence. "Somehow or other these barges got adrift, but we do not know how; we had nothing to do with it." I cannot accept that view of the facts. You have first of all to notice that the *Gratitude* was made fast to the *Albert* on the flood tide and lay throughout the flood tide, then swung to the ebb and lay throughout the ebb tide, and it was not until the succeeding flood that this happened; that is to say that she came adrift, although it was on the ebb tide that the *Western Belle* came down on the top of her and the other barges. I think when this broad fact is coupled with the evidence given on the part of the plaintiffs that certainly explains, though it may not explain with exactitude, how these chains were broken, how the barges were forced, and how very probably in the course of that the headfasts, or whatever the correct term is, which made these barges fast to the other barges were broken. When that broad fact is coupled with the evidence it seems to me that a very strong case is made that the cause of this accident was that the *Western Belle* came down upon these barges. And, although the counsel for the defendants says that it is no part of the defendants' business to suggest how otherwise it could have occurred, it seems to me that it is a very strong thing to say that they have nothing to do with it when the plaintiffs say they had, and no other explanation is forthcoming which accounts for the disaster. If the *Western Belle* did it, it was a negligent matter to get where she did, and I do not see myself why she should get there if proper care had been taken. Bearing these circumstances in mind, I think that the plaintiffs have established their case that there was negligence on the part of those who were commanding the *Western Belle*, and that that negligence caused the disaster of breaking adrift. Perhaps I ought to say that the Elder Brethren take the view of the case which I have expressed. If, then, on this point there is any other defence it is this — can the plaintiffs in consequence of no one being in charge of the barge be treated as negligent themselves, so as to prevent their recovering because they could have avoided the consequences of what happened? I do not quite agree with the plaintiffs' view that if there had been anybody there nothing could be done. It may be after these four barges were drifting in a bunch up the river one man on one of them might have had a difficulty in preventing what happened, although then possibly if he had got adrift from the others he might have kept clear of being jammed under the dolphin. I think it is very likely he could, but the case must be taken up a little earlier. If there was this breaking adrift by the breaking of the rope or chain it is very possible he would have taken some steps to keep this laden barge with the valuable cargo in her fast to something, either to some of the barges which did not break adrift, the lower ones, or to the ketch herself even. One can hardly believe that nothing could be done if a man had been there to avert the drifting of the barges unattended up the river. Then the question comes to be whether there was in the circumstances of the case any negligence in not having a man there. Upon that there are some cases, and I think those cases depend upon pure questions of fact—namely, whether it is usual to have a man in charge—and the question whether it is so really depends upon whether there was anything that it is necessary to anticipate that you ought to have done to avert the accident. In docks there are several cases, and it does not seem the rule to have a man in charge in a dock. One says to one's self why is that? Because there is no necessity to anticipate danger. Others are cases in which even in a dock it has been held or indicated that it might be negligence, or would be negligence, if there was no one in charge, but that has been where there have been some dangers which were known, and which were so obvious that they ought to have been prevented. The same principle must apply wherever the barge is situated, whenever it is necessary, on account of the run of the river or exposure in any way, that someone should be there—it would be negligence, but then one finds it is not usual to have people in such a case as this. On the other hand, if the barges are in the roads, and are protected as these barges were and out of the track altogether, the only evidence before me is that it is not usual to have a man in charge of these barges placed in this position. If the defendants had been able to give any evidence to show that in such circumstances as these it was usual to take such care beyond what was taken the case would have been different, but in the case before us the evidence is that as a rule no one is left in charge in circumstances like this. It appears to me, therefore, in this case the negligence and the consequences are established by the plaintiffs, and that, therefore, there must be judgment for them, and a reference if required.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield.*

Solicitors for the defendants, *Keene, Marsland,* and *Co.*

May 8 *and* 16, 1906.

(Before Sir GORELL BARNES, President, and BARGRAVE DEANE, J.)

THE HIBERNIAN. (*a*)

Through bill of lading—Inland freight paid by steamship company—Damage to cargo during transit by sea—Lien of steamship company for whole inland freight paid.

Bags of flour were forwarded from Milwaukee to London under a through bill of lading, the flour being conveyed by rail to Montreal and thence by the Allan Line to London. The through bill of lading contained clauses with regard to the carriage of the goods by land and sea, and also incorporated all the "conditions

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment," and was signed by the carrying companies severally and not jointly. One of the clauses relating to the carriage by the railway company in the through bill of lading was as follows: "This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company." The following was a clause in the bill of lading regularly used by the Allan Line: "When the goods are carried at a through rate of freight the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof."

The steamship company having paid the railway company the amount of the inland freight, the flour was shipped on the H. *to be conveyed to London. On the voyage the* H. *got ashore, but her cargo was salved, and some of it was sold in a damaged condition, and the remainder was transhipped and brought to London. The steamship company refused to deliver the goods to the plaintiffs, who were indorsees of the bills of lading, until they were paid the amount of the inland freight paid to the railway company in respect of the lost goods as well as the through freight on the goods delivered.*

Held, that the steamship company had under the terms of the bill of lading a lien for the whole of the inland freight on the goods which arrived, notwithstanding the loss of part of the goods during the ocean voyage.

APPEAL from a decision given by His Honour Judge Lumley Smith, sitting in Admiralty in the City of London Court.

The plaintiffs were Messrs. Tasker and Co., and the defendants were Allan Brothers and Co., the owners of the steamship *Hibernian*.

Fifteen hundred bags of flour were sent under three through bills of lading, each of which was for 500 sacks, from Milwaukee to London. The flour came by rail from Milwaukee to Montreal, and was there handed to the defendants, the owners of the steamship *Hibernian*, for carriage to London.

During the voyage on the 18th May 1905 the *Hibernian* ran upon Stormy Point, Codroy Bay, Newfoundland, Her cargo was salved, but of the 1500 bags of flour shipped 366 were sold in a damaged condition in Canada.

The balance of 1134 bags were transhipped and brought on to London by the defendants.

The plaintiffs, who were indorsees of the three bills of lading, applied to the defendants for the flour, but the defendants refused to deliver the goods to the plaintiffs unless they paid the through freight on the bags which had arrived, and also a sum equal to the inland freight paid by the defendants to the railway company for the carriage of the 366 bags which had not arrived in London. The amount of the inland freight on the bags which did not arrive amounted to 14*l.* 8*s.* 3*d.*

The plaintiffs paid that sum to the shipowners under protest and got delivery of the flour, and then brought an action to recover the sum paid to the defendants.

The action was brought in the City of London Court, and His Honour Judge Lumley Smith held that the bills of lading under which the flour was carried did not give the shipowners a lien for the whole inland freight on the cargo actually delivered, and ordered the shipowners to return to the plaintiffs the sum of 14*l.* 8*s.* 3*d.*

The shipowners appealed.

The following are the material clauses in the through bill of lading. No. 12 deals with the carriage to Montreal, and Nos. 15 and 17 with the sea carriage.

12. This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company.

15. Freight payable on weight is to be paid on gross weight landed from ocean steamship unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight.

17. The property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

The following clause was in the regular form of the Allan bill of lading:

When the goods are carried at a through rate of freight, the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the ship owner or his agents shall have a first lien on the goods in whole or in part until payment thereof.

C. R. Dunlop for the appellants.—The through bill of lading was signed on behalf of the railway company and the defendants severally and not jointly. Under clause 12 the railway company on completing their part of the contract were entitled to be paid by the defendants, who were the agents of the plaintiffs to pay the inland freight. The defendants are therefore entitled to recover this sum as money paid for the plaintiffs at their request. [THE PRESIDENT.—You did not sue for it; you asserted your right to a lien for the amount, which is a different thing.] The steamship company by paying the inland charges succeeded to the railway company's lien, and became entitled to stand in the shoes of the railway company. It has been held that if the shipowner pays the railway company too much inland freight and gets it from the consignee, the consignee can recover it from the shipowner, because the shipowner is the agent of the shipper or consignee to pay the proper inland charges, and not the agent to pay more than is due:

Kitts v. *Atlantic Transport Company*, 7 Com. Cas. 227.

The inland charges constituted one debt and not as many debts as there were bags delivered. The inland freight is in effect advance freight which must be paid by the plaintiffs even if the goods do not arrive.

F. D. Mackinnon for the respondents.—The real question in this case is whether the shipowner or the consignee is to insure the risk of the loss of the benefit of the inland freight. The contract is for the payment of one sum for freight from Milwaukee to London, and the whole sum or nothing is recoverable. The shipowner is not entitled to *pro ratâ* freight. The shipowner is only entitled to freight on goods delivered. Where a through bill of lading is signed on behalf of different carriers separately it has been held to be one contract for one consideration, so that where the whole freight had been paid to the shipowner and the goods were lost the shippers were not entitled to recover back the freight paid in respect of the remainder of the transit:

Greeves v. *West Indian and Pacific Steamship Company*, 22 L. T. Rep. 615; 3 Mar. Law Cas. O. S. 426 (1870).

If the shipowners had a lien for the whole amount paid to the railway company, *Kitts* v. *Atlantic Transport Company* (*ubi sup.*) is wrongly decided. [The PRESIDENT.—No; for the shipowner can only claim a lien for the right amount.] No specific sum was due to the railway company, and for the appellants to succeed there must be a debt due to them for a specific sum. [The PRESIDENT.—They might pay the money on the terms that they were to recover it by asserting a lien and not by action.] The clause in the regular bill of lading does not refer to cases of short delivery, but is inserted to render it unnecessary to exercise a lien on each sack for the proportion of the freight. The shipowners have a lien on the goods delivered for the whole freight, but only in respect of the goods delivered, otherwise they might claim a lien for freight on goods coming by later steamships, which would be unreasonable. Clause 17 of the through bill of lading can only incorporate clauses which are consistent with the through bill of lading.

C. R. Dunlop in reply.

Cur. adv. vult.

May 16.—The judgment of the court was delivered by

The PRESIDENT.—This was an appeal from the judgment of His Honour Judge Lumley Smith, given in the City of London Court, Admiralty Jurisdiction, on the 28th Feb. last, in favour of the plaintiffs for the sum of 14*l.* 8*s.* 3*d.* with costs. The learned judge stated that the case raised a novel and difficult point of law, and gave leave to appeal. The point raised is as to the construction of, and effect to be given to, a through bill of lading from Milwaukee to London, part of the transit being by railway to Montreal and the rest by sea by the Allan Line to London. Counsel for the defendants stated that the point really turned upon whether there was what he termed a "flaw" in this through bill of lading, which appears to have been drawn in a somewhat unbusinesslike manner, for although it contains twelve clauses of considerable length with regard to the carriage by land and eighteen clauses with regard to the carriage by sea, as an addition to those eighteen clauses it declares that the property covered by the bill of lading is subject to all the conditions expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment, and therefore incorporates the conditions expressed in such bills of lading, and refers the holder of the through bill of lading to a document which he may not have and which is full of all sorts of conditions, and almost requires a magnifying glass for the purpose of ascertaining what it is that is expressed therein. I cannot understand why the carriers do not have their shipping documents drawn up more carefully and in more simple, reasonable, and convenient form, especially where they are to regulate a very large trade. The facts which raised the point are shortly as follows. The plaintiffs, who are grain and flour importers in London, were the indorsees for value, and the persons to whom the property passed by reason of the indorsement of three bills of lading, Nos. 3003, 3004, and 3005, each of which was for 500 sacks of flour marked "Best Gem," and the defendants are the owners of the steamship *Hibernian*, and run a line of steamers from Montreal to London, known as the Allan Line. The goods described by the bills of lading came by railway from Milwaukee to Montreal, and were then shipped by the *Hibernian* to London. On or about the 18th May 1905 the *Hibernian* ran upon Stormy Point, Codroy Bay, Newfoundland; her cargo was salved, and the defendants, out of the 1500 bags, sold in Canada 366 bags which were damaged. There is no complaint by the plaintiffs with regard to this sale. The remainder of the 1500 bags—namely, 1134 bags—were transhipped by the defendants on to another of their vessels and brought to London. On the arrival thereof the defendants refused to release the goods to the plaintiffs unless the plaintiffs paid to them a sum which represented the amount of the through freight on the goods delivered in London, together with a sum of 14*l.* 8*s.* 3*d.* in respect of the inland carriage of the 366 bags aforesaid to Montreal; and in order to obtain possession of their goods the plaintiffs had to pay the defendants the amount demanded, which they did under protest, and then brought the present action to recover back the said sum of 14*l.* 8*s.* 3*d.* The said three through bills of lading were in similar terms. By them the goods were described as received at Milwaukee, to be carried to the port of Montreal, and thence by the Allan Line to the port of London, and to be there delivered as consigned upon payment immediately on discharge of the property of the freight thereon at the rate from Milwaukee to London of 19 cents U.S. gold currency per 100lb. gross weight and advanced charges. The bills of lading were signed on behalf of the National Dispatch Great Eastern Line, and of the defendants severally and not jointly, and contained conditions with respect to the service until delivery at the port of Montreal which are set out on the left-hand side in the lower part of the through bills of lading. Clause 12 of these conditions is as follows: "This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company." The bills of lading also contained conditions with respect to the service after delivery at the port of Montreal and until delivery at the port of London, which

are set out on the right-hand side in the lower part of the said bills of lading. Clause 15 of such conditions provides that "freight payable on weight is to be paid on gross weight landed from ocean steamship unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight." Clause 17 is that "the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein." A form of the regular bill of lading in use by the Allan Line was put in, and that contains amongst numerous others this clause: "When the goods are carried at a through rate of freight the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof." When the goods shipped under these bills of lading arrived at Montreal the defendants paid to the railway company (the inland carriers) the inland freight charges for the carriage of the whole of the goods mentioned in the bills of lading from Milwaukee to Montreal, and the sum of 14*l.* 8*s.* 3*d.* is the amount of such inland carriage, so far as it relates to the 366 bags which have not been delivered in London. The claim of the defendants on the arrival of the goods in London was that they had a lien on the goods which arrived for the whole of the charges which had been paid in respect of the inland freight at Montreal, and therefore were not only entitled to receive the through freight on those goods which were delivered in London, but so much of the charges as had been paid in respect of inland freight for those which had not been there delivered. The plaintiffs disputed the right of the defendants to any such lien, and thus the point arose. The whole question in the case seems to be whether the defendants are right in their contention that under the clauses to which I have referred in the bills of lading they were entitled to assert the lien which they claimed, or were not. If the bills of lading contained no reference to any payment of inland charges it is clear that the defendants could only claim freight in London at the through rate on those goods which were there delivered, but it is difficult to give any meaning to the clauses relating to the payment of the inland freight charges at Montreal and to a lien upon the goods for them unless they were to confer upon the defendants some further rights than those which they would have had if there had been an entire omission of the above-mentioned clauses; and so it would seem *primâ facie* that these clauses were inserted with the object of giving them the right which they claimed in the present case, and the question comes to be whether they have effectively done so.

Now, when the defendants paid the railway company the inland freight charges at Montreal I think it is clear from the terms of the bills of lading that they had at that moment a lien upon the whole of the goods mentioned in the bills of lading respectively for the whole of the inland freight charges, which they then paid in respect thereof, and which they were bound to pay under clause 12 above referred to; and if they once had that lien it is difficult to see why the subsequent non-arrival of a portion of the goods should defeat the lien which existed upon the whole of the goods and confine it to a lien on those which arrived for the freight on them only. I am of opinion, therefore, that, having regard to the nature of the business which was contemplated by these bills of lading and to the terms of the above-mentioned clauses, the payment of the inland freight on everything delivered to the ocean steamship company under any one bill of lading was secured by virtue of the lien conferred upon the steamship company on all the goods included in that bill of lading, and that such lien could be enforced against those goods which arrived, notwithstanding the loss of part of the goods during the ocean voyage. It does not seem to me to be material that the plaintiffs have no knowledge of the precise arrangements as to the division of the through freights between the railway company's and the steamship line, and cannot know the exact charges for inland freight paid to the former by the latter; but it is obvious that these charges must be at a less rate than the through freight, and the shipowners must claim at their peril for the correct amount paid in respect of those goods which do not arrive after being delivered to the shipowners. All that this case involves in future cases is in reality the question of who is to insure the risk of the loss of the benefit of inland carriage, very much as a similar question arises in cases of advanced freight. In my opinion the defendants were entitled to make the demand they did make for a lien to the extent, in addition to the freight on the goods delivered in London, of the sum of 14*l.* 8*s.* 3*d.*, the amount of the charges which they had paid in respect of the goods which were not delivered in London. Therefore the judgment of the court below should be reversed, and judgment entered for the defendants, with costs here and below.

Leave to appeal was granted.

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

Solicitors for the respondents, *Crump* and *Son.*

Tuesday, May 22, 1906.

(Before Sir GORELL BARNES, President, assisted by two of the Elder Brethren.)

THE ITALIA. (*a*)

Salvage — Award — Apportionment — Deck and engineer officers' ratings.

On the hearing of a salvage suit brought by the owners, master, and crew of the steamship E. *to recover salvage for services rendered to the* I., *an apportionment between the owners, master, and crew of the salving vessel was asked for. The navigating officers on the* I. *were rated at a lower rating than the engineer officers, and, if the salvage was distributed among the crew according to their ratings, the navigating officers would have received less than the engineer officers.*

Held, that the salvage should be distributed among the officers as though the deck officers were rated at the same rate as the engineer officers of the same grade.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

The Bremen (94 *L. T. Rep.* 381; 10 *Asp. Mar. Law Cas.* 229 (1906) *not followed.*

ACTION for salvage.

The plaintiffs were the owners, master, and crew of the steamship *Etonian*; the defendants were the owners of the steamship *Italia.*

The *Etonian* was a steamship, running in the Leyland Line, of 6438 tons gross and 4135 tons net register, fitted with triple expansion engines of 5000-horse power effective, was manned by a crew of forty-eight hands all told, and when she rendered the services was on a voyage from Antwerp to New Orleans with a general cargo.

The *Italia* was a steamship, running in the Creole Line, of 6363 tons gross and 4142 tons net register, and when the services were rendered to her she was on a voyage from New York to Naples with a general cargo, and had on board 832 steerage passengers and a crew of eighty-four hands all told.

About 7.20 a.m. on the 4th Dec. 1905 the *Etonian* was in latitude 40.15 N. and longitude 31.52 W., when she sighted the *Italia*, which was exhibiting two black balls and the code signal, "Will you take me in tow?" The wind at the time was strong from the N.E., there was a heavy swell and rough sea running, and the *Italia* was drifting to the south. As the *Italia* rose on the sea it was seen that she had lost the blades of her propeller, and her lifeboat came off to the *Etonian* with the chief officer, who requested the *Etonian* to tow his vessel to Fayal.

Those on the *Etonian* then got a new six-inch wire hawser ready; the lifeboat of the *Etonian*, in charge of the first officer, was lowered into the water and went away to the *Italia* with a rope, and the wire hawser was by this means passed to the *Italia* and was then made fast on board her. About 2 p.m. on the 4th Dec. the towage began for Fayal, which was reached on the evening of the 5th Dec., and on the morning of the 6th Dec. the *Italia* was got safely into Horta Harbour, having been towed about 190 miles. The value of the *Etonian*, her cargo, and freight was 190,000*l.*; the value of the *Italia* was 42,000*l.*, of her cargo 40,000*l.*, and of her freight 1940*l.*, making in all 83,940*l.*

Pickford, K.C., *Aspinall*, K.C., and *C. R. Dunlop* for the plaintiffs.—The services were valuable and merit a high award. An apportionment is needed between the owners, master, and crew of the *Etonian.*

Laing, K.C. and *Stephens* for the defendants.

The PRESIDENT.—In this case there is no real dispute as to what was done. The *Etonian* is a steamship of 6438 tons gross register, and was bound from Antwerp to New Orleans with general cargo, manned by a crew of forty-eight hands. The *Italia* is a steamship of 6363 tons gross register, and was homeward bound from New York to Naples, with general cargo, 832 passengers, and a crew of eighty-four hands. The accident that had happened to her was that all the blades had been stripped from her propeller, and therefore she was quite helpless, and it was necessary for her to get assistance. In those circumstances the *Etonian* was asked to tow her to Fayal, which was about 190 miles distant, and did so.

The chief matters which call for notice are the values. The value of the *Etonian*, a liner running in a regular trade, was very large. The value of the *Italia* was also considerable, as, taking the figure stated in the affidavit, which I feel I cannot disregard, that value was 42,000*l.* She had on board a cargo of wheat and general goods, valued altogether at about 40,000*l.*, and the freight at risk was 1940*l.*, making altogether a sum at risk of 83,940*l.* In addition, there was what I have already noticed as an important matter—namely, the presence on board of 832 passengers and a crew of eighty-four. One of the difficulties which this vessel was in arose from the necessity of obtaining early salvage assistance—because she could not help herself at all—having regard to the fact that she had all these people on board, who, if she were kept out any time, would soon become sufficiently hungry and, I have no doubt, somewhat strenuous in their desire to get off the ship. That is one of the matters which have to be considered in a salvage case of this kind, because the longer the ship is kept out the greater is the risk and peril actually run. Then, again, the locality in which this ship was picked up is at that time of the year—namely, the month of December—a bad locality, having regard to where she might drift. She could not be said to be in immediate danger, because she was tight, but she would have drifted about, and whether she would have got ashore it is impossible to say—it depends upon the winds and the currents. There is no doubt that this large vessel with passengers required to be rescued as quickly as possible, and that was done with eminent satisfaction in this case. No doubt the sea was sufficiently rough to make it difficult to get connected, but I do not think it can be said that the salving steamer was in any substantial danger. I think the proper award to make is 3750*l.*

I am asked to apportion that amount, and I think the proper division to make is to give the owners 3000*l.*, the master 250*l.*, and the crew 500*l.*, which will be divided according to their ratings, with this qualification: I have said lately that I have noticed that deck officers are often not rated so highly as engineers, and, in basing my division amongst the crew upon their ratings, I direct that the deck officers shall be rated equally with the corresponding rank of engineers—for instance, the first officer will be treated as rated the same as the first engineer, and so on. I also think that the first officer and the men who went in the boat with him should receive extra half shares.

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

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

Wednesday, June 27, 1906.

(Before BARGRAVE DEANE, J. and Trinity Masters.)

SPILLERS AND BAKERS LIMITED *v.* W. ROBERTSON; THE DIAMOND. (*a*)

Contract of carriage—Damage to cargo—Liability of shipowner—Damage "by reason of fire"——Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502—*Seaworthiness—Improper use of ship fittings.*

Where a cargo was damaged by fire caused by the negligence of the crew in overheating a stove, and by smoke and water used to extinguish the fire:

It was held that the shipowner was relieved from liability by sect. 502, *sub-sect.* 1, *of the Merchant Shipping Act* 1894, *the court finding that the stove was safe if properly used, and the shipowner was not in fault or "privy" to the crew's negligence.*

Held, further, that the damage caused by the smoke and water used to extinguish the fire was damage "by reason of fire" within the meaning of the statute.

ACTION for damages for breach of contract.

The plaintiffs were Spillers and Bakers Limited; the defendant was William Robertson.

The case made by the plaintiffs was that the defendant had agreed with the plaintiffs to provide steamers to load full or part cargoes of flour and (or) bran at Cardiff and carry them to Belfast.

In Dec. 1905 the steamship *Diamond* was provided by the defendant and loaded by the plaintiffs with flour and bran in good order and condition, and the plaintiffs received a bill of lading for the flour and bran dated the 29th Dec. 1905, and it became the duty of the defendant to deliver the flour and bran at Belfast in the like good order and condition.

The plaintiffs alleged that in breach of the contract a large part of the flour and bran was delivered damaged by fire and smoke and by water employed to extinguish the fire. They also alleged that the fire was caused by the negligence of the crew of the *Diamond* in overheating a stove in the forecastle so that the iron bulkhead became overheated, and a wooden casing on the afterside of it and the bags of flour stowed near it caught fire. They further alleged that the *Diamond* was unseaworthy because the stove was placed too near the bulkhead and the wooden casing without any baffle plate or other means of insulation to prevent the overheating of the bulkhead and the ignition of the casing and cargo.

The defendant admitted that the flour and bran were loaded on the *Diamond*, and that during the voyage the cargo was damaged by an outbreak of fire which was due to the negligence of the crew in overheating a stove, but alleged that under the contract he was not responsible for loss or damage of any kind arising from the neglect, default, or error in judgment of any person employed in or about the ship. The defendant also alleged that he was not liable for the damage by reason of the provisions of sect. 502 of the Merchant Shipping Act 1894, and denied that the *Diamond* was unseaworthy.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Sect. 502 of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) is as follows:

> The owner of a British seagoing ship, or any share therein, 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—namely: (i.) where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship.

Hamilton, K.C. and *Bailhache* for the plaintiffs.—The defendant cannot claim the protection of sect. 502 of the Merchant Shipping Act, for his vessel was unseaworthy. The warranty of seaworthiness is an absolute warranty:

> *The Glenfruin*, 52 L. T. Rep. 769; 5 Asp. Mar. Law Cas. 413 (1885); 10 P. Div. 103.

The exceptions cannot help the shipowner unless the ship is fit for the particular cargo to be carried:

> *Queensland and National Bank* v. *Peninsular and Oriental Steam Navigation Company*, 78 L. T. Rep. 67; 8 Asp. Mar. Law Cas. 338; (1898) 1 Q. B. 567;
>
> *Maori King* v. *Hughes*, 73 L. T. Rep. 141; 8 Asp. Mar. Law Cas. 65; (1895) 2 Q. B. 550.

And also they must be stated in clear terms or he cannot avail himself of them:

> *Borthwick* v. *Elderslie Steamship Company*, 90 L. T. Rep. 187; 9 Asp. Mar. Law Cas. 513; (1904) 1 K. B. 319.

The section does not apply at all unless the damage happens without the owners' actual fault or privity. The defendant knew of the position of the stove, and the defective placing of the stove was his fault. Actual fault or privity, like wilful default, implies that the person guilty of it "is a free agent, and that what has been done arises from the spontaneous action of his will": (see the observatione of Bowen, L.J. in *Re Young and Harston's Contract*, 53 L. T. Rep. 837, at p. 839; 31 Ch. Div. 168, at p. 175). The loss caused by smoke and water is not damage by fire.

Scrutton, K.C. and *R. Wright* (*F. D. Mackinnon* with them) for the defendant.—Sect. 502 of the Merchant Shipping Act protects the defendant. The section would apply even though the ship is unseaworthy. As the facts are within the words of the section, the Act applies unless a contrary intention appears:

> *London and South-Western Railway* v. *James*, 28 L. T. Rep. 48; 1 Asp. Mar. Law Cas. 526 (1872); L. Rep. 8 Ch. 241.

The only limitation to the protection afforded by the section are the words "without his actual fault or privity." They occur in sect. 503, but it has been held that where the shipowner's servants on shore have been negligent he can still claim the benefit of the section:

> *The Warkworth*, 51 L. T. Rep. 558; 5 Asp. Mar. Law Cas. 326 (1884); 9 P. Div. 145.

And he can do so in this case, where the negligence is that of the crew. Even the presence of the owner on board does not amount to his being actually at fault or privy to what goes on on board:

> *The Satanita*, 72 L. T. Rep. 311; 7 Asp. Mar. Law Cas. 580; (1895) P. 258.

There is no evidence of the actual fault or privity of the owner in this case. Damage by water and

smoke caused by a fire is damage by reason of fire just as damage by fire caused by explosion is damage by explosion:

Stanley v. *Western Insurance Company*, 17 L. T. Rep. 513; L. Rep. 3 Ex. 71.

The *Diamond* was seaworthy if proper use had been made of her equipment:

Hedley v. *Pinkney and Sons' Steamship Company Limited*, 70 L. T. Rep. 630; 7 Asp. Mar. Law Cas. 135; (1894) A. C. 222.

Hamilton, K.C. in reply.

BARGRAVE DEANE, J.—This is an action of breach of contract. There is a contract between the plaintiffs and the defendant for the carriage of a cargo consisting of flour, in bags, and bran, and the contract, as I understand, contains a provision, which is immaterial, that the shipowner is not to be responsible for loss or damage occasioned by the negligence, default, or error in judgment of the master or crew. I do not think that contract is material because I am going to decide this case, not upon that, but upon an Act of Parliament. The Merchant Shipping Act, s. 502, says that "The owner of a British seagoing ship, or any share thereof, 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—namely, where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship." Undoubtedly this cargo was damaged partly by fire, partly by the smoke resulting from the fire, and partly by the water used to put out the fire, and I hold that the water and smoke were matters which occurred by reason of the fire. That is the only reasonable interpretation of the statute.

Now, the action being brought for breach of contract, the cargo having been damaged by fire, smoke, and water, the defendant's answer this is: "The damage was caused by reason of the negligence of my crew. In the forecastle there was a stove, and that stove was placed 3½in. to 4in. from the bulkhead which separated the forecastle from the hold in which this cargo was stowed. That stove was overheated. The crew had piled it up with coal to such an extent that it had become red hot above the fire brick, and that heat communicated itself to the iron bulkhead behind the stove, with the result that the fire occurred. The fault was not my fault, but it was the fault of my crew." This is clearly a case within the statute. The owner is not liable unless he has himself been guilty of some fault, or privy to the matters which caused the damage. First of all, there is an implied contract in every case, when a man undertakes to carry a cargo, that his ship shall be seaworthy, or, to use a better phrase, fit for the duty which he undertakes. In this case, the defendant supplied the *Diamond*, and the question which I have to ask myself is this: Was this ship seaworthy, or fit for the carrying of this cargo of flour in bags, and bran? Apart from this question of the stove, it is not suggested she was not. Was, then, this stove in an improper place? Was it too near to the bulkhead, and ought it to have been protected by a baffle plate or some other contrivance for preventing heat from the stove, if it became overheated, being communicated to the bulkhead? The question which I have asked the Elder Brethren is this: In their practical experience was this stove improperly placed at the spot where it was? They have given me the advice that in their opinion if that stove had been properly used there is no reason whatever why it should not have been perfectly safe. The fact that this vessel had made many previous voyages with similar cargoes, while this stove was in the same position, is very strong evidence in support of the view which the Elder Brethren take. My view is clear, assisted as I am by their advice in this matter, that this stove was not so placed as to render the vessel unseaworthy or unfit to carry this cargo. The evidence to my mind is all the other way. The question therefore, is this: Was the owner in fault or privy to this misconduct or carelessness on the part of the crew? There is no evidence that he was. It is suggested it was his fault that the stove was placed in an improper position. I have held that the stove was not placed in an improper position, and therefore that point falls to the ground. For these reasons I think judgment must be entered for the defendant, with costs.

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

Solicitors for the defendant, *Crump* and *Son.*

July 3 *and* 17, 1906.

(Before Sir GORELL BARNES, President, and BARGRAVE DEANE, J. and Trinity Masters.)

THE CARLISLE.(*a*)

Shipping casualty — Board of Trade inquiry—Duty of board—Suspension of master's certificate—Appeal by master—Return of certificate —Costs of appeal—Merchant Shipping Act 1894 (57 *& 58 Vict. c.* 60), *ss.* 470 (1) (*a*) (2) (3). 475 (3), 479—*Rules for Formal Investigation into Shipping Casualties* 1873, *r.* 6; 1894, *rr.* 11, 12, 13, 20 (*i.*).

The steamship C., *while on a voyage from Vladivostock to Port Arthur, lost her propeller and sailed to the Philippine Islands; she was thence towed to Manila and repaired, and the consignees of her cargo, the Russian Government, ordered her to go to Saigon. The* C. *arrived at Saigon on the 6th May* 1905. *The consignees did not take delivery of the cargo, which consisted largely of munitions of war. Explosions and fires occurred on board the* C. *on the 7th and 11th Dec.* 1905, *and the master ordered the crew to leave the ship. The explosives on board were then in part overhauled by a French Government expert, who reported to the British Consul that there was no fear of another explosion, and about the 21st Dec. the crew were ordered back to the ship. On the 3rd Jan.* 1906 *several explosions and fires occurred on board, and the vessel became a wreck. Two of the crew were not seen again after the 3rd Jan. In May* 1906 *the Board of Trade ordered an inquiry, which was held at Cardiff, with regard to the casualty, and inserted the following question among others submitted to the court, "Was the loss of the steamer* C. *and the loss of life caused by the*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

wrongful act or default of the master"? The court found that "the loss of life was due primarily to the fire and explosion, proximately probably to drowning, and was conduced to by the wrongful act and default of the master," and suspended his certificate for twelve months. The master appealed.

Held, that there was no evidence to justify a finding that the loss of life was caused by the wrongful act or default of the master, and that the master's certificate should be returned to him.

Where in a Board of Trade inquiry the board submitted (inter alia) *the following question for the opinion of the court, "Was the loss of the steamship and the loss of life caused by the wrongful act or default of the master," but refused to express an opinion whether the master's certificate should be dealt with, the Admiralty Division, on appeal, reversed the decision of the court below, and found that there was no wrongful act or default on the part of the master, and ordered the Board of Trade to pay the costs of the successful appeal, being of opinion that the board ought to have assisted the court below by intimating whether in their opinion the certificate should be dealt with and had in the circumstances invited the court to do so.*

APPEAL by F. Simpson, the late master of the steamship *Carlisle*, from the decision of a court of formal investigation, held at Cardiff, to inquire into the circumstances of a shipping casualty.

The court had suspended the master's certificate for twelve months on the ground that the loss of life on board the steamship had been caused by his wrongful act or default.

The *Carlisle* was a steamship of 2157 tons gross and 1362 tons net register, and on the 22nd April 1904 left Cardiff, bound nominally for Kiao-Chau, but really for Vladivostock, with a cargo of coal. War had broken out between Russia and Japan some months before the *Carlisle* left Cardiff, and coal had been declared contraband of war.

The *Carlisle* arrived at Vladivostock on the 19th July and delivered her cargo, and, after several voyages along the coast of Siberia, she again reached Vladivostock on the 26th Sept., and on the 13th Oct. a charter-party was entered into under which the *Carlisle* was to proceed to Port Arthur, which was then closely besieged.

Fifteen hundred tons of munitions of war and about 500 tons of foodstuffs, worth nearly 1,000,000*l.* sterling, were placed on board the *Carlisle*, and on the 7th Nov. she left Vladivostock for Port Arthur.

On the 18th Nov. the *Carlisle* lost her propeller, but managed to keep clear of the Japanese coast, and in Feb. 1905 reached San Miguel Bay, in the Philippine Islands.

The *Carlisle* was then towed to Manila, where she was repaired, and her master received orders that he was to proceed to Saigon, Port Arthur having capitulated in Jan. 1905.

The *Carlisle* arrived at the mouth of the Saigon river on the 6th May 1905, and remained at different places on the river until the casualty happened.

In Sept. 1905 some ammunition and foodstuffs were transferred to the Russian cruiser *Diana*, and the master, after his arrival at Saigon, was endeavouring to make the consignees take delivery of the cargo.

On the 7th Dec. an explosion, followed by a fire, occurred on board, but the fire was extinguished. Arrangements were then made by the master to have the cargo overhauled by an expert, but before this was done, a further explosion and fire occurred on board on the 11th Dec., the fire being again extinguished.

On the 12th Dec. the master, who had been living at an hotel in Saigon since the arrival of the ship at Saigon, came down to the ship and ordered the crew to leave her, and on the same day the French expert began to examine the ammunition.

On the 17th Dec. the expert reported to the British Consul that it was safe for the crew to return to the ship, and on the 19th Dec. the officers, and on the 21st Dec. the crew, returned to her. During their absence the damaged foodstuffs had been sent ashore in a lighter, and the explosives which were considered uncertain or damaged were thrown overboard.

On the 3rd Jan. 1906, about 8.30 p.m., an explosion, followed by four or five others, took place on board, and a fire broke out which caused the officers and crew to leave the ship, and, after getting ashore, they proceeded to Saigon, which they reached about 2 a.m. on the 4th Jan. 1906. It was then found that the second engineer and a seaman named Cavallo were missing; the engineer had turned in about 8 p.m., and the seaman had last been seen on the forecastle at 5 p.m.

After the crew left the ship further explosions took place which were heard at Saigon, eight miles further up the river, and, when the master and officers reached the vessel on the 4th Jan., she was lying with her poop awash and her bow 6ft. above the water. Search was made for the missing men, but they were not found, and on the 7th Feb. the crew and officers were sent home as distressed seamen.

A formal investigation into the casualty was ordered by the Board of Trade, and was held at Cardiff on the 8th, 9th, 10th, 11th, and 14th May 1906.

The notice of investigation contained the questions submitted to the court at the conclusion of the evidence with the exception of 3*a*, which was added at the conclusion of the evidence.

Counsel for the Board of Trade at the close of the evidence submitted the following questions upon which he desired the opinion of the court: (1) What was the nature and description of the cargo shipped at Vladivostock in or about Oct. 1904? Were the crew aware of the contents of the holds when the vessel sailed, and the port to which she was bound? (2) After the vessel arrived in Saigon river on or about the 2nd May 1905 were all necessary and proper precautions taken for the safety of the ship and her crew? (3) What was the cause of the fires and explosions which occurred on board the vessel on or about the 7th and 11th Dec. 1905 and the 3rd Jan. 1906? (3*a*) Were the ship's log-books saved, and, if not, under what circumstances were they lost? (4) What was the cause of the loss of life? (5) Was the loss of the steamship *Carlisle* and the loss of life caused by the wrongful act or default of the master?

When the questions had been submitted to the court, the solicitor appearing for the master asked, "Are the Board of Trade asking that the master's certificate shall be dealt with?" Counsel for the Board of Trade replied that "The Board of Trade do not ask for anything of the sort. They ask the court to answer the questions and make such recommendations as it thinks fit." The stipendiary then said: "If the board do not ask the court to deal with the certificate, I take it the court will not deal with it. If you do ask that it be dealt with, the court will consider whether they shall deal with it. What do the rules say?" Counsel for the Board of Trade then quoted from the rules to show that it was not necessary for the Board of Trade to ask the court to deal with an officer's certificate.

On the 14th May the stipendiary magistrate, Mr. T. W. Lewis, gave his decision in which his three assessors concurred, and suspended the master's certificate for twelve months.

By his report he found that "the loss of the vessel was due to fire and explosion caused, it is conjectured, by spontaneous combustion in the cargo." "The loss of life was due primarily to the fire and explosion, proximately probably to drowning, and was conduced to by the wrongful act and default of the master."

In answering the questions submitted by the Board of Trade in the annex to the report of the court, the court, in answer to question (4), "conjectured that the second engineer and the seaman jumped overboard when the explosion and fire occurred, and were drawn under by the swift current and drowned."

In answer to question (5) the court found that

The omission of the master of the steamship *Carlisle* to discharge his cargo into lighters or land it, as above mentioned, was a neglect of duty which, if not omitted, might possibly have preserved the vessel from loss. Such omission (if a culpable omission conducing to the loss) was a default, but, if not culpable, was a mere error of judgment. The master exercised his judgment and took some measure, viz., the engagement of an expert to overhaul the cargo—a measure he appears to have considered sufficient; but, in the opinion of the court, he should have taken other measures, and have taken them with promptitude after the explosion of the 7th Dec. He should also have given some personal attention to the overhauling by the expert, and to precautions against fire. The court is of opinion that the measures omitted were culpable omissions, but does not feel justified in confidently pronouncing the opinion that the omissions caused or conduced to the loss of the vessel. With regard to the loss of life, the position is entirely different. As already stated, and for the reasons stated, the master did not exercise the diligence, care for, and attention to the safety of his crew that duty demanded. The master's neglect to berth the crew ashore after the explosion of the 7th Dec. was a grave default, and his acts in ordering the crew back to the vessel and permitting them to remain on the vessel after the explosion on the 11th Dec., before the examination of the cargo was completed, were wrongful acts to which the loss of life is due. The master's certificate is suspended for twelve months.

On the 16th May the master gave notice that it was his intention to appeal against the judgment of the court to the clerk of the court and to the solicitors of those who were parties to the inquiry, and on the 15th June delivered a notice of the grounds of the appeal, which were (*inter alia*) that the vidence did not show that the alleged loss of li e was caused by a wrongful act or default of the master, and that the report was contrary to the evidence and against the weight thereof; that, as the court did not find that the loss of life was caused by the wrongful act and default of the master, but only that the loss of life was conduced to by the master's alleged wrongful acts and defaults, the suspension of his certificate was contrary to law and sect. 470 of the Merchant Shipping Act 1894; that the finding of the court that the master should have discharged his cargo into lighters, or have landed it, was unsupported by evidence that he could have so discharged his cargo and have so landed it, or that the owners of the cargo, the Russian Government, or the French authorities at Saigon would have permitted such discharge or landing; that the evidence showed that the return of the seamen to the vessel on or about the 21st Dec. was approved by the British Consul at Saigon, after having satisfied himself by the French Government expert's report; and that the fact that the master allowed the crew to return on board the vessel after both he and the British Consul had been advised that it was safe for them to do so was not a wrongful act or default for which his certificate should be suspended.

The appeal came before the Admiralty Divisional Court on the 3rd July 1906, when the following sections of the Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) and Rules for Formal Investigation into Shipping Casualties 1878 and 1894 were referred to.

Merchant Shipping Act 1894:

Sect. 470 (1). The certificate of a master, mate, or engineer may be cancelled or suspended: (*a*) By a court holding a formal investigation into a shipping casualty under this part of the Act . . . if the court find that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default. (2) Where any case before any such court as aforesaid involves a question as to the cancelling or suspending of a certificate, that court shall, at the conclusion of the case or as soon afterwards as possible, state in open court the decision to which they have come with respect to the cancelling or suspending thereof. (3) The court shall in all cases send a full report on the case with the evidence to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, send the certificate cancelled or suspended to the Board of Trade with their report.

Sect. 475 (3). Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts; namely (*a*) if the decision is given in England or by a naval court, to the High Court.

Sect. 479 (1). The Lord Chancellor may (with the consent of the Treasury so far as relates to fees) make general rules for carrying into effect the enactments relating to formal investigations, and to the rehearing of, or an appeal from, any investigation or inquiry held under this part of this Act, and in particular with respect to the appointment and summoning of assessor, the procedure, the parties, the persons allowed to appear . . (2) Any rule made under this section while in force shall have effect as if it were enacted in this Act.

Rules for Formal Investigation into Shipping Casualties 1878:

Rule 16. On the completion of their examination, the Board of Trade shall state in open court upon what question in reference to the causes of the casualty, and the conduct of any persons connected therewith, they desire the opinion of the court; and if any person whose conduct is in question is a certificated officer, they shall also state in open court whether in their opinion his certificate should be dealt with.

Rules for Formal Investigation into Shipping Casualties 1894.

Rule 11. When the examination of the witnesses produced by the Board of Trade has been concluded, the Board of Trade shall state in open court the questions in reference to the casualty, and the conduct of the certificated officers, or other persons connected therewith, upon which the opinion of the court is desired. In framing the questions for the opinion of the court, the Board of Trade may make such modifications in, additions to, or omissions from the questions in the notice of investigation as, having regard to the evidence which has been given, the Board of Trade may think fit.

Rule 12. After the questions for the opinion of the court have been stated, the court shall proceed to hear the parties to the investigation upon and determine the questions so stated. Each party to the investigation shall be entitled to address the court and produce witnesses, or recall any of the witnesses who have already been examined for further examination, and generally adduce evidence. The parties shall be heard and their witnesses examined, cross-examined, and re-examined in such order as the judge shall direct. The Board of Trade may also produce and examine further witnesses, who may be cross-examined by the parties, and re-examined by the Board of Trade.

Rule 13. When the whole of the evidence in relation to the questions for the opinion of the court has been concluded, any of the parties who desire so to do may address the court upon the evidence, and the Board of Trade may address the court in reply upon the whole case.

Rule 20. Every appeal under sects. 475 and 478 of the Merchant Shipping Act 1894 shall be conducted in accordance with the conditions and regulations following (namely): . . . (i.) The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the court may think just.

Hamilton, K.C., *Batten*, K.C., and *A. D. Bateson* appeared on behalf of the appellant, the late master of the *Carlisle*.

John Mansfield for the Board of Trade.

The PRESIDENT.—In this case there is an appeal by Mr. Simpson, the late master of the late steamship *Carlisle*, against a judgment of the court of inquiry held before Mr. Lewis, the stipendiary magistrate, and assessors, at Cardiff, in May last. The judgment of the court was delivered on the 14th May, and the result of that judgment was that the master's certificate was suspended for twelve months. It is against that suspension of the master's certificate that this appeal is brought, and the master sets out in the record before us the grounds on which he brings the appeal. Now, the matter comes before us—I think it is material to mention this—by virtue of the Merchant Shipping Act. The 464th section provides that: "For the purpose of inquiries and investigations under this part of this Act a shipping casualty shall be deemed to occur"—and then it sets out the cases in which it shall be deemed to occur, one of them being "when any loss of life ensues by reason of any casualty happening to or on board any ship on or near the coasts of the United Kingdom"; and another, "when in any place any such loss, abandonment, material damage, or casualty as above mentioned occurs and any witness is found in the United Kingdom." Then there is power given to the Board of Trade to direct the holding of a formal investigation, and a sub-section of sect. 466 provides that "the court after hearing the case shall make a report to the Board of Trade, containing a full statement of the case and of the opinion of the court thereon, accompanied by such report of, or extracts from, the evidence and such observations as the court think fit." Then sect. 470 provides that "the certificate of a master, mate, or engineer may be cancelled or suspended by a court holding a formal investigation into a shipping casualty, or by a naval court constituted under this Act, if the court find that the loss or abandonment of, or serious damage to, any ship, or loss of life, has been caused by his wrongful act or default." A further provision in that section deals with the necessity for the concurrence of one at least of the assessors. Then the 2nd and 3rd sub-sections of sect. 470 are as follows: (2) "Where any case before any such court as aforesaid involves a question as to the cancelling or suspending of a certificate, that court shall, at the conclusion of the case or as soon afterwards as possible, state in open court the decision to which they have come with respect to the cancelling or suspending thereof." (3) "The court shall in all cases send a full report on the case, with the evidence, to the Board of Trade, and shall also, if they determine to cancel or suspend any certificate, send the certificate cancelled or suspended to the Board of Trade with their report." Then the 475th section provides for a rehearing in certain cases, and the only provision which affects this court in this case is the 3rd sub-section of sect. 475. That is as follows: "Where on any such investigation or inquiry a decision has been given with respect to the cancelling or suspension of the certificate of a master, mate, or engineer, and an application for a rehearing under this section has not been made or has been refused, an appeal shall lie from the decision to the following courts—namely: (*a*) If the decision is given in England or by a naval court, to the High Court."

So what we are concerned with here is an appeal from a decision given with respect to the cancelling or suspension of the certificate of this master, and that is what our inquiry seems to me to be confined to. Now, the report in this case is as follows: "The court having carefully inquired into the circumstances attending the above-mentioned shipping casualty, finds, for the reasons stated in the annex hereto, that the loss of the vessel was due to fire and explosion caused, it is conjectured, by spontaneous combustion in the cargo. The loss of life was due primarily to the fire and explosion, proximately probably to drowning, and was conduced to by the wrongful acts and default of the master, whose certificate is suspended for twelve months." At the conclusion of the annex the court states the following: "The omission of the master of the steamship *Carlisle* to discharge his cargo into lighters or land it, as above mentioned, was a

neglect of duty which, if not omitted, might possibly have preserved the vessel from loss. Such omission (if a culpable omission conducing to the loss) was a default, but if not culpable was a mere error of judgment. The master exercised his judgment and took some measure—viz., the engagement of an expert to overhaul the cargo—a measure he appears to have considered sufficient; but, in the opinion of the court, he should have taken other measures, and have taken them with promptitude after the explosion of the 7th Dec. He should also have given some personal attention to the overhauling by the expert and to precautions against fire. The court is of opinion that the measures omitted were culpable omissions, but does not feel justified in confidently pronouncing the opinion that the omissions caused or conduced to the loss of the vessel. With regard to the loss of life the position is entirely different. As already stated, and for the reasons stated, the master did not exercise the diligence, care for, and attention to the safety of his crew that duty demanded. The master's neglect to berth the crew ashore after the explosion of the 7th Dec. was a grave default, and his acts in ordering the crew back to the vessel and permitting them to remain on the vessel after the explosion on the 11th Dec., before the examination of the cargo was completed, were wrongful acts, to which the loss of life is due."

Now, the appeal before us is, of course, with regard to that last paragraph, and the finding that the loss of life was, to use the expression of the court, "conduced to by the wrongful acts and default of the master." I take it they must have meant "caused by," because otherwise they would not have brought this within the section which justified the suspension. The question, then, on this appeal is whether that last finding is correct or not? I have referred to the Act, because I think that we are not at liberty to enter upon a general inquiry as to all that is in this report, and the various matters and questions which were there gone into, except so far as they bear, or the evidence given with respect to them bears, whether directly or indirectly, upon the question upon which alone an appeal to this court lies.

Therefore it is material, before dealing very shortly with the facts, to see what were the questions which were submitted for the decision of the court by counsel representing the Board of Trade. The first question was what was the nature and description of the cargo shipped at Vladivostock in or about Oct. 1904? Were the crew aware of the contents of the holds when the vessel sailed and the port to which she was bound? There is nothing relating to the inquiry before us which makes it necessary to make any reference to that question. The second question was, after the vessel arrived in Saigon River on or about the 2nd May 1905, were all necessary and proper precautions taken for the safety of the ship and her crew? That is, of course, an important question, bearing directly upon what we have to decide. The third question was: "What was the cause of the fires and explosions which occurred on board the vessel on or about the 7th and 11th Dec. 1905 and the 3rd Jan. 1906?" That bears upon the present question. (3A.) was: "Were the ship's log-books saved, and, if not, under what circumstances were they lost?" and we really have nothing to do with that. The fourth question was: "What was the cause of the loss of life?" That really was an important question. It is covered more or less by the third. The fifth, which is also an important question, was as follows: "Was the loss of the steamer *Carlisle* and the loss of life caused by the wrongful act or default of the master?" I have said that we are not concerned here with a general inquiry into all the questions which may be asked in a case of this kind, because the appeal is confined to the question whether or not the certificate of the master has been properly cancelled or suspended or not. We were invited, it seems to me, rather to travel outside the consideration of that question, because it was said that in the course of the annex to the report the learned magistrate had gone into the question of the seaworthiness of this vessel when she left Vladivostock, and had referred in part of his report to her not being then in a seaworthy condition. As far as I can see, no question was submitted by the Board of Trade to the magistrate which rendered it necessary for him to express an opinion on that point, and at the same time I think, for reasons that I have already indicated, it is only material for us to consider it in considering how much weight is entitled to be given to findings which are under consideration by the court. Beyond that I do not think we are at liberty to go.

The short facts which it seems necessary to refer to in considering what we have to consider appear to be these: On the 7th Nov. 1904 this vessel left Vladivostock for Port Arthur. She met with a disaster, which required her to put into Manila. From there, after repairs, she proceeded to Saigon. There she lay until she was lost on the 3rd Jan. in this year. On the 7th Dec. last a fire broke out, after an explosion. On the 11th Dec. another explosion and fire occurred. Perhaps these explosions are not to be wondered at, because this vessel had proceeded from Vladivostock with a cargo of explosives, and had been lying through the summer, or a large part of the summer, at Saigon, and probably the great heat there would affect some part of her cargo, which seems to have been liable to spontaneous combustion. After the explosion on the 11th Dec. the master ordered the crew to leave, and a French expert was called in. It is necessary to consider pretty closely the evidence about that part of the case. That evidence is to be found in the following passages taken from the evidence of the master of the vessel: "I was asking you whether, after the second fire, the crew remained on board or left the ship?—Yes, under my orders. They came back in the day-time?—Yes. Then, after that fire, did you get some expert to examine the cargo?—Yes; there was an expert from the French Government. He was overhauling the whole of the cargo. He got so far that he said there was no fear of another explosion, and he informed the consul of that, and he told the men, and they went back to the ship. Mr. Mansfield: Do you know whether the expert tried any test to ascertain that the cargo was safe or not?—I could not say; it was reported to me by the consul who he was and that he was an expert for the French Government to examine all the ammunition, but as to the tests I do not know." Further on, in cross-examination, he says: "Now the crew remained on shore, I

think, until after a report had been made by this French expert on or about the 21st Dec. ?—Yes. Did you notice the examination made by the French expert ?—I noticed how he was doing it. How was he doing it ?—Emptying the cases and shifting them in the holds from one hold to the other; he opened every case. You do not mean every case on board ?—So far as he had gone; every case on board was to have been opened. Do you know what holds he examined ?—Nos. 2, 3, and 4; I do not know that he touched No. 1; Nos. 3 and 4 holds were practically finished and he was at No. 2. I am taking between the 10th and the 19th, was that examination during these dates ?—Nos. 2, 3, and 4 holds. Was any examination made by him before the 10th ?—Not by him. Do you know, captain, that during that time the expert did not make any examination at all of Nos. 1 and 2 holds and only a cursory examination of Nos. 3 and 4 holds ?—He was the finest expert in French Cochin China employed by the French Government, and what I saw of him—I have no idea what explosives are—but his examination seemed to me to be thorough." Then again on page 28 of the record I find the captain says this: "In regard to the French expert's report, was it on your requisition or at the request of the authorities at Saigon that the French expert was called on ?—It was my request through the Russian Government. You made a representation to the Russian Government ?—Yes, and in consequence of that the expert was sent to report as to the safety of the ship. Did you see his report after he made it ?—I saw his report every day that he was there practically. Yes, but there was one report made on the 19th Dec., about nine days after he had commenced his investigation ?—Yes, there must have been one. Did you see that report he made on the 19th Dec. ?—The only report I saw was the one he sent to the consul. The Stipendiary: He says there was a verbal report every day and one written report to the consul and he saw that ?—Yes. Mr. Jones: Did you see the report that was written and submitted to the authorities ?—It was not submitted to any authorities. To whom was it handed ?—The vice-consul at Saigon had it. To whom was the written report made ?—It was made at my request. It was made to somebody ?—To me. You saw it ?—Yes. You read it ?—Yes, I had it translated. It was in French and the consul read it out to me." Again, on page 29, there is this: "Mr. Mansfield: Was that a verbal report ?—It was for the consul; he would not allow the men to go on board until he got this French expert's report. Having got that he allowed the men to go on board ?—Yes. But he made a report sufficient to satisfy the consul ?—Yes." Then the chief officer is asked: "Before the crew returned had the expert made his report to the consul ?—I don't know. You don't know whether he reported that the ship was safe ?—Only what the captain told me." When recalled at the end of the inquiry the witness was asked this: "When the expert came down from the French Government and was examining the ammunition did he examine all in the ship ?" His answer was, "No, he had not time to do that; No. 2 hold was scarcely started." The same witness is asked what he saw in regard to the examination of the cargo, and he says, "They were examining the cargo of smokeless powder, and the cases were being opened. Several of them were opened—all the time he was opening them—and he had cases he was putting over the side. The good ones were kept and restowed." Then the question is put: "I take it that, owing to the limited time at his disposal, the examination extended to a very small portion of the cargo ?" The answer of the witness is, "Yes." Later, in his re-examination, I find this: "Can you tell us how much cargo the French expert had examined before the 19th or 17th Dec. ?—A very small portion. Had he examined all in one hold ? No, he had only got the smokeless powder turned over and looked at. He had examined the smokeless powder ?—I think he had in one hold. That is No. 4 hold ?—Taken it out of No. 4 hold and restowed it in No. 3. Nothing had been done to No. 3 before the 17th ?—Yes, there were several cases of smokeless powder down there, and they were turning the cargo over to get space. Is it right to say that the smokeless powder in No. 3 hold had been examined ? — Yes." Then the second officer is examined, and he says this: "Were you on board when the French expert was making his examination ?—Yes. Can you tell us what he did in the course of making that examination ? Yes, he took the cargo out of the holds and arranged it in different positions. Which holds ?—Nos. 3 and 4. And re-arranged the cargo ?—Yes, partly. Did he open any cases ?—Yes, several of them—a good few. What cases did he open ?—All smokeless powder. Did you go yourself before the consul ?—Yes, after the second explosion. And did you go to him again before you returned to your ship ?—No. Do you know whether he had a report. He told me so. That he had a report from the French expert ? — No, he didn't say who from. And did he tell you whether it was safe to return to the ship ?—He said by no means not to go to the ship until I was ordered back. Was that before or after he received this report ?—Before." The evidence of the chief engineer is, I think, very important. It is this: "Were you there when the French expert was examining the cargo ?—Yes. Can you tell us what he did ?—He opened cases as he brought them upon deck—dozens of cases, we'll say—and picked out what he thought was bad, threw overboard some, and some he kept, and put the cases of smokeless powder in No. 3 hold. Did you go before the consul ?—Yes. Did you go more than once ?—Oh, yes, I went two or three times. Do you know whether he had a report from the French expert ? He said so. He said he was perfectly satisfied the ship was safe. When was that ?—After the second explosion — after the 11th or 10th, whichever it was.

On the Saturday following—five or six days after ?—The Stipendiary: Do you say this—the consul said in my hearing, after the second explosion, that he had had a report from the French expert, and he said the vessel was perfectly safe ?—Yes. You are perfectly sure of it ?—Yes. Was the master there at the time ?—No. Who else was there ?—Only myself." So it is tolerably clear that the engineer, probably a thoroughly competent man, alive to the situation, went alone to the consul and satisfied himself whether it was reasonably safe to go back to the ship, and was told by the consul that he had a report that it was safe. There is one other witness worth referring to on this point, and that is the cook, and he says

this: "You saw the consul the next day?—Yes, sir. And you stayed ashore until the 18th or 19th? Yes.—Then did you see the consul again?—We saw the consul before we went aboard. Had the captain told you to go aboard?—Yes, sir, the captain went to the consul in the morning. Did the consul tell you what the expert said?—He said the vessel was reported safe, and he was going to get a written report next day, but I have not seen it. Then you returned on board?—Yes."

The substance of it seems to me to come to this, that the captain, having heard of these two explosions, had asked for an expert to examine the cargo, and that expert had made an examination which, it is true, was only partial, but which had been sufficient to satisfy him that he was justified in reporting to the consul that in his own opinion the men might safely go on board the ship; and that when the captain told them they were to go on board some of them went and saw the consul, and were told by him that it was safe. Unfortunately that did not prove to be the case, because on the 3rd Jan. an explosion occurred, which ended in the vessel sinking. All the crew got away except two, who were unfortunately found missing, one being the second engineer, Mr. Lang, and the other a seaman. As counsel for the appellant says, there may be a doubt as to the fate of those men, but I think it is a reasonable presumption that they lost their lives owing to the disaster.

The question we have to determine is whether that loss of life was caused by the wrongful act or default of the master. I do not wish to decide this case upon the question of doubt whether these men were drowned or not in consequence of the explosion—I think there is very little doubt about it—but I want to put the case upon the question whether the evidence is such as to satisfy a tribunal that the master was guilty of a wrongful act or default. He is not responsible in this case for mere error of judgment—there must be something more than that—and I cannot bring myself to hold on such evidence as has been given that this master acted wrongfully—in this case it must be almost wilfully. He has a report from an expert. It may be the expert was mistaken—it may be he was right so far as he could see; but at any rate the report of the expert was that it was safe for the crew to go back, and if the captain acted honestly upon that report—and, looking at the evidence, I do not see any suggestion that he acted dishonestly or knowingly exposed the crew to danger—I do not think it is reasonable to hold upon such evidence that a case of wrongful act or default is established. It may be it was not wise to rely too much upon what he was told, and it would have been better to have kept the men off the ship, but to my mind this finding is not supported by the evidence, and it is the only finding which affects the captain. I do not intend to travel into the inquiry which counsel for the appellant asked me to embark upon, in all its width. Anything that is legitimately connected with the finding we have come to will have its weight, because of what we have said about that finding, but beyond that I do not think we are at liberty to go. The conclusion to which we have come upon the whole of this case is that the master's certificate has not been properly suspended, and ought to be returned to him.

BARGRAVE DEANE, J.—I agree. I am of opinion that the meaning of the Act of Parliament is that a master's certificate can only be suspended for doing something which he ought not to do, or omitting to do something which it is plainly his duty to do. What has he done in this case which he ought not to have done? What could he have done in this case more than he did do? He obtained an examination by a man who is described as a French expert attached to the French Government. That gentleman seems for several days to have overhauled the smokeless powder, which was the chief source of danger, and afterwards he made a written report to the British consul that in his opinion it was safe for the crew to return to the ship. That was the opinion of a gentleman of experience. He expressed that opinion to the consul, and the consul told the captain that in his opinion it was safe for the crew to return. The matter does not stop there, because it appears that some of the crew, being in doubt as to whether it was safe, took the best possible means in their power of finding out whether it was safe or not. They went alone to see the consul and asked his opinion. Are we to say that the captain was to blame and the consul was to blame because the French officer was mistaken? It is all very well to be wise after the event, but that is not the meaning of the Act of Parliament. As my Lord has said, there must be some wilful neglect of duty or some wrongful act in order to bring the captain within the section. In my opinion, the evidence does not support anything like negligence on the part of the captain. I think he did all he could reasonably be expected to do.

The PRESIDENT.—I ought to add that the Elder Brethren take practically the same view. They do not think there was anything higher than an error of judgment.

The question of the costs of the appeal were reserved and came before the court for argument on the 17th July.

Hamilton, K.C. and *A. D. Bateson.* — The appellant having been successful is entitled to his costs:

The Arizona, 42 L. T. Rep. 405; 4 Asp. Mar. Law Cas. 269 (1879); 5 P. Div. 123.

In that case the Board of Trade had invited the court to deal with the certificate. Where the Board of Trade opposed the appeal they have been ordered to pay the costs:

The Famenoth, 48 L. T. Rep. 28; 5 Asp. Mar. Law Cas. 35 (1882); 7 P. Div. 207.

Both those decisions were under the earlier rules, but the rules of 1895 have not brought about any change. Under the earlier rules counsel for the Board of Trade had to state whether in the opinion of the Board of Trade the certificate should be dealt with. That rule has been repealed, but the new rules in effect provide for the same course, for when the evidence has been heard the counsel for the Board of Trade submits the questions to the court which the board desire to have answered, and they are not necessarily those which are contained in the notice of investigation because they may be altered, omitted, or

added to, and in this case an additional question was inserted—namely, 3 (*a*). There was nothing to prevent counsel for the Board of Trade from deleting question (5) from those submitted to the court. By submitting that question they invited the court to deal with the certificate. It is true that in the case of *The Throstlegarth, Shipping Gazette*, May 9, 1899, the costs of the appeal were not given to the successful appellant, but it does not appear that that case laid down any general principle. No costs were given to the appellant in *The Grecian, Shipping Gazette*, June 10, 1902, but that case is not an authority in favour of the respondents as that was an appeal from a naval court abroad, and the Board of Trade merely appeared to see that all the facts were brought before the court and they did not start the proceedings.

John Mansfield for the Board of Trade.—It is not usual for the Board of Trade to be ordered to pay costs. The Board of Trade always endeavour to take up a neutral attitude, and the submission of question (5) to the court cannot be taken to mean that the Board of Trade think that the certificate should be dealt with. [THE PRESIDENT.—Your argument seems to amount to this, that unless the Board of Trade in terms ask for the suspension of the certificate they ought never to be ordered to pay the costs of an appeal.] The duty of the Board of Trade is to see that all the facts connected with the casualty are brought before the court below and the Appeal Court, and if they do no more than that they should not be condemned in costs. The costs of the appeal were not given to the appellant in *The Throstlegarth* (*ubi sup.*) or in *The China, Shipping Gazette*, Feb. 23 and March 25, 1899. The appellant ought not to be given the costs of the appeal if his conduct has been such as to render the inquiry as to the suspension of his certificate reasonable:

The Arizona (*ubi sup.*);
The Largo Bay, Wreck Inquiries, Walter Murton, 1884, p. 200.

Hamilton, K.C.—*The China* was a case in which, in order to prevent an injustice, the Board of Trade ordered a rehearing of the case, it was not an appeal. There is nothing in the general conduct of the captain in this case to make the court refuse him his costs.

THE PRESIDENT.—The question reserved in this case is a matter of importance, because it affects the question of costs where there has been an inquiry by the Board of Trade into the loss of a vessel. In this case there was an inquiry into the loss of the *Carlisle*, and the loss of life in connection with the loss of the ship, held at Cardiff in the month of May last, and the result was that the certificate of the master was suspended for twelve months. An appeal was afterwards lodged by the master from the decision of the magistrate, and that appeal was recently heard before this court; and this court, having regard to the evidence, came to the conclusion that the certificate ought to be restored to the master; that is to say, that the evidence did not sufficiently establish, after careful examination, that the loss of life, which was the point on which the magistrates had proceeded, was "caused by the wrongful act or default of the master." Then there arose a question of the costs of the appeal, and some cases were cited on both sides in connection with that question; but it was thought by the court desirable that the cases cited should be looked into and the older rules seen, with a view to ascertaining the real position. There were some rules issued, first of all, in 1876, but it is not necessary to go so far back as to refer to them, because rules were issued in 1878, and the 16th of those rules is as follows: "On the completion of their examination the Board of Trade shall state in open court upon what questions in reference to the causes of the casualty, and the conduct of any person connected therewith, they desire the opinion of the court; and if any person whose conduct is in question is a certificated officer, they shall also state in open court whether, in their opinion, his certificate should be dealt with." The practice was in accordance with that rule for some time, and in 1879 a statute was passed which gave a right of appeal to this court from the decision of a magistrate suspending a certificate. That right of appeal is continued by the Merchant Shipping Act 1894. Now, there were two cases decided after the passing of the Act of 1879. One is the case of *The Arizona* (*ubi sup.*), decided in March 1880, in which the master's certificate had been suspended, and there was an appeal; and on appeal it was held by the Court of Appeal "that there was no evidence that the damage had been caused by the wrongful act or default of the master, and the Court of Appeal reversed the decision and restored to the master his certificate. The court below having suspended the certificate on the invitation of the Board of Trade, the Court of Appeal ordered the Board of Trade to pay the costs of the appeal." That case was followed by *The Famenoth* (*ubi sup.*), in which the same course was adopted. I have before me the report of the magistrate, and I find that counsel for the Board of Trade said: "The Board of Trade are of opinion that the certificate of the master should be dealt with." In that case also there was an appeal, and costs were allowed on the same grounds as in *The Arizona*—namely, that the suspension of the certificate having proceeded upon an expression of opinion that the magistrate should deal with the certificate, the effect was to invite the magistrate to deal with the certificate. Therefore the Court of Appeal held that the master should have the costs of the appeal. Then there came, after the Act of 1879 and after the Act of 1894, a fresh set of rules, Rules for Formal Investigation into Shipping Casualties 1894. Rules 11 and 12 are the important ones. Rule 11 is as follows: "When the examination of the witnesses produced by the Board of Trade has been concluded, the Board of Trade shall state in open court the questions in reference to the casualty, and the conduct of the certificated officers, or other persons connected therewith, upon which the opinion of the court is desired. In framing the questions for the opinion of the court the Board of Trade may make such modifications in, additions to, or omissions from the questions in the notice of investigation as, having regard to the evidence which has been given, the Board of Trade may see fit." Rule 12 reads thus: "After the questions for the opinion of the court have been stated, the court shall proceed to hear the parties to the investigation upon, and determine, the question so stated.

Each party to the investigation shall be entitled to address the court and produce witnesses, or recall any of the witnesses who have already been examined for further examination, and generally adduce evidence. The parties shall be heard and their witnesses examined, cross-examined, and re-examined in such order as the judge shall direct. The Board of Trade may also produce and examine further witnesses, who may be cross-examined by the parties, and re-examined by the Board of Trade." Perhaps I should read also rule 13, which is as follows: "When the whole of the evidence in relation to the questions for the opinion of the court has been concluded, any of the parties who desire so to do may address the court upon the evidence, and the Board of Trade may address the court in reply upon the whole case." There is one case that has been referred to, that has occurred since these rules were issued. That is the case of *The Throstlegarth* (*ubi sup.*), where there was a successful appeal from the suspension of a certificate, and this court, being asked to deal with the costs, thought it was not a case in which the costs should be given against the Board of Trade—that they had acted with fairness both in the court below and in the Court of Appeal, and that having done so, in that case costs should not be given against them. That is the case principally relied upon by the Board of Trade. In that case there was no investigation or consideration of the principle which might apply to affect this question—it was apparently a decision upon the particular facts, and there is a very short decision upon the point, in accordance with the view entertained by the court at that time.

This matter has now been fully threshed out, and it seems to me that the question requires a determination which will be of assistance in these cases for the future. The Court of Appeal—that is this court—has a general discretion which is expressed in rule 20 of the rules of 1895, sub-sect. (i.): "The Court of Appeal shall have power to make such order as to the whole or any part of the costs of and occasioned by the appeal as the court may think just." One has to say upon what lines that discretion should be exercised, without, of course, in any way fettering the court in any particular case, because the discretion is general—but the lines on which one may proceed to consider the exercise of that discretion seem to me of importance. There is no question whatever of the fairness and propriety of the conduct of this case by the Board of Trade. In former days I had a great deal of experience of the conduct of Board of Trade inquiries, and as I was always opposed to the department, I think I am pretty well able to judge of their fairness and propriety.

The question is what is the position to be adopted by the Board of Trade at the conclusion of the evidence. Formerly there was no difficulty, because the Board of Trade were obliged to state in open court whether in their opinion the certificate of the officer should be dealt with. In the present case, what took place illustrates the position pretty plainly. At the close of the evidence this is what occurred: "Mr. Vachell: Are the Board of Trade asking that the master's certificate shall be dealt with?—Mr. Mansfield: The Board of Trade do not ask for anything of the sort. They ask the court to answer the questions and make such recommendations as it thinks fit.—The Magistrate: If the board do not ask the court to deal with the certificate, I take it the court will not deal with it. If you do ask that it be dealt with, the court will consider whether they shall deal with it. What do the rules say?" Mr. Vachell then addressed the court on behalf of the registered owner and master, later on counsel or solicitors addressed the court on behalf of other persons interested, and then Mr. Mansfield replied on behalf of the Board of Trade. Now, one of the questions put was this: "Was the loss of the *Carlisle* and the loss of life caused by the wrongful act or default of the master?" The position taken up by the Board of Trade is that they ought not to be condemned in costs where the case is left as Mr. Mansfield left it, and that it is for the magistrate to determine whether he will find certain facts which justify him in dealing with the certificate, whether he will deal with the certificate, and whether he will inflict such and such a sentence. The position taken up by that suggestion appears to me to be an incorrect position, because one must look at the course a case of this kind takes. A certain accident happens. It is an accident of such a nature that it is desirable an investigation should take place. The Board of Trade decide there shall be that investigation. The whole of the evidence connected with the matter is then placed before the court in the usual way. An inquiry is being held. At the outset it is not certain at all what will be the course of the inquiry—what questions will arise and how the matter will be dealt with—and it is not until the close that anybody can be certain exactly what position ought to be adopted. As soon as the inquiry is closed the questions are put. Those questions may directly involve the liability of the master or other officer to have his certificate suspended, and it is almost a natural course of things that from that moment the master or officer is placed in the position of a defendant who is being charged with an offence which may lead, if found against him, to the suspension of his certificate. So, if the matter is left as in this case it was left, the magistrate is in effect being asked to deal with the certificate if he finds that the facts justify him in so doing. It is natural, then, that the magistrate, if he find those facts, should proceed to deal with the certificate and inflict the penalty which he thinks is justifiable. I cannot help feeling that that is not a satisfactory position. Allowing in every way for the fairness and propriety with which these inquiries are conducted, the Board of Trade represent the public in this matter. They have a duty also to those who are concerned—the master, the owners, and others which it is desirable to discharge properly. Then one has to ask oneself what position is the Board of Trade in, through their counsel, at the time the inquiry is closed. If at that time it is clear, reasonably clear, that there is not a case made for suspension of the certificate, I cannot help feeling that the Board of Trade are at liberty to say so. If, on the other hand, the case is a strong one, showing gross negligence and impropriety of conduct on the part of the master, leading to a loss caused—to use the words of the section—"by his wrongful act or default," I think the Board of Trade are quite justified in the discharge of their duties in saying to the magistrate

it is a case of that character, and the certificate should be dealt with.

It seems to me logically to follow that at the close of the inquiry the Board of Trade has to determine upon the line of conduct it will pursue; and if it simply leaves the matter to the magistrate, instead of giving the magistrate its views on the matter, it leaves the magistrate entirely at large, and without, it seems to me, the full assistance that can be given to him. It seems to me desirable in the interest of all concerned that there should be the power I have indicated invested in the Board of Trade, and that it should be exercised. I am not in the least afraid that it will be exercised in any way adverse to the person in charge of the vessel beyond what the evidence justifies, because I can perfectly rely upon the fairness with which any charge would be preferred. Going back to this particular case, it seems to me that the effect of the course the inquiry took was to leave the magistrate to deal with the certificate, and it was dealt with. That being so, an appeal was brought, and successfully brought, and it would be a very great hardship upon the master—a man, probably, not possessed of much means—if he were to have to fight his appeal and win it and have his certificate returned to him, without being able to obtain from the Board of Trade the necessary expenses to which he has been put. Therefore I think this case cannot for practical purposes be distinguished from the older cases, where there is an invitation to the magistrate to suspend the certificate, and that invitation is acted upon and ultimately overruled. It is further said in this case that our discretion should not be exercised in favour of the master because there were other circumstances in the case which disentitled him to the exercise of that discretion in his favour. I do not think there are any grounds for acceding to that view, and it seems to me to have been conclusively shown that the discretion of the court should be exercised in his favour.

BARGRAVE DEANE, J.—I am of the same opinion. I think that the Board of Trade are wrong in their view that they ought to be neutral. I think the Act of Parliament means they shall not be neutral, but shall give assistance to the court. I think that instead of being neutral they should assist both sides if the evidence justifies it. Had that been done in this case I think probably the learned magistrate would not have found as he did do, and would not have imposed a very heavy penalty upon the master. I think that the Board of Trade, by the Merchant Shipping Act, is especially asked to take this particular line, because there are provisions in the Act which enable them, notwithstanding that the master's certificate has been suspended, to overrule that suspension if they think right, or, if they think there has been a miscarriage of justice, under another section they can order a rehearing, so that justice may be done. I think it is clear that the Board of Trade are not in the position of a prosecutor, not in the position of a neutral, but are in the position of a body having special opportunities of knowing what is right and what is wrong, whose duty it is to assist the court, after the evidence, in coming to a right conclusion. That is a matter in which I think in this particular case they have gone wrong; and I think this decision will assist the Board of Trade, and help to prevent possible miscarriages of justice in the future.

Solicitors for the appellant, *Crump* and *Son*, for *Vachell* and *Co.*, Cardiff.

Solicitor for the respondents the Board of Trade, *R. Ellis Cunliffe.*

July 6, *Aug.* 2 *and* 3, 1906.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE HOHENZOLLERN. (*a*)

Salvage—Appraisement—Reopening appraisement—Market value of property salved—Value to owners for the assessment of salvage.

Under ordinary circumstances an appraisement by the marshal in a salvage action is conclusive, and the right principle is to assess the value of the ship to the owners in her damaged condition on the completion of the services.

The Harmonides (87 *L. T. Rep.* 448; 9 *Asp. Mar. Law Cas.* 354 (1902); (1903) *P.* 1) *followed.*

SALVAGE SUIT.

The plaintiffs were the owners, master, and crew of the steamship *Siam*; the defendants were the owners of the steamship *Hohenzollern*, her cargo, and freight.

The suit was instituted to recover salvage for services rendered to the steamship *Hohenzollern* under the following circumstances:—

The *Hohenzollern* is a steamship of 6668 tons gross and 3321 tons net register, and when the services were rendered to her was on a voyage from Marseilles to Alexandria with mails, cargo, and ninety-seven passengers.

On the 25th Feb. 1906, when the *Hohenzollern* was in latitude 34-36 N. and longitude 22-34 E. her propeller struck against something causing her tail end shaft to break and damaging her stern tube, which filled with water. Shortly afterwards the *Siam* sighted her, and, taking her in tow, brought her to Suda Bay on the 27th Feb.

The *Siam* is a steamship of 4600 tons gross register, and when she rendered the services was on a voyage from Barry to Port Said with a cargo of coal. The value of the *Siam* was 45,000*l.*, the value of her cargo 6000*l.*, and of her freight 2550*l.*

The owners of the *Hohenzollern* swore an affidavit of values in which they stated the value of the *Hohenzollern* was 25,500*l.*, of her cargo 7400*l.*, and her freight 370*l.* The owners of the *Siam* thereupon had the *Hohenzollern*, her cargo, and freight appraised by the marshal, and the value of the *Hohenzollern* as appraised was 51,500*l.*, of her cargo 8303*l.*, and of her freight 370*l.* The owners of the *Hohenzollern* then gave notice to the plaintiffs that they would move the court for leave to reopen the appraisement, on the ground that it had been made on a wrong basis.

On the case coming on for hearing counsel for the defendants moved the court for an order that the appraisement should be reopened.

Laing, K.C. and *D. Stephens* for the defendants.—The result of the appraisement was only

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

made known to the defendants yesterday, and, being dissatisfied with it, they are asking to have it reopened. This may be done, as the application has been made at once:

Williams and Bruce Admiralty Practice, 3rd edit p. 315.

The marshal appointed J. Lachlan, ship valuer, and J. A. Thompson, consulting engineer, to make the valuation, but the former never saw the vessel; the appraisement was therefore irregular. An appraisement may be reopened:

The Oscar, 2 Haggard, 257.

Even though the court will not order a sale to test the value of property after an appraisement:

The R. M. Mills, 1 Mar. Law Cas. O. S. 5 (1860); 3 L. T. Rep. 513.

An appraisement will not be varied after a salvage decree has been made:

The Georg, 71 L. T. Rep. 22; 7 Asp. Mar. Law Cas. 476 (1894); (1894) P. 330.

But it may be varied before decree.

Aspinall, K.C. and *Noad* for the plaintiffs.—The appraisement is regular; one of the valuers saw the ship. An appraisement being an act of the court by its deputy is conclusive.

BARGRAVE DEANE, J.—I am not prepared to say that the appraisement is wrong, but the disparity between the figures is so great that I am not sure that I should be right in accepting either figure. The registrar shall appoint a valuer who shall make an independent valuation. I shall make no award until it is made.

The case again came before the court on the 2nd Aug., when it appeared that Mr. Kellock, the valuer appointed by the registrar, had assessed the value of the *Hohenzollern* at 52,800*l.*, of her cargo 8303*l.*, and of her freight 370*l.*

Laing, K.C. and *Stephens* for the defendants.—The valuer and the appraisers who assisted the marshal have arrived at this figure by proceeding on a wrong basis. They have based their valuation on the value of the vessel to her owners, and in doing so they have followed *The Harmonides* (*ubi sup.*); but that is an erroneous view to take; the proper basis on which the valuation should be made is the market value of the vessel:

The Cleopatra, 3 P. Div. 145, at p. 150.

The valuer should attend the court and be examined as to the principle on which they proceeded.

Aspinall, K.C. and *Noad* for the plaintiffs.—The value to the owners has been properly taken.

BARGRAVE DEANE, J.—I have seen the President about this matter, and he has seen the valuation and appraisement. His view is that in ordinary cases it is not desirable to go behind the appraisement, so I have gone rather further than he would have gone in ordering this further valuation. His view is that, following the judgment in *The Harmonides* (*ubi sup.*), there is a proper principle upon which the appraisement should be made, and it does not appear from the appraisement upon what principle it has been made. As it is undesirable that the gentlemen who appraise should be brought into court to be examined and cross-examined as to how they arrive at their conclusions, I shall ask Mr. Lachlan to send me a report as to the principles on which he proceeded in arriving at his conclusion.

Aug. 3.—BARGRAVE DEANE, J.—I have now seen Mr. Lachlan, and he tells me that he appraised this vessel as a seagoing vessel, the property of people who used her for carrying cargo and general purposes, and for those purposes he assessed her worth in her damaged condition. That was the view taken by the court in the case of *The Harmonides*. The value is what she is worth in her damaged state to her owners. That is the view the court will take in the future, so the appraisement in this case will be accepted.

Counsel having addressed the court on the value of the services, judgment was then given.

BARGRAVE DEANE, J.—This is an action of salvage brought by the owners of the *Siam*, a new steel screw steamship of 4600 tons gross, which carried a cargo worth 6000*l.*, the vessel being worth 45,000*l.* and her freight 2550*l.* The total value of the salving property is therefore 53,550*l.* The *Hohenzollern* is a large steamer belonging to the Norddeutscher-Lloyd, of Bremen. She is a vessel of 6668 tons gross, and was carrying a general cargo of 800 tons and about ninety passengers, including some Royalties. The value of the vessel, her cargo, and freight is to be taken at 61,453*l.*, so that the property at stake is of very great value. The *Hohenzollern* broke her tail shaft on the morning of the 25th Feb., and the *Siam* came up and took her in tow and towed her, including the time occupied in making fast when the hawsers broke, for forty-eight hours. The weather for vessels of that size was not extraordinary, and the chief trouble seems to have been that the *Hohenzollern* was rather seriously damaged by the way in which her tail shaft was broken. She was making some water, but according to the evidence of her master she was able to keep it under with her pumps with perfect ease. At the same time she had a cargo of a perishable nature, some of which was damaged, and no doubt it was very important she should be towed in as soon as possible. The services were well rendered, but they were not rendered with any real difficulty. A claim is made for 290*l.* odd for expenses. That is part of the award which I am about to make. It is alleged that the *Siam* was detained in Suda Bay for some days after she arrived. I take no notice of that, because it would appear from the correspondence that she stayed longer than was really necessary. Still she was properly detained some twenty-four hours, because, undoubtedly, the towage would render necessary an inspection of her engines. The result is that the services really occupied some three days, and this large property was saved. The lives of the people on board were not at stake, but no doubt the passengers were nervous and anxious about the condition of things. One has to ask oneself what is a fair award, and the opinion of the court is that the sum of 2700*l.* is the proper figure. The plaintiffs will have the costs of the appraisement.

Solicitors for the plaintiffs, *Crump* and *Son*.
Solicitors for the defendants, *Clarkson* and *Co.*

Aug. 9 *and* 10, 1906.

(Before BARGRAVE DEANE, J. and Trinity Masters.)

THE ST. AUBIN. (*a*)

Collision—Barge swinging at tier—Turn of tide—Duty to have man on board—Duty to show light—Preliminary article—Thames By-laws 1898.

Where at night in the river Thames a barge fast by her headfast to another barge attached to a ship lying at tiers is swinging or about to swing to the tide, she ought, under the preliminary article of the Thames by-laws, to have someone to warn passing vessels, by light or otherwise, of her position.

ACTION of damage.

The plaintiffs were the owners of the dumb barge *Grace* and the cargo laden therein; the defendants were the owners of the steamship *St. Aubin*.

The action was brought to recover the damage sustained by the alleged negligent navigation of the *St. Aubin*.

The case made by the plaintiffs was that about 5 30 a.m. on the 30th Jan. 1906, the *Grace*, a dumb barge of 81 tons register, laden with a cargo of 120 tons of pitch, was lying head down river fast to the port bow of the barge *Joe*, alongside the steamship *Victorious*, which was lying moored at the buoys on the south shore off Greenwich. The *Victorious* had the two regulation riding lights duly exhibited in her port rigging, and they were burning brightly. The wind was W.S.W., a moderate breeze, the weather was fine and clear, and the tide high water slack. The *Grace* was swung stern up alongside the *Joe* waiting to discharge her cargo into the *Victorious*, and in the ordinary course of events, as soon as the ebb tide began to be felt, would have swung stern down alongside the ship. The man in charge of the *Grace* was on the deck of the *Victorious*, keeping a good look-out. In these circumstances the *Grace* began to swing with the tide stern towards the north and close in to the *Victorious*, and as she did so the *St. Aubin* was observed by those on board the *Victorious* coming down the river close to the tiers on the south shore at full speed, angling towards the *Grace* and *Victorious*, apparently under a port helm, and, continuing on at full speed, she struck the *Grace*, which was still only partially swung, breaking her adrift, and doing her so much damage that she sank before she could be got into shallow water, and thereby greatly injured her cargo.

The plaintiffs charged the defendants with not keeping a good look-out; with improperly failing to keep clear of the *Grace*; with improperly navigating too close to the tiers on the south shore, when they knew, or ought to have known, that barges and other craft would commence to swing; and with failing to ease up, stop, or reverse their engines in due time or at all.

The case made by the defendants was that the *St. Aubin*, an iron screw steamship of 1181 tons gross and 701 tons net register, whilst on a voyage from London to South Shields in water ballast, manned by a crew of seventeen hands all told, was a little above the entrance of Deptford Creek, in the river Thames. The weather was clear but dark, the wind was westerly and light, and the tide was high water slack. The *St. Aubin*, in charge of a duly licensed pilot, was proceeding on her course down the reach to the south of mid-channel, making about seven to eight knots. The regulation lights for a steamship under way and a stern light were being duly exhibited, and were burning brightly, and a good look-out was being kept on board her. Under these circumstances, those on the *St. Aubin* observed a sailing barge standing across from the south to the north side of the river ahead of the *St. Aubin*, and also a second sailing barge closely following on her starboard quarter. The engines of the *St. Aubin* were slowed and afterwards stopped, and her helm was ported a little and then steadied. As the second of the barges drew clear across the bow of the *St. Aubin* those on board made out a dumb barge, which proved to be the *Grace*, lying athwart the river about ahead of the *St. Aubin* and about a length distant, and, although at a considerable distance from a vessel lying at Greenwich buoys, without any light to indicate her position. Thereupon the engines of the *St. Aubin*, which, with engines stopped, was making about three knots through the water, were reversed full speed astern, but, as the *Grace* was lying right athwart the course of the *St. Aubin*, the stem of the *St. Aubin* struck the starboard side of the *Grace* about amidships.

The defendants charged the plaintiffs with not keeping a good look-out, with leaving the *Grace* unattended and improperly moored, and with allowing her to swing athwart the river and the fairway without exhibiting any light.

The following articles of the Thames By-laws 1898 were referred to during the course of the arguments and judgment:

Preliminary.—In obeying and construing the following by-laws relating to lights and signals and steering and sailing due regard shall be had to all dangers of navigation and of collision, and to any special circumstances which may render a departure from them necessary in order to avoid immediate danger. Nothing in the following by-laws shall exonerate any vessel or the owner, master, or crew thereof from the consequences of any neglect to carry lights or signals, or to keep a proper look-out, or of any precaution which may be required by the ordinary practice of seamen or by the special circumstances of the case.

30. With the exceptions hereinafter named a vessel under 150ft. in length when at anchor or moored shall carry forward where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear uniform and unbroken light visible all round the horizon at a distance of at least one mile. . . . The exceptions are as follows: (*a*) Where masted vessels are lying in tiers the outermost off shore masted vessel only of each tier shall carry the riding light. (*b*) Lighters lying at the usual barge moorings in the river above Gravesend are not required to exhibit the riding light. (*c*) Every steam vessel, sailing vessel, or lighter moored permanently head and stern in the river shall in addition to or in lieu of the riding light exhibit such light or lights as the conservators shall from time to time order or direct.

31. Every person in charge of a lighter when under way and not in tow shall between sunset and sunrise when below London Bridge have a white light always

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

ready and exhibit the same on the approach of any vessel.

49. Every steam vessel and steam launch when approaching another vessel so as to involve risk of collision shall slacken her speed and shall stop and reverse if necessary.

Laing, K.C. and *A. E. Nelson* for the plaintiffs.—Rule 30, which the plaintiffs are alleged to have broken, does not apply to a barge in the position of the *Grace*. Barges in this position are not in the habit of exhibiting lights. There have been no prosecutions to enforce the rule against barges. It must be admitted that the *Grace* does not come within the exceptions of rule 30. The man in charge of the *Grace* was guilty of no act of negligence. Those on the *St. Aubin* admit that they might find a barge fifty feet out from the side of a moored vessel; but as many barges are eighty feet long, it follows that when they swing to the tide, they must be farther out than that. The collision was brought about by those on the *St. Aubin* porting when they saw the sailing barges. They should have stopped their engines sooner than they did, and they should not have ported, and so have allowed the barges to have crossed ahead of them without driving themselves over to the vessels at the tier.

Aspinall, K.C. and *Adair Roche* for the defendants.—The exceptions in rule 30 do not apply to the *Grace*, but rule 30 does apply, for the *Grace* was either at anchor or moored, and she should therefore have shown a light. If she was showing no light there was a duty on those in charge of her to warn approaching vessels of her position, or they should have been in attendance when she swung to pull her out of the fairway. It must be a question of fact in each case whether it is negligent to leave a barge swinging unattended in this way. The *Grace* was a vessel to which rule 30 applies, for by the interpretation clause "lighter" means any dumb barge for carrying goods, and "vessel" includes any lighter or barge, and if the *Grace* was not anchored she was at least moored. There are two categories of vessels under the rules, those under way and those at anchor or moored; a vessel is under the interpretation clause under way when not at anchor or made fast to the shore or the ground. The *Victorious* was moored, and so was the *Grace*, for she was fast to the *Victorious*. The speed of the *St. Aubin* cannot be said to have been excessive, and the look-out was good.

Laing, K.C. in reply.—Rule 31 shows that a lighter under way and not in tow must carry a light which is ready to be exhibited on the approach of a vessel; but there is no such duty on a lighter which is not under way. Even lighters under way are not bound to show a light, but only to have one ready to show in case of need.

Aug. 10.—BARGRAVE DEANE, J.—This is an action brought by the owners of the dumb barge *Grace* and her cargo for damage occasioned by a collision with the *St. Aubin*. The *St. Aubin* is a steamer of 1181 tons gross and 701 tons net register, and she left London on a voyage to South Shields, in water ballast, on the morning of the 30th Jan. in this year. The collision happened off what is called the Greenwich tier at about half-past five in the morning. The result of the collision was that the barge was cut half way through and sank. That shows that the steamer must have had some way on her, but in the case of a barge I am not sure it proves very great speed. The allegation is that the damage was occasioned by the bad look-out of those on the *St. Aubin*, and that she was improperly navigated too near to the Greenwich tier. The facts are these. The *Grace* went down the river to a vessel called the *Victorious*, which was lying at the Greenwich tier, and found there a barge called the *Joe*, which was alongside the steamer, and she made fast by her head-rope to the side of the *Joe*, but did not make fast astern. When the tide turned, somewhere about half-past five, the lighterman in charge of the *Grace* was not on board—he was on the *Victorious*—and the barge, as the tide turned, began to swing out, with her stern out towards mid-channel, and would eventually, no doubt, have swung round alongside the *Victorious*, with her head astern of the *Joe*, and with her head up river. It was while she was athwart the stream, at right angles to the *Joe*, that she was struck by the *St. Aubin*. The *Grace* was a loaded barge, and according to the evidence of the man in charge of her she had a freeboard of some 15in. The night is said to have been dark, but clear, and, as far as I can estimate, I think she was, as a fact, altogether away from the side of the *Victorious* between 80ft. and 90ft.—perhaps a little more, 90ft. to 100ft., the extreme end of her. The story of the *St. Aubin* is that she was coming down river at full speed, and at some little distance up river from where the *Victorious* lay she eased her engines and then stopped them, owing to a report from the mate, on the look-out forward, of a red light on the starboard bow. That turned out to be a barge coming out of Deptford Creek and crossing the bows of the *St. Aubin*. She was followed by another sailing barge, also coming out of Deptford Creek. There has been some contradiction in the case as to whether that second barge was carrying lights or not, but I need not discuss that question, because the master said the second barge did not affect his navigation. Undoubtedly the fact of these two barges crossing the bows of the *St. Aubin* with their sails, and the wind W.S.W., would be a matter which might interfere with the look out on the *St. Aubin* seeing this barge, lying low in the water and athwart the river. The *St. Aubin* ported a little, steadied, and then starboarded, to get back on to her course, which she said was to the southward of mid-channel, and almost immediately she found this barge under her bows.

That raises two questions. First, was there a proper look-out kept on the *St. Aubin*, or was there a defective look-out? It is impossible for me to say that the look-out on the *St. Aubin* was defective because they did not see this barge sooner than they did. It was a dark night, the barge was only 15in. out of the water, and was lying right athwart, and there was absolutely nothing to attract attention. Then, on the other hand, it is said that there ought to have been a light on the barge. I will deal with the regulations presently, but it seems to me that there being no light certainly was a matter which interfered with the look-out on the *St. Aubin* seeing that barge. As to the speed of the *St. Aubin*, I am not prepared to say—and the Elder Brethren so advise me—that the *St. Aubin*

was going, in the circumstances, at the time of the collision, or immediately before the collision, at an improper speed. The damage done to the barge might have been occasioned by this vessel, the *St. Aubin*, going at about two knots at the time of the collision, which is what the master puts the speed at. A more serious question in the case really is, What was the cause of this collision? Was it inevitable? In other words, is there nothing which could have been done which might have prevented this collision. We have heard a good deal of discussion about the regulations. I agree it is very difficult indeed under the Thames Rules to find a regulation which in fact deals with this case. First of all it is undoubtedly the fact that a lighter is "a vessel"—that is to say, a vessel under 150ft. in length—there is no question as to that. Then rule 30 says: "A vessel under 150ft. in length, when at anchor or moored, shall carry forward, where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light (hereinafter called the riding light) in a lantern so constructed as to show a clear, uniform and unbroken light, visible all round the horizon at a distance of at least one mile." I am unable to bring myself to say that this case is within that rule. I am not prepared to say, especially when I have heard all the evidence about custom and practice, that this was a vessel under 150ft. at anchor or moored, so that she ought to carry a white light when in that position alongside the *Joe*. The accident, however, did not happen when she was in that position. The accident happened when she was absolutely unattended and was projecting out athwart the stream from the *Joe*, to an extent, as I have said, of 90ft. to 100ft. Then there are the exceptions mentioned in art. 30. The exceptions clearly do not apply. She is not a masted vessel, under exception (*a*). She was not lying at the usual barge moorings, under (*b*); and she was not a lighter moored permanently head and stern in the river, under (*c*). Is it then to be said that there is absolutely no provision for dealing with such a case as this, either in the Thames Rules or the general Sea Rules? In Mr. Stuart Moore's book (Rules of the Road at Sea, 3rd edit.), at p. 280, you will find, at the commencement of the Thames Rules and under the head of "Preliminary"—"Nothing in the following by-laws shall exonerate any vessel, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or to keep a proper look-out, or of any precautions which may be required by the ordinary practice of seamen, or by the special circumstances of the case." That is, I think, identical in words with art. 29 of the Sea Rules, which is as follows: "Nothing in these rules shall exonerate any ship, or the owner, master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." Now, is it reasonable that a barge, at night, on a dark night, fastened only by her headfast to the side of a barge alongside a ship, should be left absolutely unattended at the turn of the tide, so that she should be allowed to swing out as this barge was allowed to swing out—to swing out without anybody on board her to give notice, and, still more, without anybody on board to show a light or to take any precaution which, in the wording of the rule, "may be required by the ordinary practice of seamen or by the special circumstances of the case?" In my opinion the special circumstances of the case—of every case of this description, when on a dark night a low-lying barge is allowed to swing out right in the path of everybody going up and down—require that somebody should be on board, so as to show a light. We know that by art. 31 barges have to have a light handy when they are under way—"Every person in charge of a lighter, when under way and not in tow, shall between sunset and sunrise, when below London Bridge, have a white light always ready, and exhibit the same on the approach of another vessel." It is true that article does not apply to this particular case, but it does show that it is necessary there should be precautions at hand on board a lighter, in order to avoid difficulty which may arise. In my opinion, and I am glad to say I am supported by the Elder Brethren in this matter, there ought to have been someone on this barge—the man in charge of it, probably, and he says he was not on his barge but on the steamer when his barge swung. He ought to have been on the barge and ought to have had a light ready to be shown, and ought to have shown it, to an approaching steamer. I know the question is somewhat of a novel character, and if I am wrong the Court of Appeal will put me right, but I think the preliminary paragraph covers this case, and I have no hesitation in saying that in this particular case there was what I consider to be negligence under that paragraph in not having a man on board the barge, with a light ready to show to the *St. Aubin* as she came up. The result of my decision is that I think the only blame for this collision rests with the *Grace*.

Solicitors for the plaintiffs, *J. A.* and *H. E. Farnfield*.

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

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, May 22, 1906.

(Before VAUGHAN WILLIAMS, STIRLING, and MOULTON, L.JJ.)

THE RACINE. (*a*)

Collision—Total loss—Ship chartered in advance—Loss of charters—Measure of damage—Practice.

Where a vessel is totally lost by collision whilst on a chartered voyage from her home port to a foreign port, thence to proceed under charter to another foreign port, and thence home under charter, her owners are entitled to recover from the wrongdoer her value at the end of her chartered voyages (subject to this period not being too remote), together with the estimated net freight she would have earned under the charters less a reasonable deduction for contingencies.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The Kate (80 *L. T. Rep.* 423; 8 *Asp. Mar. Law Cas.* 539 (1899); (1899) *P.* 165) *approved.*

Appeal by the defendants, the owners of the steamship *Racine*, against the decision of the President confirming a report of the Admiralty registrar in favour of the plaintiffs, the owners of the schooner *Secunda*.

The plaintiffs were the owners of the schooner *Secunda*; the defendants were the owners of the steamship *Racine*.

The *Secunda* was a three-masted schooner of 203 tons gross and 170 tons net register, and on the 22nd April 1905, while on a voyage from Cardiff to Cadiz with a cargo of coal, was run into and sunk by the steamship *Racine*.

The *Secunda* was carrying the coal under a charter-party, dated the 2nd March 1905, under which a commission of 5 per cent. on the amount of the freight was due to the owners' agent on the charter-party being signed.

Under the charter-party the charterers were given an option to cancel if the vessel was not ready to load at Cardiff on or before the 17th April 1905.

The owners of the *Secunda* had also entered into two other charter-parties, both dated the 27th Feb. 1905, with Thomas Crawford, of Glasgow, under one of which they undertook to carry a cargo of salt in bulk from Cadiz to St. John's, Newfoundland, and under the other they undertook to carry a cargo of oil in casks from a port in Newfoundland to Queenstown for orders, and thence to a place of discharge in the United Kingdom.

Commission in each case was payable on the signing of the charters, ship lost or not lost.

After the collision the owners of the *Racine* agreed to pay the owners of the *Secunda* 80 per cent. of the damages sustained by the latter, subject to their being assessed by the registrar and merchants.

The claim came before the registrar and merchants, and on the 28th March 1906 the registrar issued his report, in which he stated that "the value of the *Secunda* was assessed as at the conclusion of her current voyage—that is, on her return to the United Kingdom," and that "a deduction of about 10 per cent. was made from the presumed net freight for contingencies." He also reported that, as a sum was allowed for freight, the claim for brokerage was not allowed.

The amount allowed by the registrar as the value of the schooner was 2400*l.*, and as freight which would have been earned under the charters 300*l.*

On the 24th April 1906 the solicitors for the owners of the *Racine* delivered a notice of motion in objection to the report of the registrar asking for an order that the report should not be confirmed in so far as it dealt with the value of the *Secunda* and the estimated value of the freight. With regard to the value of the *Secunda* as fixed at 2400*l.*, they alleged that it was excessive; that the registrar and merchants had assessed the value of the *Secunda* at the end of Aug. 1905, which was not the true measure of damage; that there was no evidence as to what the value of the *Secunda* would have been at that time; and that the defendants had had no opportunity of calling evidence as to the *Secunda's* value at that time. With regard to the amount of 300*l.* allowed for freight, they alleged it was excessive, and that the registrar and merchants had allowed the profit the plaintiffs claimed they would have made on the three charter-parties entered into by them before the *Secunda* was sunk, and that such claim was problematic and was too remote.

The motion in objection to the report came before the President on the 7th May 1906.

Dr. *Stubbs* appeared on behalf of the owners of the *Racine*.—The argument of counsel was the same as that in the Court of Appeal.

R. H. Balloch appeared on behalf of the owners of the *Secunda*, and was not called on.

The President.—I do not think there is anything in the points taken. As to the loss of freight, in my view it is covered by the case of *The Kate* (*ubi sup.*) and the principle there laid down, and I see no ground for saying the registrar acted wrongly in applying that principle. With regard to the value of the *Secunda*, the registrar has reported as to the time at which he assessed her value, and counsel for the appellants has not satisfied me that the registrar was wrong in what he has done. The motion will be dismissed with costs.

Counsel for the appellants asked for leave to appeal, but the President refused to grant leave.

On the 8th May counsel for the owners of the *Racine* applied *ex parte* to the Court of Appeal and obtained leave to appeal from the decision of the court below, and the appeal was heard by the Court of Appeal on the 22nd May 1906.

Aspinall, K.C. and *Stubbs* for the appellants, the owners of the *Racine*.—The court below was wrong in taking the value of the *Secunda* at the probable time of her arrival in the United Kingdom at the conclusion of the three charters. The freights on the last two charters are too problematical to have any effect on her value. The value of the *Secunda* has been assessed at too high a figure. She cost 2666*l.* in Aug. 1904; at the time of the collision her value has been estimated at 2560*l.*, 2300*l.*, and 2125*l.*, but the court has assessed her value in Aug. 1905, when she was supposed to return to this country, at 2400*l.* Where the full value of the vessel has been allowed as compensation, the injured owner can recover nothing for the loss of the employment of his vessel:

The Columbus, 3 W. Rob. 158.

The owner is entitled to the market value of his ship just before the collision:

The Clyde, Swab. 23.

That case was followed by Lord Hannen, who held that where there was a total loss of a ship "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":

The City of Rome, 8 Asp. Mar. Law Cas. 542, note (1887).

Freight which would be earned for carrying cargo on board at the time of the loss has been allowed (*The Amalia*, 8 L. T. Rep. 805; 34 L. J. Adm. 21), and also, where a vessel was sunk while proceeding in ballast to load a cargo, the measure of damage to her owner was held to be the

value at the end of the chartered voyage, together with the estimated profit under the charter (*The Kate, ubi sup.*), but that case only covers the loss of freight on the current charter, and is based on the case of *The Argentino* (61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433 (1889); 14 App. Cas. 519), where damages were assessed for a partial as distinguished from a total loss. The proper measure of damage is the value of the *Secunda* at the time of her loss, together with the profits for the voyage on which she was carrying cargo. Her owners could get another vessel and so earn the future profits to be made out of the two last chartered voyages.

Scrutton, K.C. and *Balloch* for the respondents, the owners of the *Secunda*, were not called on.

Vaughan Williams, L.J.—I am not sure that I think the evolution of law through the various decisions which have been cited to us has been quite satisfactory. Speaking for myself, I am not sure that I should have brought myself to adopt the rule that was laid down by Dr. Lushington and Sir James Hannen in the cases of *The Columbus* (*ubi sup.*) and *The City of Rome* (*ubi sup.*) and other cases to the same effect. At all events, if I had to adopt that rule because I could not think of any better one, I should still have been conscious that the application of the rule would not produce perfect justice as between the ship which had caused the collision and the other ship which was damaged. At the same time I say of the later cases, including *The Argentino* (*ubi sup.*), that I do not feel at all satisfied, myself, that the rule of law as now established, which seems to me to render the ship to blame for the collision liable for special damages in the shape of loss of special profits, which are more or less an accident in each case, does do complete justice as between the parties. It seems to me difficult to be satisfied with a rule which would make the measure of damages, where the wrongful act is identically the same in two cases, differ absolutely according to the loss which has been sustained by the person who is injured by the collision—though the wrongful act of the wrongdoer is identical in both cases.

Still, the rule seems now to be fully adopted that the injured party is entitled by way of damages to *restitutio in integrum*, which is to place him in the same position as he would have been in but for the collision causing damage—that is to say, not simple damages which will restore to him the ship, but also damages which would put him in the same position as to profits to be earned as if the collision had never occurred at all. I agree that if that rule is adopted as it has been, among other cases, in the comparatively recent case of *The Kate* (*ubi sup.*)—I do not see how we can do otherwise than follow that rule here as it is there established. The other observation that I have to make about this case is that I do not at all suppose that the rule has been adopted in the sense that you would give to the injured party *restitutio in integrum* in respect of profits to be earned without discounting those profits by the possibility of something occurring which would have prevented the earning of the profits. Of course, if you take the case of the profits to be earned upon a particular voyage which is happening at the time of the collision the discount would practically be very small. It differs in different cases. If the profits are to be earned by arriving at a distant point, say San Francisco, the risk of not being able to earn them would be very small when the vessel arrived within a short distance of her port of destination. Still, I understand we are always to discount these future profits by taking the possibility of accidents into consideration; and if you have a chain of charter-parties, of course the possibility of earning the profits, not being defeated, increases with the lapse of time. I have seen here in this case the actual figures upon which the conclusion was arrived at, and it seems to me that these principles, which have now been absolutely adopted, have been properly and very liberally applied, and that ample discounts have been allowed. It is impossible for us to do otherwise than affirm the judgment of the court below.

Stirling, L.J.—I think the authorities point to the conclusion at which the learned President of the Admiralty Division arrived. The law as applied to a case of a partial loss was stated by Lord Herschell in the House of Lords in the case of *The Argentino* (*ubi sup.*). He said: "I think that damages which flow directly and naturally, or in the ordinary course of things, from the wrongful act cannot be regarded as too remote. The loss of the use of a vessel and of the earnings which would ordinarily be derived from its use during the time it is under repair, and therefore not available for trading purposes, is certainly damage which directly and naturally flows from a collision. But, further than this, I agree with the court below that the damage is not necessarily limited to the money which could have been earned during the time the vessel was actually under repair. It does not appear to me to be out of the ordinary course of things that a steamship, whilst prosecuting her voyage, should have secured employment for another adventure. And if at the time of a collision the damaged vessel had obtained such an engagement for an ordinary maritime adventure, the loss of the fair and ordinary earnings of such a vessel on such an adventure appears to me to be the direct and natural consequence of the collision."

In the present case we have the case of the loss of a vessel which at the time of the loss was subject to three successive charter-parties—one to Cadiz, another from Cadiz to Newfoundland, and a third from Newfoundland back to this country. If the law, stated by Lord Herschell, is applicable in the case of a total loss, then it seems to me that the loss of the earnings under those charter-parties would have to be taken into account as part of the damages. It is said that the rule does not apply to the case of a total loss; but, although in the early case of *The Columbus* (*ubi sup.*) before Dr. Lushington, that learned judge appears to have laid down the law in a way which would seem to lead to the conclusion that such was his opinion, yet in the later case of *The Amalia* (*ubi sup.*) he expressly states that where the ship is entirely destroyed the practice has been to take the values of the ship and freight at the ultimate port of destination at the time she would have arrived there, with interest upon those sums. This practice is recognised in the judgment of Lord Esher, the dissenting judge in the Court of Appeal in the case of *The Argentino* (*ubi sup.*),

where he speaks of the authorities which allowed loss of freight to be earned to be taken into account. The sole contention which remained here, therefore, was that although that addition must be made to the damages as regards the loss of freight on the voyage on which the ship was actually engaged at the time of the loss, which was the voyage under the first charter-party, yet the loss of freight under the other two charter-parties ought to be treated as too remote. It seems to me that would be sticking to the letter and not following the spirit of the rule laid down by Lord Herschell in the words I have read. That view was taken by the late President of the Admiralty Division in the case of *The Kate* (*ubi sup.*), and I think we ought to follow it.

MOULTON, L.J.—I am of the same opinion. The case is a little complicated. A typical and fundamental case is the case of a ship which has been sunk by collision by the tortious act of some other person when engaged under charter-party in an adventure. Everyone agrees that the plaintiff is entitled to be put in the same position pecuniarily as if the collision had not occurred. It is obvious that it is a complicated question to ascertain what is the value of a ship upon the high seas at a particular place, having partially performed a contract of carriage; and, therefore, because the data for ascertaining what the plaintiff must receive to be put in the same position as if the collision had not occurred are so difficult to ascertain at that moment, the registrar, following the practice of the court, has calculated the loss at another date, where the data are more easily ascertained. There is no change in what you are calculating—you are calculating the pecuniary difference made to the plaintiffs by the collision—but you calculate it at a date at which you can get data more easily, and you allow interest from that date only. The date taken is the conclusion of the voyage. Setting aside other risks, but for the collision, the plaintiff would at the end of the voyage have been in possession of his ship, diminished in value by the wear and tear of that voyage, and would have been in possession of the freight. Neither of these things, however, were certainties. There was the risk of loss during the subsequent part of the voyage, and these two sums must to some extent be discounted according to the risk. Having allowed for those other risks you get a sum of money the possession of which would be the equivalent of the plaintiff's position had the collision not taken place. The collision had deprived him of that sum, taken as on that date, and the practice of the court in fixing the damage has been to calculate that sum and allow interest from the date of the probable arrival at the end of the voyage. It appears to me that is an accurate method of calculating what ought to be given to the plaintiff to put him in the same position as if the collision had not taken place.

The present case differs from the typical and fundamental case with which I have dealt in two respects. In the first place we have here a chain of voyages. I can see no difference in the principles which may be applied, whether the voyage be one voyage or a chain of voyages under the same charter-party. The more numerous the voyages unperformed the more numerous the risks that may not be successfully overcome. It does not at all follow, therefore, that the mode in which these risks are discounted will be the same for the later voyages as for the earlier voyages; but the same principle will apply. In the present case there is not one charter-party and a chain of voyages, but each link of the chain has its separate charter-party. Can that make any difference? I cannot see how it possibly can be held to affect the question, and, therefore, I am of opinion that the method of estimating the damage followed in this case by the registrar is quite accurate. I may say I am also satisfied that it is in complete accordance with the authorities.

Solicitors for the appellants, *Stokes* and *Stokes*.

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

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, May 1, 1906.

(Before WALTON, J.)

OCEANIC STEAMSHIP COMPANY *v.* FABER. (*a*)

Insurance—Loss or damage to hull or machinery through any latent defect in the machinery—"Inchmaree clause"—Flaw in shaft developing into crack—Latent defect becoming patent—Cost of new shaft.

A flaw was caused by the welding of a new end on to the tail shaft of the plaintiffs' vessel in 1891. *The shaft was drawn and passed by Lloyd's surveyor in* 1900. *The flaw developed into a crack, but could not be discovered as long as the shaft was not drawn. The crack was discovered in Oct.* 1902, *when the shaft was drawn and condemned, and replaced by a new shaft. The policy of insurance, which was effected on the vessel from May* 1902 *to May* 1903 *provided: "This insurance also specially to cover loss of and (or) damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager."*

Held, the crack, which was the damage, was the latent defect itself, and was not a damage to machinery caused by a latent defect within the meaning of the above clause.

Held, further, that it was not established that the crack arose during the currency of the policy.

COMMERCIAL LIST.

Action tried before Walton, J., sitting without a jury. The plaintiffs' claim was against underwriters upon a policy of marine insurance to recover the cost of replacing the tail shaft of the steamship *Zealandia*.

The following was the agreed statement of facts:—

1. The plaintiffs are a shipping company carrying on business at 329, Market-street, San Francisco, U.S.A., and the defendant is one of several subscribers to a policy of marine insurance dated the 14th May 1902, for twelve calendar

(*a*) Reported by TREVOR TURTON, Esq., Barrister-at-Law.

months from noon on the 18th May 1902, on the plaintiffs' steamship *Zealandia* at San Francisco subject to the printed port insurance clauses attached thereto.

2. Attached to the said policy was a port insurance clause providing (*inter alia*): "With leave to dock, undock, and change docks as often as may be required, and to go on slipway, grid-iron, and (or) pontoon and (or) to adjust compasses. The insurance also specially to cover loss of and (or) damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager. In case of any claim for average, the repairs to be paid without deduction of one-third whether the average be particular or general. The above clauses and conditions are additional to those contained in the annexed policy, and so far as they are inconsistent therewith are to supersede the same."

3. By supplementary agreements, dated respectively the 24th June and 17th July 1902, attached to the policy, it was agreed (1) to suspend the insurance from time of vessel leaving San Francisco until expiry of thirty days after her re-arrival there from which date this policy shall re-attach, and (2) that the insurance shall re-attach from noon the 10th July 1902.

4. . . . . .

5. On the 11th July 1902 the steamship *Zealandia* docked at San Francisco on completion of a voyage from San Francisco to Honolulu and back, and on the 13th July proceeded to Martinez.

6. On the 11th Oct. the steamship *Zealandia* left Martinez and proceeded to the wharf at San Francisco, and on the 30th Oct. 1902 the vessel was docked at the Union Iron Works dry dock, San Francisco, for the purpose of being overhauled. The propeller was removed and the tail shaft drawn into the tunnel for examination. A fracture 3ft. forward of the after liner was then discovered and the shaft condemned.

7. On the 27th Aug. 1904 the shaft was further examined after breaking it at the point of fracture at the ironworks where it was then lying.

8. Unless the owners of the steamship *Zealandia* had reason to fear that something was wrong with the tail shaft or its connections, they never drew the shaft except when requested to do so by Lloyd's surveyor.

9. The shaft was drawn in April 1900, and was examined by Lloyd's surveyor, and from that date until Oct. 1902, when the shaft was again drawn to be examined by Lloyd's it remained in place subject only to the ordinary examinations which all machinery undergoes at the hands of the chief engineer.

10. It would have been an impossibility to have discovered the condition of the shaft while the shaft was in place in the ship.

11. Even if the shaft had been drawn and examined within a year prior to its condemnation it is possible that the condition of the shaft could not then have been discovered.

12. The owners did not employ a superintendent engineer before Jan. 1902. Any special overhauling of the machinery done prior to that time was done under the personal supervision of the chief engineer of the ship, and Lloyd's engineer surveyor would be called in to certify as to the condition of the machinery.

13. Nothing occurred between the 18th May 1902, the date mentioned in the policy for the inception of the risk, and the 30th Oct. 1902, to warrant the withdrawal of the tail shaft.

14. The logs of the steamship *Zealandia*, the survey reports upon the two examinations above-mentioned, dated the 5th Nov. 1902 and Aug. 1904, and the documents and accounts set out in the average statement are admitted as evidence of the facts therein stated.

On the 5th Nov. 1902 a Lloyd's survey was made, and the report stated that

> A fracture was found in the same (*i.e.*, shaft) about 3ft. forward of the after liner extending diagonally for a distance of 13in., and about ⅝in. deep.

On the 27th Aug. 1904 a survey was made, and the report stated that

> The propeller shaft was made of wrought iron 15½in. diameter by 22½ft. long and fitted with two brass liners. The shaft was condemned on account of a fracture situated between liners about 8in. in length and clearly defined . . . The shaft was put under hammer and broken at the point of fracture. Found: A defective part taking the form of a segment of a circle fully 4in. deep. The centre of shaft in way of break showing two laminations nearly 4in. long but having no connection with fracture. No material corrosion was observed in the vicinity of fracture . . . the defect which caused the shaft to be condemned was the direct result of an imperfect weld (subsequent inquiries proved that this shaft had a new end welded on from the vicinity of present fracture in 1891).

The surveyor who reported on the 5th May 1902 reported again on the 27th Aug. 1904 that

> The cause of the flaw is the result of imperfect welding at that point under the surface, thus leaving a latent defect. . . .

J. A. Hamilton, K.C. and *Leslie Scott* for the plaintiffs.—A latent defect was one of the perils insured against. The flaw was a latent defect which gradually extended itself to the surface of the shaft, and the plaintiffs sustained damage to the machinery. It was a hidden flaw which led to the fracture, and the damage comes within the words "loss of and (or) damage to . . . machinery . . . through any latent defect in the machinery. . . ." There was a damage other than the defect—viz., the damage caused by the shaft being condemned, and that within the currency of the policy. The latent defect by becoming known brought about a damage to the plaintiffs. There is no evidence to show when the defect developed. Even assuming that the defect existed or developed before the policy attached, the latent defect was discovered during the currency of the policy and caused loss or damage. In other words the loss or damage happened during the currency of the policy, and that being so the plaintiffs are entitled to recover under the policy of insurance.

Scrutton, K.C. and *Maurice Hill* for the defendants.—There was a latent defect, but there is no evidence of damage by it, or damage by it during the currency of the policy. The latent defect dated from the welding in 1891, but no crack or fracture was visible in April 1900.

Subsequent to that date the vessel had made various voyages to which the policy did not refer, and if the damage to the shaft caused by the development of the flaw took place during one of those voyages that loss would not have been within the policy. There is no evidence of loss during the time the policy attached. Nothing happened which would cause the flaw to develop during the time the vessel was covered. The only evidence is as to the discovery of loss, but the loss itself might have been in existence prior to the attaching of the policy. The insurance was against the happening of physical loss or damage, not against the discovery of defects or for the cost of a new shaft. The crack was the latent defect itself. The underwriters are not responsible for the latent defect itself nor for the particular piece of machinery in which it was found. The plaintiffs have failed to prove (1) that the damage happened to the shaft during the time the policy attached, and (2) that the cause of such damage was a latent defect. The underwriters accordingly are not liable for the cost of the new shaft.

WALTON, J.—This is a claim by shipowners against the defendant, an underwriter, upon a policy of marine insurance dated the 14th May 1902 for twelve calendar months from the 18th May 1902 to the 18th May 1903. The clause in the policy upon which the claim arises is a clause which is commonly called the "Inchmaree clause." It is called the "Inchmaree clause" because it was introduced into policies of insurance in consequence of the decision of the House of Lords in the case of *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser, and Co.*, the *Inchmaree* case, reported 6 Asp. Mar. Law Cas. 200 (1887); 12 App. Cas. 484. That was a case in which in consequence of a certain valve being closed during the working of a donkey-engine the donkey-pump was destroyed. It cost 72*l.* 10*s.* to replace the pump, and the shipowner claimed 72*l.* 10*s.* from the underwriters. The question there was whether the destruction of the donkey-pump was caused by a peril insured against. It was in fact caused by a valve being closed when the pump was being worked, and that valve was closed either through the negligence of the engineers of the vessel, or through a latent defect. The cause of the damage was the closing of the valve; then in working the pump with the valve closed, the pump was destroyed. Therefore the loss of the pump was in consequence of the closing of the valve, and the question was whether the closing of the valve was a peril insured against, and it was held that it was not—it was not caused by a peril of the sea, or by any of the other perils which were mentioned in the policy. In order to give a larger indemnity to shipowners under their marine policies of insurance after that case, the clause upon which the present claim arises was introduced.

The clause in the present case is in these words: "This insurance also specially to cover loss of and (or) damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breakage of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager." In Oct. 1902, during the currency of the policy in question, the vessel was docked at San Francisco for the purpose of being overhauled. The propeller was removed, the tail shaft drawn into the tunnel for examination, and then it was discovered that there was a fracture in the shaft about 3ft. forward of the after liner. It was a fracture, a crack, extending for a length of about, one of the surveyors says, 8in., and another says 13in. In October, during the currency of the policy, the fracture was discovered, and in consequence of that the shipowners—the plaintiffs—were obliged to replace the shaft by a new one, and they are suing the underwriter for the cost of the new shaft. As to how and when the fracture arose, there is little evidence. All that is known is that in 1891 this shaft was welded—a new piece was welded on to the old part of the shaft. In 1900 the vessel was surveyed and the shaft was drawn and was passed by Lloyd's surveyor, and therefore it may be inferred, assuming that the surveyor did his duty, that in 1900 the fracture was not visible. In May 1902 the policy attached, and in Oct. 1902 the crack was discovered. The surveyors say that from the appearance and direction of the fracture in their opinion the defect that caused the shaft to be condemned was the direct result of imperfect welding—probably of an imperfect welding when this shaft had a new end welded on to it in the vicinity of the fracture in the year 1891.

Those seem to me to be the facts, and that seems to me to be all the evidence there is. I think from the evidence that the fracture was caused by an imperfect welding made in 1891. Apparently the flaw arising from the imperfect welding had not made itself visible on the surface in 1900. At some time between the survey in April 1900 and Oct. 1902 the flaw which was not visible in April 1900 became visible on the surface in the form of a crack such as has been described. That is the inference which I draw from the evidence. That fracture having been found out during the currency of the policy, of which the defendant is the underwriter, the question is: Is the defendant liable to indemnify the plaintiffs in respect of the expenses they have been put to in replacing the shaft?

To answer that, I have to construe the clause. It seems to me quite plain that the effect and sense of this clause is not that the underwriters guarantee that the machinery of the vessel is free from latent defects, or undertake, if such defects are discovered during the currency of a policy, to make such defects good. It is plain that that is neither the intention of those who drew this clause nor the sense of the clause, reasonably read and reasonably construed. The underwriters agree to indemnify the owner against any loss of or damage to the hull or machinery through any latent defect, so that a claim does not fall within the clause unless there is loss of or damage to hull or machinery, or some part of the hull or machinery, and there is no claim unless that damage has been caused through a latent defect, or through one or other of the

causes that are mentioned in the clause—in this particular case—through a latent defect. Therefore there must be a latent defect causing loss of or damage to the hull or machinery, and causing that loss of or damage to the hull or machinery during the currency of the policy under which the claim is made. If those conditions are fulfilled the underwriters are liable to indemnify the owners in respect of that loss or damage. It seems to me that the loss or damage here is the fracture, the crack. Was that caused in consequence of a latent defect? There was an imperfect welding causing a flaw in the shaft, the flaw being the imperfection of the joining of two pieces which were welded together; that imperfect welding, or, in other words, that flaw, did not become visible on the surface until some time between April 1900 and Oct. 1902. That is the inference of fact which I draw from the evidence. The crack which is the damage, the only damage which is proved, is really nothing but the development of the flaw—that is, of the latent defect.

In my opinion, such development of a latent defect is not "damage to the machinery through a latent defect." In such a case I think the damage is not damage caused by the latent defect, but the latent defect itself and nothing more; a latent defect becoming patent is all that has happened, and it seems to me that the latent defect becoming patent is not within the words of this clause "damage to the machinery through a latent defect."

The argument for the plaintiffs is this, that the loss is a pecuniary loss which the owner suffers when he has to replace his defective shaft, and that therefore the underwriters of a policy which is current when the defect is discovered and when the owner therefore has to replace the shaft are the underwriters who have to pay; that it does not matter when the defect arose or when it developed. All that is important as to fixing the liability of the underwriters is when is it found out; and when it is found out, and the shaft has to be replaced, the defect has to be made good at the expense of the underwriters who happen to be underwriters of the ship at that time; so that whether it is the underwriters of the ship from May 1902 to May 1903, or from May 1903 to May 1904, or from May 1901 to May 1902, who have to pay, depends merely on the accident of when the flaw or crack was discovered, and when it so became necessary to spend the money.

That is the argument, but I cannot accept it. It seems to me that the construction which the plaintiffs seek to put upon the clause is most unreasonable. The only doubt which I think there is arises from certain words as to breakage of shafts to which I have referred during the argument. The clause covers loss of or damage to the hull or machinery "through the negligence of the master, mariners, engineers, or pilots." To me it is plain that "through" must there be read as meaning "in consequence of" or "caused by"; in other words, what is covered is loss of or damage to the hull or machinery caused by the negligence of the master, mariners, engineers, or pilots. Then the next part of the clause is this—"or through explosions, bursting of boilers, breakage of shafts." If "through" means "caused by" in the first part of the clause, one naturally would say it must mean the same in the second, and therefore it ought to be read "loss of or damage to the hull or machinery caused by explosions, bursting of boilers, and breakage of shafts." And if that is the correct reading, then the clause does not cover—I will take one of these things only—breakage of shafts, but covers only damage to hull or machinery caused by breakage of shafts. That is to say, if a shaft breaks and in consequence of that any other parts of the machinery or the hull get damaged, then the damage caused by the breakage of the shaft is covered by this clause. That construction of those words "damage caused through the breakage of shafts" does present a little difficulty, because I cannot help feeling some doubt whether it was not intended by this clause to make the underwriter liable not merely for the consequences of the breakage of the shaft, but for the breakage of the shaft itself if it happens during the currency of the policy.

But I think if the words are construed in the way that one does ordinarily construe the English language, giving the word "through" the same sense in the second part of the clause that it bears, and must bear, in the first, if the words are so construed, the underwriters are not liable for the breakage of shafts merely because there is a breakage of shafts, unless, of course, that breakage of shafts is caused by one of the perils insured against in the ordinary form of policy, but are only liable for the loss or damage to the hull or machinery caused by and consequent upon the breakage of the shafts. However, I have not to decide that. There may be some special considerations applicable to the construction of those words "breakage of shafts." But then comes the last part of the clause, which is that upon which the present claim is made, "or through any latent defect in the machinery or hull." I am quite satisfied that in that part of the clause "through" must be read as meaning "caused by" or "in consequence of." When the underwriters underwrote the steamer for twelve months from the 18th May 1902 to the 18th May 1903, with this clause in the policy, I am satisfied that they did not mean to say: "If during that year you find any defect in the machinery or hull we undertake to make that latent defect good." I am quite satisfied that the underwriters by this clause did not undertake any such liability. If the latent defect during the year of the policy causes any loss or damage, then they do undertake to indemnify the shipowner against that loss or damage. That is enough to dispose of this case, and if I am right in that, then the plaintiffs are not entitled to recover. But supposing I am not right in saying that there was no damage caused by a latent defect, and supposing I ought to find that the fracture the crack, was a consequence of the latent defect, the flaw, that they are not one thing, but that one is the consequence of the other, and that there is a crack caused by the latent defect, and that the crack is damage to the machinery within the clause, have the plaintiffs made out any case that the underwriter under this policy is liable? He is not liable unless the damage was caused by the latent defect during the currency of this policy. Was it caused between the 18th May 1902 and the 30th Oct. 1902, when it was discovered? Did the crack appear between

those two dates? Did the flaw cause the crack after the 18th May 1902? There is no evidence to show that it did. There is no evidence to show that the vessel was in any way in a different condition on the 30th Oct., when the crack was discovered, from that she was in on the 18th May 1902, when the policy attached. There is nothing to show that anything happened between the 18th May 1902 and the 30th Oct. 1902 that is material for the purposes of this case. As far as I know, the crack was there at the beginning of May 1902 just as it was in October. The machinery had not experienced any very serious strain or pressure—at any rate there is no evidence that it had. Taking even what seems to me in this case the view most favourable to the plaintiffs—namely, that the crack may be considered as caused by or being a damage to the machinery through the latent defect—there is nothing to show that that crack was so caused by the latent defect or arose at any time during the currency of the defendant's policy, and therefore on that view of the case it seems to me that the plaintiffs also fail, and that therefore there must be judgment for the defendant with costs.

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

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

May 23 *and* 31, 1906.

(Before Bigham, J.)

Hadji Ali Akbar and Sons Limited *v.* Anglo-Arabian and Persian Steamship Company Limited. (*a*)

Bill of lading—Breach of contract—"Bound for London"—Condition—Change of destination—Liberty to call at any port out of ordinary route; to deviate; to ship and reship by any other vessel belonging to defendant company or not—Excepted perils—Damage by perils of the sea, rain, spray, &c.—Transhipment.

Where goods were shipped under a bill of lading which contained the following provisions: "Shipped apparently in good order . . . on board the steamship . . . and bound, subject to the liberties hereafter mentioned, for London . . . with liberty . . . to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all of which ports shall be deemed to be included within the intended voyage . . . and to deviate for any purpose, with liberty either before shipment, or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not) or tranship or land and store . . . and thence reship on the said steamship or any other steamship (whether belonging to the company or not) . . . eighty-eight cases asafœtida . . . and to be carried and delivered (subject to the exceptions, limitations, and conditions hereinafter mentioned) in like good order and condition . . . at the port of London on deck at shippers' risk." The excepted perils included damage by perils of the seas, rain, spray. . . . Clause 16 of the conditions provided: "Should the ship for any cause whatever not call at the port for which the goods have been shipped, the owners . . . of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer," and such goods were delivered damaged in London, the fact that the voyage to London had been abandoned and the goods carried to Cardiff and there transhipped into a small steamer which carried them to London were held not to defeat the object of the bill of lading contract, and the shipowners were held entitled to rely upon the exceptions in the bill of lading.

The words "other line" in clause 16 *of the bill of lading mean merely another steamer, and not a "liner" as distinguished from a small trading steamer.*

Commercial List.

Action tried before Bigham, J. sitting without a jury.

The plaintiffs claimed damages for breach of contract and breach of duty in or about the carriage of goods by sea.

The facts as found were as follows:—

The plaintiffs were consignees of 528 packages of asafœtida which were shipped under a bill of lading at Bandar Abbas, in the Persian Gulf, by the defendants' steamer the *Arabistan* for London. The steamer took on board a quantity of other cargo, shipped at different ports in the Persian Gulf, some of which was destined for London, some for Cardiff, and some for the United States.

She sailed from the Gulf at the end of Nov. 1905 bound, in the first instance, for London.

On the 13th Dec. she arrived at Port Said. She left that port on the 14th making for Oran.

Between the 15th and 18th Dec. she encountered very bad weather, during which the asafœtida, which was carried on deck, was damaged by sea water. It was in respect of this damage that the plaintiffs sought to recover.

On the 19th Dec. the defendants, being then advised of the quantities of cargo on board the vessel for London and Cardiff respectively, determined to bring the vessel direct to Cardiff instead of London. They accordingly telegraphed from their head office in London to Oran to that effect.

The vessel arrived at Oran on the 23rd Dec. There the master received the telegram, and acting on the fresh instructions, he left Oran bound for Cardiff. His course until he got abreast of Finisterre was identical with the course to London, but at that point his course had to be altered in order to make for Cardiff.

The vessel arrived at Cardiff in due course, and there it was found expedient in the ship's interest to tranship the London cargo into a small steamer (the *Emperor*) chartered by the defendants for the purpose, and so to bring it to its destination.

The *Arabistan* then discharged her Cardiff cargo and proceeded to the United States.

(*a*) Reported by Trevor Turton, Esq., Barrister-at-Law.

The damaged condition of the plaintiffs' goods was discovered on their delivery in London, and the present claim was made.

One of the bills of lading was as follows:

Shipped, apparently in good order and condition by Syed Suleiman, on board the steamship *Arabistan*, . . . commander, or whoever else may be placed in command for the voyage, and bound, subject to the liberties hereafter mentioned, for London, the undermentioned goods with liberty, before or after shipment, to carry the same or any part thereof in craft for any part of the voyage, to transfer the same into craft to enable the said steamship to cross any bar, and to ship and reship the same at the sole risk of the owners thereof, to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all which ports shall be deemed to be included within the intended voyage, to sail with or without pilots, to tow and assist vessels in all situations, and to deviate for any purpose, with liberty either before shipment, or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or tranship or land and store, or put into hulk or craft, for such time as may be deemed expedient, and thence reship on the said steamship or any other steamship (whether belonging to the company or not), and with liberty, in the event of the steamship putting back, or into any port, or otherwise being prevented by any cause from commencing or proceeding in the ordinary course of her voyage, to proceed under sail or in tow of any other vessel, or in any other manner. S. S 32 cases asafœtida; J. S. 56 cases asafœtida (88) eighty-eight only stated as being marked and numbered as herein indicated, on deck at shippers' risk not responsible for contents, and to be carried and delivered (subject to the exceptions, limitations, and conditions hereinafter mentioned) in like order and condition, from ship's tackles, where ship's responsibility shall cease, at the port of London, or so near thereunto as she may safely get, unto H. A. Akbar and Sons, or to his or their assigns. Freight and primage for the said goods to be paid in cash on arrival, without deduction, at 35s. per ton of 40cwt., and to be considered earned, ship or goods lost or not lost. Average payableaccording to York-Antwerp Rules 1890.

The following are the exceptions, limitations, and conditions above referred to:

The ship is not liable for loss or damage occasioned by the act of God, perils of the sea, fire, enemies, pirates, robbers by land or sea, arrests and restraints of princes, rulers, port or other authorities, or people, breakage of shafts, collision, explosion, bursting or leakage of boilers or pipes, heat, steam, fire on board, in hulk, or craft, or on shore, wheresoever and whensoever occurring, jettison, barratry, accidents to or defects, latent on beginning of voyage or otherwise, in hull, tackle, boilers, machinery, equipment of ship, or craft, or their appurtenances, any act, error, neglect, or default whatsoever of pilots, master, or crew, or other servant of the shipowner, in the management, stowage, or navigation of the ship or otherwise, or of any other ship or craft, detention, delay, or loss of any description arising from strikes, or locks-out, of officers, engineers, seamen, workmen, or labourers, or any circumstances beyond the shipowner's control, and all and every the dangers and accidents of the seas, rivers, canals, and land carriage, and of navigation of whatever nature or kind, are excepted.

The ship is not liable for loss or damage arising from insufficient packing, torn, mended, chafed, weak, or fragile bags, bagging, cases, or wrappers, reasonable wear and tear of packages, inaccuracies, obliteration, indistinctness, or absence of marks, quality marks, portmarks, countermarks, numbers, address, or descriptions of goods shipped, leakage, breakage, pilferage, wastage, dust from coaling, discharging or loading on the voyage, rain, spray, sweat, rust, decay, effects of climate, land damage, vermin, evaporation, smell, leakage, or drainage, or contact with other goods. Fines and expenses, and losses by detention of ship or cargo caused by incorrect marking, or by absence, incompleteness, or incorrectness of description of contents or weight, or of any other particulars or certificates required by the authorities at the ports of loading or discharge or any intermediate port, upon either the packages or bills of lading or separately, shall be borne by the owners of the goods.

The ship is not liable for loss of or any damage to any goods capable of being covered by insurance, nor for risks of lighterage to or from vessel or warehouse, nor of transhipment or storage of any kind, notwithstanding that cost of the same may be paid by the ship, nor for loss of or damage to goods under through bill of lading, where the damage is done whilst the goods are not in the actual possession of the shipowner, nor in any case for more than the invoice, or declared or known value of the goods, less charges and brokerage, whichever shall be least. A clean receipt given by transhipment vessel or agents to exonerate the ship from all claims. Mate's receipts to be evidence of quantity of and of condition in which goods are received by this company from river steamers and craft. Any loss of or damage to goods for which the carrier is liable must be claimed against the company in whose custody they may be at time of accident, and no claim can be entertained unless written notice be given by consignee to steamer's agent before goods are taken delivery of and survey held within seven days of the goods being discharged.

The goods, while waiting shipment and transhipment, and also as soon as they are discharged over the ship's side, shall be at the risk of the shippers or consignees.

Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer.

Hamilton, K.C. and *Chaytor* for the plaintiffs. —The protection afforded by the bill of lading cannot apply, because the goods were carried on a voyage other than that contracted for. The bill of lading should be construed in view of what the parties contemplated. If the voyage was not the voyage contemplated by the parties, the protection in the bill of lading fails. Further, there was an abandonment of the destination. In the cases of *Le Duc* v. *Ward* (6 Asp. Mar. Law Cas. 290 (1888); 58 L. T. Rep. 908; 20 Q. B. Div. 475, per Lord Esher, M.R, at p. 480) and *Glyn* v. *Margetson* (7 Asp. Mar. Law Cas. 366 (1893); 66 L. T. Rep. 142; (1892) 1 Q. B. 337; see also Lord Herschell (1893) A. C. 351, at p. 355) there was no abandonment of the port of destination, and *à fortiori* the principle laid down applies where the port of destination is abandoned. Clause 16 of the bill of lading defines the power to tranship. That power is limited to transhipment into steamers belonging to the defendants, or other liners. The steamship *Emperor*, which ultimately carried the goods from Cardiff to London, was not a liner; it was a coasting vessel. The steamship *Emperor* did not belong to the

defendants. The voyage was to be to London, and the exceptions must be read subject to that stipulation. The protective clauses cannot apply where there has been a departure from an essential part of the contract. The bill of lading does not apply where there has been such a deviation as to make the whole voyage different:

Balian and Sons v. *Joly, Victoria, and Co. Limited*, 6 Times L. Rep. 345.

The voyage was changed on the 19th Dec. The voyage was changed when the shipowners intended to change it, although the same track was followed for some distance:

Arnold, Marine Insurance, 7th edit., par. 336.

The words "then in the port of Amsterdam" in a charter-party have been held to be a condition:

Behn v. *Burness*, 1 Mar. Law Cas. O. S. 329 (1863); 8 L. T. Rep. 207; 3 B. & S. 751.

So the words "bound for London" in this bill of lading should be held to amount to a condition, the principle being the same. The shipowner could not leave out London merely at will. That is a condition subject to the power to tranship for reasonable purposes of the voyage. The provision "subject to the liberties hereinafter mentioned" is similar in effect to that in *Glyn* v. *Margetson* (*ubi sup.*), and the principle is the same. That provision shows that clause 16 is a governing clause to the extent that the words "whether belonging to the company or not" must be read so as to be consistent with clause 16. The liberty in that clause is more restricted. Further, the terms of the bill of lading are ambiguous. The shipowner can only protect himself, provided he does so in unambiguous terms:

Borthwick v. *Elderslie Steamship Company*, 9 Asp. Mar. Law Cas. 513 (1904); 90 L. T. Rep. 187; (1904) 1 K. B. 319;

Rathbone Brothers and Co. v. *MacIver, Sons, and Co.*, 9 Asp. Mar. Law Cas. 467 (1903); 1903, 89 L. T. Rep. 378; (1903) 2 K. B. 378, per Vaughan Williams, L.J., at p. 384.

No protection can be claimed, because of the ambiguity of the terms. The defendants are liable for the loss, which was caused by damage to the goods by sea water.

Scrutton, K.C. and *Dawson Miller* for the defendants.—Under the bill of lading the defendants had the power (1) to deviate and call at any ports out of route, and (2) to substitute another vessel. Express words were used giving power to call at ports out of route, and upon those words the defendants rely, and not upon the fact that the route taken was part of the customary voyage:

Evans, Sons, and Co. v. *Cunard Steamship Company Limited*, 18 Times L. Rep. 374.

The defendants had the right to carry to London *via* Cardiff, either in their own or another vessel. The bill of lading protects the defendants because the damage was caused by an excepted peril—viz., perils of the sea. Even if the defendants had not the power to do what they did, the damage was caused by an excepted peril whilst on board the vessel named in the bill of lading. The defendants are protected from damage caused through negligence whilst on board the steamship *Emperor*.

Hamilton, K.C. in reply.—It is impossible to say how much damage was done prior to the change of voyage. The defendants, if they are to be protected, must prove how much damage occurred before the change of voyage:

Davis v. *Garrett*, 1830, 6 Bingham, 716.

Damage occurred before and after the change of voyage. The exemption from negligence ceased when the discharge from the steamship *Arabistan* took place:

Simon, Israel, and Co. v. *Sedgwick*, 7 Asp. Mar. Law Cas. 245 (1892); 67 L. T Rep. 785; (1893) 1 Q. B. 303.

The case of *Evans, Sons, and Co.* v. *Cunard Steamship Company Limited* (*sup.*) is not in point. The defendants could only be protected if the bill of lading contained a liberty to abandon the voyage; there is no such liberty.

Cur. adv. vult.

May 31.—Bigham, J.—This action is brought to recover damages for breach of a bill of lading contract to deliver goods in good order and condition. [Having stated the facts set out above, the learned judge continued:] The defendants resist the claim on the ground that the damage was due to causes for which by the terms of the bill of lading they are not responsible—namely, perils of the sea. The plaintiffs, however, contend that in the circumstances the defendants are precluded from relying upon the exceptions in the bill of lading. They say that by altering the destination of the vessel at Oran and by transhipping the cargo into the *Emperor* at Cardiff the defendants broke the bill of lading contract, and thereby lost any right they might otherwise have had to rely on the exceptions contained in it. The question turns upon the meaning of the bill of lading and upon the extent and effect of certain liberties reserved in it in favour of the shipowners. The document is described in its margin as the "homeward" bill of lading of the Anglo-Arabian and Persian Steamship Company Limited, and underneath this description is printed a long list of "consignees and agents" at different ports in England and the Continent of Europe, including London, Swansea, Cardiff, and many others. The document sufficiently indicates the kind of trade carried on by the defendants—namely, a trade from the Persian Gulf to different ports in the West. The margin also contains in writing particulars of the plaintiffs' shipment, showing that it consisted of a small parcel of goods on which the freight amounted to about 10*l*. The body of the bill of lading contained the following passages: "Shipped apparently in good order and condition by H. Mir Ahmed on board the steamship *Arabistan*, voyage 15 . . . and bound, subject to the liberties hereafter mentioned, for London, the undermentioned goods, with liberty . . . to proceed to or call in any order for any purpose at any port or ports whatsoever, although in a contrary direction to or out of or beyond the ordinary route, all which ports shall be deemed to be included within the intended voyage . . . and to deviate for any purpose, with liberty either before shipment or at any period of the voyage, and so often as may be deemed expedient, at any port or place, to ship the whole or any part by any other steamship (whether belonging to the company or not), or

tranship or land and store . . . and thence reship on the said steamship or any other steamship (whether belonging to the company or not) 528 packages asafœtida on deck at shipper's risk . . . and to be carried and delivered (subject to the exceptions, limitations, and conditions hereinafter mentioned) in like good order and condition, from ship's tackles, where ship's responsibility shall cease, at the port of London."

It is upon these so-called "liberties" that the defendants rely as justifying the change of destination at Oran and the transhipment of the plaintiffs' goods into the *Emperor* at Cardiff. I think the defendants are right. No doubt the object of the bill of lading contract is that the plaintiffs shall have their goods carried to London, and if the liberties were of such a kind that if put into operation they would defeat the object, it might be possible to disregard them in construing the document. They are, however, not of such a kind. It is to be remembered that the defendants' ships are general ships soliciting cargo in and about the Persian Gulf for carriage to different ports in the West. They may get much or little for this or that port, so little sometimes that, from a business point of view, it would be out of the question to send the ship there. Yet a bill of lading, such as the one sued on, would be issued to the shipper; he would, however, know quite well that if there happened to be little cargo on board for that port the ship would probably make for some other destination to which it would be more expedient to go, and would send forward his goods to their destination by transhipment. The shipper gets an advantage in this way, because, if the ship were bound by the contract to go to the port of destination of each particular parcel of goods carried, the rate of freight would necessarily be very high, so high, indeed, as frequently to prohibit trade.

It is for these reasons that the liberties relied on are inserted in the bill of lading. Their meaning is plain. They are reasonable, and instead of defeating the object of the shipper, they enable that object to be attained in the cheapest, and possibly in the only, way. I am, therefore, of opinion that the defendants were justified in altering the first destination of the vessel from London to Cardiff and that by so doing they in no way forfeited their right to rely upon the exceptions as to the perils of the sea.

Among the excepted perils set out in the bill of lading is one numbered 16. It is as follows: "Should the ship for any cause whatever not call at the port for which goods have been shipped, the owners or agents of the ship are at liberty to forward the goods from any port at which they may call to their port of destination by any steamer or steamers, either of their own or any other line. Should the goods for any cause be forwarded by steamer of any other line, shippers and consignees are to be bound by all clauses and conditions of the usual bill of lading of such steamer." Why this passage is included among the exceptions I do not know, but it is relied upon by the plaintiffs as limiting the shipowners' liberty of transhipment to a transhipment into a "liner" as distinguished from a small trading steamer such as the *Emperor*. I do not, however, think that the words "other line" are used here in any other sense than as meaning another steamer. Nor do I think that the passage has any relation to the liberties contained in the earlier part of the bill of lading, or that it can be read as cutting down or qualifying those liberties. In this case the damage done to the plaintiffs' goods was caused by an accident for which the defendants neither were by their contract nor have by their conduct made themselves responsible, and judgment must be in their favour, with costs.

Judgment for the defendants.

Solicitors for the plaintiffs, *Hollams, Sons, Coward,* and *Hawksley.*

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

July 23, *Aug.* 7 *and* 9, 1906

(Before Phillimore, J.)

Moel Tryvan Ship Company Limited *v.* Krüger and Co. Limited. (*a*)

Bill of lading—"All other conditions as per charter-party"—Negligence clause in charter-party—Charterers receiving address commission—Charterers presenting bills of lading without negligence clause for master's signature—Negligence—Implied contract of indemnity—Ship totally lost by master's negligence—Liability of shipowners to indorsees of bills of lading.

The plaintiffs, who chartered a vessel to the defendants, excepted themselves in the charter-party from "accidents of navigation . . . even when occasioned by negligence . . . of the . . . master," and the charter-party provided that "the master to sign clean bills of lading . . . at any rate of freight without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading"; "the necessary cash, if required by the master, for ship's disbursements to be advanced by charterers . . . to the master at loading port . . . up to 500l. on account of freight"; "the ship to be consigned at loading port to charterers or their agents, and to pay them a commission of 2½ per cent. on the estimated gross amount of freight on the cargo taken aboard, and in the event of the vessel, during the progress of the voyage . . . being obliged to put back, or to put into any port or ports, in case of accident or distress, the consignment of the cargo to be placed in the hands of charterers' agents."

The vessel loaded a cargo, and the charterers presented for the master's signature bills of lading which contained certain excepted perils, but did not contain the negligence clause. The clause "freight . . . and all other conditions as per charter-party" was inserted. The master and the charterers thought that that clause incorporated all the exceptions in the charter-party. On presentation of the bills of lading to him, the master asked whether that clause was inserted, and, on being told that it was, bills of lading were signed. The vessel sailed, and, whilst on the voyage, was totally lost through the master's negligence. The shipowners thereupon became liable to the indorsees of the bills of lading. In an action by the shipowners against the charterers (1) *for damages for breach*

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

of duty as agents, or (2) *on an implied contract to indemnify the plaintiffs:*

Held, the charterers neither as charterers nor agents had any duty in regard to the presenting of the bills of lading, but there was an implied contract between the charterers and the plaintiffs to indemnify the plaintiffs against the consequences of the master signing the bills of lading which the charterers procured him to sign, and therefore the charterers were liable.

Action tried in the Commercial Court before Phillimore, J., sitting without a jury.

The plaintiffs' claim was for damages against the defendants for breach of duty as agents for the plaintiffs, or on an implied contract to indemnify the plaintiffs.

The plaintiffs were shipowners and the defendants merchants in Burma. The plaintiffs chartered to the defendants a vessel to load and carry a cargo from Rangoon to Rio de Janeiro, subject to certain perils, one of which was accidents to navigation, even if due to the negligence of the master.

The charter-party was as follows:

Burma. Rice charter. Sail 98. London, April 22, 1903.—It is this day mutually agreed between Moel Tryvan Ship Company Limited . . . managers of the . . . *Invermore* . . . and Messrs. Krüger and Company Limited, of London, merchants, that the said ship . . . shall with all convenient speed proceed from Capetown after discharging cargo to . . . Rangoon . . . and there . . . shall load (always afloat) from the said charterers or their agents, at such customary berth as they may direct, a full and complete cargo . . . not exceeding 2500 tons net intake weight of clean rice. . . . And being so loaded shall therewith proceed to Ilha Grande for free pratique and then proceed to Rio de Janeiro . . . freight thereon being payable, on true delivery of the cargo, at and after the rate of twenty shillings and sixpence (20*s.* 6*d.*) sterling per ton of 1016 kilos. . . . (6) The act of God, perils of the sea . . . stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners. (7) The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight, without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading. . . . [Disbursements.] 18. The necessary cash, if required by the master, for ship's disbursements to be advanced by charterers or their agents to the master at loading port, say up to 500*l.* on account of freight. . . . [Address Commission.] 19. The ship to be consigned at loading port to charterers or their agents, and to pay them there a commission of 2½ per cent. on the estimated gross amount of freight on the cargo taken on board, and in the event of the vessel, during the progress of her voyage from loading port to port of discharge, being obliged to put back, or to put into any port or ports, in case of accident or distress, the consignment of the cargo to be placed in the hands of charterers' agents.

The vessel loaded a cargo at Rangoon, the defendants entering and clearing the vessel. The defendants presented the following bill of lading for the master's signature:

Shipped in good order and well conditioned by Krüger and Company Limited in and upon the good sailing ship called the *Invermore* . . . now riding at anchor in the port of Rangoon and bound for Ilha Grande for free pratique, and then to proceed to Rio de Janeiro, 14,109 bags cleaned Ngasein rice, No. 2 quality, each weighing 131lb. nett . . . to be delivered in the like good order and well conditioned at the aforesaid port of Rio de Janeiro (the act of God, the King's enemies, fires, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto order or to its assigns, freight for the said goods and all other conditions as per charter-party dated London, the 22nd April 1903. . . . Dated in Rangoon, the 11th July 1903.

The bill of lading did not contain the exception "accidents of navigation . . . even when occasioned by negligence . . . of the master," as in the charter-party, but both the charterers and the master thought that the clause in the bill of lading, "freight . . . and all other conditions as per charter-party" incorporated for all purposes every exception in the charter-party. When the bill of lading was presented to the master, he asked whether it contained the ordinary clause "conditions as per charter-party," and was informed by the charterers that it did. The master signed the bills of lading, and the vessel proceeded on her voyage until the 12th Oct. 1903, when by the negligence of her master she stranded and with her cargo became a total loss.

The plaintiffs alleged that it was the defendants' duty as charterers to present and as the ship's agents to present or see that there were presented to the master for signature bills of lading in accordance with the terms of the charter-party, but, in breach of their duty so to do, presented and (or) allowed to be presented to the master for signature bills of lading which did not incorporate the exception in the charter-party—viz., "stranding and other accidents of navigation excepted, even when occasioned by negligence of the master."

In consequence, as the plaintiffs alleged, of the defendants' failure to incorporate the exception in the negligence clause, the plaintiffs had been adjudicated in the Admiralty Division to be liable to the holders of the bills of lading.

The plaintiffs claimed an indemnity against the amount which they would have to pay by way of damages under the judgment, and against all costs of the Admiralty action and of the proceedings taken by the plaintiffs to limit their liability in the Admiralty action.

The defendants by their defence denied that either as charterers or under clause 19 of the charter-party or otherwise at all they became under any duty to the plaintiffs with regard to the form of the bills of lading to be presented to the master for his signature.

Alternatively the defendants alleged that if they were under any duty to the plaintiffs with regard to the form of the bills of lading, then such duty was only to use reasonable care and skill to see that the bills of lading appeared to incorporate the terms of the charter-party, and that there was no breach of such duty. Further, the defendants alleged, that the damages were not caused directly or at all by any act or default of the defendants.

Scrutton, K.C. and *Bailhache* for the plaintiffs. —The master was bound to sign the bills of lading if the decision was correct in *Hansen* v. *Harrold Brothers* (7 Asp. Mar. Law Cas. 464 (1894); 70 L. T. Rep. 475; (1894) 1 Q. B. 612).

As long as the bills of lading remained in the charterers' hands they were mere receipts (*Rodocanachi* v. *Milburn*, 6 Asp. Mar. Law Cas. 100 (1886); 56 L. T. Rep 594; 18 Q. B. Div. 67), but by indorsement would impose on the shipowners a larger liability than that contained in the charter-party. In the charter-party the shipowners were exempt from accidents of navigation, even if due to the negligence of the master; but the charterers required and obtained the master to do an act which imposed on the shipowners the liability to the indorsees of the bill of lading of the master's negligence. There was therefore an implied contract of indemnity by the charterers. It makes no difference whether the indemnity is implied or express as in

Milburn v. *Jamaica Fruit Importing and Trading Company of London Limited*, 9 Asp. Mar. Law Cas. 122 (1900); 83 L. T. Rep. 321; (1900) 2 Q. B. 540.

If the master was bound to sign the bills of lading and carry out a ministerial act, there was an implied indemnity. If the bills of lading were signed on request, there was an implied indemnity. The following cases are in point:

Sheffield Corporation v. *Barclay and others*, 93 L. T. Rep. 83; (1905) A. C. 392;
Birmingham and District Land Company v. *London and North-Western Railway Company*, 57 L. T. Rep. 185; 34 Ch. Div. 261;
Dugdale v. *Lovering*, 32 L. T. Rep. 155; L. Rep. 10 C. P. 196.

The charterers, who under clause 19 of the charter-party had the ship consigned to them, acted as ship's agents, and received a 2½ per cent. address commission. They ought to have informed the master as to what the effect would be of his signing such a form of bill of lading. There was a breach of duty on the part of the charterers. The master inquired of the charterers whether the bills of lading contained the usual clause "all conditions as per charter-party," and, on being told that it was included, signed the bills. The charterers' breach of duty was the cause of the damage; the plaintiffs therefore had a good claim against the defendants.

J. A. Hamilton, K.C., *Montague Lush*, K.C., and *Chaytor* for the defendants.—There was no express indemnity, and no implied indemnity to protect the shipowners against damage resulting from a mistake of law can be inferred from the presenting of the bills of lading under the circumstances. The master had the opportunity of inspecting the bills of lading, and, exercising his judgment, accepted them in the form presented. There was no obligation on the master to sign the bills of lading as presented. The master's duty was not merely ministerial as in *Sheffield Corporation* v. *Barclay* (*ubi sup.*). Both the charterers and the master thought that the inclusion of the clause "all conditions as per charter-party" provided what was meant by the charter-party. The case of *Hansen* v. *Harrold Brothers* (*ubi sup.*) is not in point. There was no breach of duty in presenting the bills of lading. The charterers were only the owners' agents for the purposes of entering and clearing the ship. That imposed no duty on them as to the form of the bills of lading to be presented. The master and the defendants considered that the clause "all conditions as per charter-party" incorporated for all purposes every exception in the charter-party. Negligence means breach of duty, but here there was no duty on the defendants. Even if there was a duty to take care, it could not be said to be negligence for a layman to take the view that the words "all conditions as per charter-party" included all the conditions in the charter-party when that view had been taken by one of the learned judges:

Diederichsen v. *Farquharson Brothers*, 8 Asp. Mar. Law Cas. 333 (1897); 77 L. T. Rep. 543; (1898) 1 Q. B. 150.

There is no law which says that if there is a rule of construction in England unknown to a merchant in Burma then that merchant is negligent. The shipowners, or their protection club, should have known the law, but it could not have been expected of the defendants. Even assuming that the defendants were negligent in presenting the bill of lading, the damage was not caused by that negligence, but by the master's subsequent negligence in grounding the ship, for which the defendants are not liable:

Stumore, Weston and Co. v. *Breen*, 12 App. Cas. 698.

Where two persons are negligent, the one who causes the bringing about of the damage is liable. The grounding was the ultimate cause. The defendants were not negligent. The master was negligent in signing a bad bill of lading and in stranding his ship. The defendants accordingly are not liable to indemnify the plaintiffs, nor liable in damages. The following cases were also cited:

Brown and others v. *Powell Duffryn Steam Coal Company Limited*, 2 Asp. Mar. Law Cas. 578 (1875); 32 L. T. Rep. 621; L. Rep. 10 C. P. 562;
Attorney-General v. *Odell*, 92 L. T. Rep. 621;
Ex parte Ford, 16 Q. B. Div. 305.

Cur. adv. vult.

Aug. 9.—Phillimore, J.—This case discloses startling divergencies between the views and practice of men of business and the law as administered by the courts. Considering the efforts that have been made by the courts to keep in touch with commercial matters and abreast of the condition of business, and, as I should have said, by commercial men to keep themselves informed of the decisions of the courts, the divergencies are surprising. The point arises in this way. The plaintiffs let their ship to the defendants on a charter-party, under which she was to load a cargo at Rangoon to be carried to and delivered at Rio de Janeiro, subject to certain perils, one of such perils being accidents of navigation, even if due to the negligence of the master. The master was to sign clean bills of lading as presented without prejudice to the charter-party at any rate of freight, but not at lower than chartered rate, unless difference is paid before signing. The ship was to be consigned to the defendants at Rangoon, and they were to receive an address commission of 2½ per cent. Also in the event of her putting into a port of distress the cargo was to be consigned to the defendants' agents. The master might, if he so desired it (as it happened he did not), require an advance up to 500*l.* from the defendants for the disbursements at Rangoon on the usual terms as to interest and insurance. These are all the material provisions. The ship was loaded, and

the defendants presented to the master bills of lading, which contained a very limited clause as to excepted perils, omitting in particular the negligence clause, but which had also the words "freight and all other conditions as per charter-party, dated London, the 22nd April 1903." It appears that the defendants had a rubber stamp with which they could put on the negligence clause, but were not in the habit of putting it on unless asked, because, as they said, some shipmasters objected; that sometimes they found shipmasters carrying their own stamps and putting on the negligence clause themselves; and that in these circumstances they were content to go on printing forms of charter-party, and bill of lading, each bearing their own names, with a clause as to excepted perils in the first much wider than the similar clause in the second. The explanation given was that it was supposed that the words in the bill of lading, "all other conditions as per charter-party," incorporated for all purposes every exception in the charter-party. Why, if so, there should be any exception in the bill of lading was not explained. However, the master, who was examined before me, had the same opinion. All he asked when the bill of lading was presented to him was whether it contained the clause of incorporation, and he thought that, if it did, the negligence clause became part of the bill of lading. Now, the startling fact is that a series of cases, beginning with *Russell* v. *Niemann* (1 Mar. Law Cas. O. S. 72 (1864); 10 L. T. Rep. 786; 17 C. B. N. S. 163) and culminating in *Serraino and Sons* v. *Campbell* (7 Asp. Mar. Law Cas. 48 (1890); 64 L. T. Rep. 615; (1891) 1 Q. B. 283), decided on this very negligence clause as long ago as 1890, and *Diederichsen* v. *Farquharson Brothers* (*ubi sup.*) have settled that this clause of incorporation has no such effect when the bill of lading gets into other hands than those of the charterers. It is also somewhat startling that a further reason why all parties at Rangoon were not particularly careful in this matter is that the negligence clause has become in the last twenty years (I fix the date from my own experience) so common in English shipping documents that English men of business have almost forgotten the common law of England and of most civilised countries, and it does not enter into their heads that a cargo owner may sue the shipowners for damages for negligent navigation. It was even suggested that underwriters have so given up reclaiming on being subrogated to the cargo owners and suing the ship that it makes no difference in the rate of premium on cargo whether there is or is not a negligence clause in the bill of lading. However, the unexpected happened. The ship struck on a reef, and was totally lost with her cargo. The holder of the bill of lading, or his underwriters, took what I could see many of the plaintiffs' witnesses thought to be a mean advantage of the omission of the negligence clause in the bills of lading — proved negligent navigation by the master, and recovered judgment against the shipowners for the sum of upwards of 18,000*l.*, which can be reduced by the provisions for limitation of liability to something over 12,000*l.*

For this sum the shipowners sue the defendants claiming that they are liable either for negligence in presenting and procuring the signature of the master to a bill of lading without the negligence clause or upon an implied contract by them to indemnify the shipowners against the consequences of the master signing a document which they procured him to sign.

With regard to the claim for negligence, it cannot arise unless the defendants had some duty in this respect to the shipowners. They had no such duty as charterers, and after consideration I am of opinion that they had no such duty as agents. It is true that the vessel was to be consigned to them, and that they were to have an address commission. Such commission was, I imagine, in early days a benefit to the charterers. It may have been even something in the way of profit out of freight made by the sellers behind the back of the purchasers. But address commission is now so common that all business men know of it. It is rather discount than remuneration for agency; and in the particular trade the intelligent gentlemen of South America see that the buyers get it. The charterers do get a benefit from having the ship consigned to them, but only in this way. They get a certain control over the ship and regulate the clearances. And it seems that the only service which is expected of them in return is to enter and clear the ship free of charge. There seems trace of a survival of the old idea of giving some pecuniary benefit to the charterers through the medium of an agency in the clause making them agents at the port of distress. But at the port of loading their benefits and their duties, at any rate in this trade, seem to be confined within the narrow limits which I have mentioned. This being so, I do not think that they were acting as ship's agents when they presented or allowed to be presented the bill of lading. The only way in which their position as agents for certain purposes comes into this case is that I must remember that when as charterers they presented the bills of lading they knew that the master had no agent with whom to consult. I should add that if I thought the charterers had any duty as ship's agents here I should have no hesitation in finding that they neglected it. To have a printed form of charter no doubt usual in the trade, but which you accept and print in your own name, and then to prepare your own bill of lading bearing your own name with a clause of excepted perils so that you do not apparently rely wholly upon the excepted perils in the charter-party, and yet to have a clause so far short of that in the charter-party, to treat the insertion of the negligence clause or its absence as a quite unimportant matter, stamping it on when asked, allowing captains to stamp it on when they pleased, and omitting it when not asked just as if it made no difference, seems to me conduct as casual and careless as can well be imagined. Still, if they had no duty the charterers may be as careless as they please. Then comes the plaintiffs' other way of making out their claim. It is put thus: The charterers tendered a bill of lading; it is for their interest, not the shipowners', that there is a bill of lading; the master must either sign any bill of lading which is presented to him (which seems to be the opinion of Lord Esher in *Hansen* v. *Harrold Brothers* (7 Asp. Mar. Law Cas. 464 (1894); 70 L. T. Rep. 475; (1894) 1 Q. B. 612, at p. 619, and possibly of Davey, L.J., at p. 621) or he must at

least justify a refusal. It turns out that the bill of lading which the charterers invited the master to sign is one which will involve his owners in a liability which they ought not to be asked to incur. Are not the shipowners entitled to an indemnity against this liability?

The law is laid down by Cotton, L J. in the case of *Birmingham and District Land Company* v. *London and North-Western Railway Company* (57 L. T. Rep. 185; 34 Ch. Div. 261, at p. 272): "If A. requests B. to do a thing for him, and B. in consequence of his doing the act is subject to some liability or loss . . . the law implies a contract by A. to indemnify B. from the consequence of his doing it." It is to be observed that in this statement of the law there is no reference to the consideration that the liability or loss may be due to the fact that what B. does at A.'s request is an injury to C. In the simple case no such consideration arises. A. may be asking B. as his agent to contract as a principal with C., or he may be a *cestui que trust* asking his trustee to invest in shares not fully paid up. But in several of the cases where an indemnity has been implied the act which B. does at A.'s request is an injury to C. Public policy then has to be considered. A conspiracy between A. and B. to injure C. gives B. no right of action against A. when C. turns the tables on him. Hence to allow B. to have an indemnity, the act, though in fact injurious to C., must be, as far as B. knows, at the time innocent. Hence arises the qualification that it must not have been "manifestly tortious to his knowledge" as stated in *Dugdale* v. *Lovering* (*ubi sup.*), and accepted by the Lord Chancellor in *Sheffield Corporation* v. *Barclay* (*ubi sup.*). I think that Lord Davey's words "without any default on his own part" are intended to convey the same idea. Hence also possibly the insistence in that case that B. must be under a duty imposed by common law or statute to do that which upon the facts as he then knows them A. can rightly require him to do. But when, as in this case, that which the charterers asked the shipowners by their master to do involved no injury to a third party, but merely rendered them subject to some liability or loss, the first of the two conditions which I have mentioned is certainly not needed. I doubt whether the second is. But to this point I will return.

The case before me would have been like *Dugdale* v. *Lovering* and *Sheffield Corporation* v. *Barclay* if the shipowners had made the master repay them what they had to pay to the cargo owners and the master had then sued the charterers for an indemnity, because they had induced him to injure a third party—namely, his owners—by signing an insufficient bill of lading. In such an action the master would require to have shown that "the act was not manifestly tortious to his knowledge" or had been done "without any default on his own part." Whether in that event he could have successfully relied on his ignorance of the law and whether misconstruction of a bill of lading is ignorance of law are matters which it is not necessary to discuss. This case is not that case. I have said that I doubt whether it is essential to an indemnity in a case like the present that B. should have been called upon by A. in virtue of some duty, whether imposed by common law or statute or private contract does not matter. But if it is essential, it seems to me that such a duty was invoked. The provision in such charter-parties as this, that the master shall sign bills of lading without prejudice to the charter-party, has, as I have said, received a construction which may make it compulsory upon him to sign any bill of lading tendered to him by the charterers (except, of course, a bill of lading which incorrectly stated the character or quantity of the goods shipped under it). Even if he be not compelled to sign any bill of lading, there is some form of bill of lading which he is bound to sign, and the charterers represented to him that this form was that form. He accepted their statement. His contractual duty was invoked. I do not see that the charterers can complain that he did not know that it was wrongly invoked. The last point taken by the defendants is that the loss which the shipowners have suffered is not due to the master signing an insufficient bill of lading, but to his subsequent negligent navigation. The case of *Milburn and Co.* v. *Jamaica Fruit Importing and Trading Company* (*ubi sup.*) is a direct authority against this contention. There the indemnity was express; here I hold it to be implied. Once get the indemnity, and the consequences are the same. But I should need no authority to reject this contention. The shipowner had a right to be protected against the negligence of his servant. This was what he stipulated for. The excepted peril in question was not a loss by an accident of navigation. It was a loss by an accident of navigation brought about by the negligence of the master. If a shipowner had commissioned an insurance broker to effect for him an insurance against such an accident, and the broker had omitted to do so, and the cargo had been lost, the broker could not have said to him, "The loss to you is not due to my carelessness, but to the bad navigation of your master." The argument rests upon a confusion between two losses, the loss of the cargo and the loss in money to the shipowner. Upon the whole, I give judgment for the plaintiffs for the amount of their limit of liability at 8*l.* per ton, with interest, and the costs of the limitation action, and for the costs of this action.

Judgment for the plaintiffs.

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

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Tuesday, May 8, 1906.

(Before Sir GORELL BARNES President, and BARGRAVE DEANE, J.)

THE NORTHUMBRIA. (*a*)

Damage to cargo—Unseaworthiness—Onus of proof—Bill of lading incorporating negligence clause in charter-party—"All other conditions as per charter-party, including negligence clause."

In an action for damage to cargo, if the shipowner makes out a prima facie *case of perils of the sea, the burden of proving that the shipowner is not*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

entitled to the benefit of the exception on the ground of unseaworthiness is upon the cargo owner.

Where a bill of lading contained the words "all other conditions as per charter-party, including negligence clause," and the charter-party stated that "the steamer is in no way liable for the consequences of . . . perils of the seas . . . Neither is the steamer answerable for losses occasioned by . . . unseaworthiness or latent defect in hull, machinery, or appurtenances, whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager . . .":

It was held in an action for damage to cargo that the bill of lading incorporated the whole of the above clause in the charter-party, and therefore the shipowner was not liable for unseaworthiness unless it resulted from want of due diligence.

ACTION for damage to cargo.

The plaintiffs were F. Lenders and Co.; the defendants were Lamport and Holt, the owners of the steamship *Northumbria*.

The case came before the court on appeal from a decision of the County Court judge at Hull sitting in Admiralty, by which he held the shipowners liable for certain damage done to a cargo of linseed shipped on board the *Northumbria*.

By a charter-party dated the 5th Dec. 1903 Simon Weiler, of Rosario, chartered the steamship *Northumbria*, a vessel of 2009 tons gross and 1243 tons net register, from Lamport and Holt, her owners.

The following was a clause in the charter-party:

11. The steamer is in no way liable for the consequences of the act of God, perils of the seas and rivers, fire, barratry of the master or crew, the acts of enemies, pirates, or thieves, arrests and restraints of princes, rulers, and people, war, epidemics, civil commotion, political disturbances, quarantine restrictions of whatever nature or kind, collisions, strandings, and other accidents or errors of navigation, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners. Neither is the steamer answerable for losses occasioned by explosion, bursting of boilers, breaking of shafts, unseaworthiness or latent defect in hull, machinery, or appurtenances, whether existing or not before or after the commencement of the voyage not resulting from want of due diligence by the owners of the steamer, or by ship's husband or manager; nor for decay, heating, moisture, putrefaction, rust, sweat, vermin, change of character, drainage or leakage arising from the nature of the goods, insufficiency of strength of packages, nor for loss occasioned by the prolongation of the voyage, obliteration or absence of marks, numbers, addresses, or description of goods, nor for loose grain, corruption of cargo, or broken bags.

Simon Weiler shipped bags of linseed on the *Northumbria* to be carried to Hull, and received bills of lading dated the 27th and 28th Dec. 1903, under which the shipowners undertook to deliver them

In the like good order and condition at the aforesaid port of Hull (the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted) unto order or to their assigns on paying freight for the said goods, and all other conditions as per charter-party, including negligence clause, dated Buenos Ayres, the 5th Dec. 1903.

The bills of lading were indorsed to F. Lenders and Co., the plaintiffs, who took delivery of the cargo on the arrival of the vessel at Hull in Feb. 1904, when it was found to be damaged.

On the 10th Feb. 1905 F. Lenders and Co. instituted proceedings in the County Court at, Hull to recover the damage they had sustained claiming, as holders of certain bills of lading dated the 28th and 29th Dec. 1903, in respect of certain bags of linseed shipped on board the steamship *Northumbria* to be carried to Hull, against the defendants, for damages suffered by them in consequence of injury to such linseed, through the unseaworthiness of the said steamship, and the breaches of duty or contract of the defendants or their servants in respect of the carriage of such linseed.

The defendants delivered a defence on the 17th May 1905, by which they alleged that the damage to the cargo was occasioned by sweat due to the inherent vice of the cargo, for which the defendants were not responsible, or by excepted perils, or by negligence, and that by the terms of the charter and bills of lading the defendants were not responsible for the damage.

The perils of the seas which were alleged to have caused the damage were that during the voyage heavy seas and the straining and labouring of the vessel strained and depressed a deck-beam and strained and cracked a deck-plate and tore the steam pipe covers from the deck, damaged the iron chairs and brackets in the way of No. 3 hold, and split the tarpaulins covering No. 3 hatch.

On the 22nd May 1905 the case was heard before the County Court judge.

The plaintiffs called two surveyors and an engineer who said that the crack in the plate, which let the water into No. 3 hold, was due to corrosion, and that they saw no signs of straining.

The defendants called the master, mate, and boatswain of the *Northumbria*, who all spoke to the vessel meeting with bad weather on her voyage from Rosario to Hull, and they also proved that although the weather before leaving Rosario had been very wet and the decks had been flooded no water had got through the deck.

The defendants further called three surveyors, who alleged that the plate was not corroded to the extent alleged, and that in their opinion it was cracked by straining, and two men who had repaired the plate, who swore that the plate was in good condition and was of its original thickness.

At the end of the evidence the County Court judge stated that he accepted the evidence of the defendants as to the thickness and condition of the plate, and gave leave to both sides to call further evidence on the question whether, if the plate was, in the circumstances, cracked through straining, that constituted unseaworthiness.

The case again came before the County Court judge on the 13th Dec. 1905, when the plaintiffs called a surveyor who said that the damage to the plate could not have been caused by heavy weather, and the defendants called a naval architect and a surveyor, who stated that the ship was, in their opinion, seaworthy, and that the

damage to the plate was caused by the straining of the ship. They also put in a letter from the secretary of Lloyds' register, which stated that in the view of the committee of Lloyd's Register the vessel was fit to carry dry and perishable cargoes, and was, therefore, a seaworthy vessel.

On the 17th Jan. 1906 the County Court judge delivered the following judgment:

I have already stated that on the question of fact as to what the condition of the cracked plate was I believe the evidence called by the defendants and do not believe that of the plaintiff's experts. It is extremely discreditable that on a question of fact of this sort there should be such a conflict of testimony. Half a dozen persons of position, and on whose evidence the court ought to be able to rely, and who all saw the plate, say, as to two at least of them, that it was corroded away to the thinness almost of a sheet of paper, one-thirty-second of an inch; whilst others say it was not corroded away at all, and though in the ordinary course of things it had wasted slightly, the ship having been built in 1888, and the plates, therefore, having had the wear and tear of some sixteen years, there was nothing abnormal in this and nothing to attract attention or to call for repair or alteration. I accept this view substantially on account of the nature of the repairs ordered and carried out at the time. At the same time it is most unfortunate that the defendants did not, when some months afterwards the cracked plate together with the patch on the top of it were removed, preserve the pieces, as an actual inspection of the cracked plate might have thrown valuable light as to the way in which it got cracked. As it is I can only draw inferences as to the cause from the evidence as to what took place. Seeing that this particular question of seaworthiness did not seem to be present to the minds of the parties at the original hearing I gave leave to both parties to call further evidence and reargue the case. But I have heard nothing to alter my opinion as to the law applicable. In *Hamilton* v. *Pandorf* (57 L. T. Rep. 726; 6 Asp. Mar. Law Cas. 212 (1887); 12 App. Cas. 518), which was much relied on for the defendants, it was pointed out by Lord Halsbury that in that case it was common ground that the ship was seaworthy when she started, and that there was no negligence on the part of the crew to render the owner liable. Here the first of these propositions is the question to be decided both as to fact and law. All went well with the vessel till she reached St. Vincent, where she called, probably for coals. After leaving that place she met with bad weather, but nothing extraordinary, having regard to the time of year and the locality, for a mid-winter voyage in the North Atlantic. The plate must have developed the crack soon after leaving St. Vincent, at all events a considerable time before the cargo was discharged from the condition of rottenness and stench in which it was found to be, and most probably on the 27th Jan., when some other damage, not of a structural nature, was observed on deck when the covering of a steam pipe alongside, but on the other side of, the hatch was forced up. This damage, however, would require no very great force of sea, as it was only a cover, and open at the bottom, so that the water would get underneath it, and, not finding any immediate exit, a very moderate sea would exert a considerable force. The captain's suggestion was that the ship running with the sea on the quarter had taken on board an abnormally heavy sea over the quarter, or what would formerly have been called, had been pooped, and that the weight of water at this particular place not being able to escape forward in consequence of the bridge deck, or rather the bulkhead between the bridge deck and the main deck, preventing it running forward, actually stove in the deck, bending the beam below it, and so cracking the plate attached to the beam. If this theory were correct it would still be a question whether a vessel so built as to be liable to such an accident could be considered seaworthy; but, unfortunately for the theory, it appeared from the mate's evidence, supported by the log, that the vessel was steaming head to wind and sea, and therefore any exceptionally heavy sea shipped would come over forward and its force and volume be broken by the forward bulkhead on the bridge deck or house, and the particular place where the crack was forward would be rather specially sheltered from its force. If, however, the court could have seen the plate and had found it was bent downwards it might have given some countenance to the theory of how the accident happened, though it would hardly have shown the fitness of the ship. It is true that there is evidence that the beam in the vicinity of the crack was not true, and had, when repairs were effected, to have a filling piece put in; but there is also evidence that this happens in the original construction of ships, and is not a matter of much importance if the plating is properly riveted. On the other hand, when we consider the position of the crack itself, almost in a line with the fore part of the hatch, and in the deck plate immediately adjacent to the much stouter and, therefore, more rigid stringer plate, which extends three feet from the ship's side, and, that of course, there was no plating in the hatchway, it is clear that if with a heavy Atlantic head sea the forward part of the vessel only be for a moment water-borne by the body of a wave, a great strain will be brought on the section of the vessel which is not entirely water-borne, and we learn from the evidence that in vessels of considerable length more recently built than this one the effect of this strain is guarded against at this particular part of the ship by thickening the plates just at the corners of the hatches. The particular danger must depend in each case, of course, on the size of the wave and the weight and length of the ship and weight and disposition of the cargo. The waves encountered by this ship on this voyage were only what might be expected to be met with in a mid-winter North Atlantic gale, and, if this ship when fully laden with cargo was not in fact strong enough, I do not see how it can be said that she was seaworthy when laden with that cargo for that voyage. That the weather was not exceptional is also shown by the fact that, though there was plenty of sea room, it was not considered necessary to lie to, either bow on, as used to be customary in very bad weather, or quarter on, which is accepted now as the better plan with steamers of modern type, but that the ship was steaming head on to the sea in the prosecution of her voyage. It is perfectly true that she had passed her survey in 1900, and that there was nothing to lead the owners to suppose that she was not fit, and if I were dealing with a case under the Harter Act the owners, in my opinion, would be exonerated; but here it is not a question of any neglect on the part of the owners, but a question of a warranty of seaworthiness, and I cannot distinguish the case from that of *The Glenfruin* (52 L. T. Rep. 769; 5 Asp. Mar. Law Cas. 413 (1885); 10 P. D. 103). Butt, J. there says: "I find as a fact that when the *Glenfruin* started from Hankow the shaft was not reasonably fit for the voyage—in other words, that the ship was unseaworthy. On the second question—viz., that relating to the nature and extent of the warranty of seaworthiness—I am, I think, concluded by authority. I have always understood the result of the cases from *Lyon* v. *Mells* (5 East, 428) to *Kopitoff* v. *Wilson* (3 Asp. Mar. Law Cas. 163 (1876) to be, that under his implied warranty of seaworthiness the shipowner contracts not merely that he will do his best to make the ship reasonably fit, but that she will really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Company* (3 Asp. Mar.

Law Cas. 516 (1877)." Altering the words shaft to plate, I adopt the actual words in that case. Moreover, though I have formed a definite opinion as to the cause of the plate cracking, the cause is not important if the plate did crack from some strain or blow of a not extraordinary nature whilst the vessel was steaming ahead in such weather as she might reasonably expect. On these facts the further question arises whether the owners are free from liability by the terms of the contract contained in the bill of lading. If I had to deal with the construction of the charter-party I have no hesitation in saying that the owners would be exonerated, as they have been guilty of no negligence ; the ship has been looked after in the ordinary way, the decks being chipped and painted in the customary way and at the usual times, and the ship having passed her survey at Lloyds' in 1900, and being prepared to do so again shortly after the accident; but I have to decide whether this condition of qualified seaworthiness is incorporated in the bill of lading, and I am of opinion it is not. To quote from the leading case, *Diederichsen* v. *Farquharson and Co.* (77 L. T. Rep. 543 ; 8 Asp. Mar. Law Cas. 333 (1897) ; (1898) 1 Q. B. 150), Smith, L.J. says : "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* (case in House of Lords not reported) (quoted by Lopes, L.J. in *Serraino* v. *Campbell*, 7 Asp. Mar. Law Cas. 48 (1890). 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* 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* (2 Mar. Law Cas. O. S. 72 (1864), reported as to this part of the judgment in 34 L. J. 10, C. P.), 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 the 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 consignees 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, M.R. and Lopes, L.J. Again, in the year 1895, in *Manchester Trust* v. *Furness, Withy, and Co.* (8 Asp. Mar. Law Cas. 57 ; 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. In the same case upon appeal Lindley, L.J. said : "It is quite true that the bill of lading refers to the charter-party to the extent which I have mentioned." 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* (2 Mar. Law Cas. O. S. 346 (1866) ; 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." It is true that the bill of lading in this case contains in addition the words "including negligence clause," and in the charter-party the sentence relating to negligence (a well-recognised and established form of exception) is contained typographically in a paragraph numbered 11, which also has the sentence relating to seaworthiness, but I cannot see that this latter sentence is included in the expression used in the bill of lading. In form it is disjunctive in the charter-party, beginning as it does with the word "neither," and the rule or maxim of law that *Expressio unius exclusio alterius* applies. The dictionary definition of "clause" I find to be (1) "a separate portion of a paragraph," or (2) "a portion of the sentence, including the subject and its predicate." Tried by either of these standards the qualified exception of unseaworthiness in the charter-party is not covered by the words in the bill of lading, and therefore, finding as I do that she was unseaworthy to carry the cargo she had in the ordinary incidents of a North Atlantic mid-winter voyage, I must find the shipowners responsible for the damage sustained by the cargo in consequence of that unseaworthiness. The costs will follow the event, but having regard to the fact that I have rejected the evidence of the plaintiff's surveyors, for reasons already given, and have decided in the plaintiff's favour on grounds entirely independent of the evidence of those persons, I feel it would be unjust to saddle the defendants with the expense of that evidence, and I disallow the costs of those witnesses called at the original hearing. I wish also to observe that though I, sitting in a court of inferior jurisdiction, feel myself bound by the case of *The Glenfruin* (*ubi sup.*), yet I think it may possibly be distinguished by a court of co-ordinate jurisdiction on the ground that there was there an original flaw in the shaft and there is no such evidence with regard to this plate, and that a shaft being in very constant turning motion such a flaw was bound to develop, and, seeing that such flaws are common enough, a shipowner should either renew his shaft more frequently or have a spare piece of shafting to put in in case of accident. I do not say, of course, that there is such a distinction, but I desire to point out that the possibility has not escaped my notice, and the very recent case of *McFadden Brothers and Co.* v. *Blue Star Line Limited* (10 Asp. Mar. Law Cas. 55 (1905) does not militate against this view, as there the unseaworthiness which occasioned the damage was found as a fact to have been the leaving open of a sluice valve which might have been closed, and which, if closed, would have prevented the damage.

The defendants gave notice of appeal on the 20th Jan. 1906, and the appeal was argued before the Admiralty Divisional Court on the 8th May 1906.

Laing, K.C. and *Dawson Miller* for the appellants, the owners of the *Northumbria*.—

The evidence does not establish that the ship was unseaworthy. Even if she was, the owners are protected by the incorporation of the negligence clause in the charter-party in the bill of lading. The loss really resulted from sea perils. The evidence is conclusive that the vessel met with bad weather which was sufficient to cause the damage. The words "including negligence clause" include the sentence relating to unseaworthiness in clause 11 of the charter-party.

Aspinall, K.C. and *A. D. Bateson* for the respondents, plaintiffs.—The learned judge in the court below has found that the vessel was not in a state in which she could withstand the ordinary perils of a winter voyage; she was therefore unseaworthy. If the shipowner wishes to relieve himself of his duty to provide an efficient ship, he must do so in clear language:

The Pearlmoor, 90 L. T. Rep. 319; 9 Asp. Mar. Law Cas. 540 (1904); (1904) P. 286;
Price v. *Union Lighterage Company*, 89 L. T. Rep. 731; 9 Asp. Mar. Law Cas. 398 (1903); (1904) 1 K. B. 412.

The fact that there was no negligence on the defendants' part does not relieve them from liability, for the damage arose from a defect in the ship:

Dobell v. *Steamship Rossmore Company*, 73 L. T. Rep. 74; 8 Asp. Mar. Law. Cas. 33 (1895); (1895) 2 Q. B. 408.

The words "including negligence clause" do not include the whole of clause 11, for that clause includes something other than the usual negligence clause, and all other conditions as per charter-party only refer to conditions to be performed by the consignee.

Laing, K.C. in reply.

The PRESIDENT.—This is an appeal from the decision of the County Court judge at Hull in a case in which the plaintiffs, Messrs. F. Lenders and Co., sued the owners of the steamship *Northumbria* for damage which, according to the claim of the plaintiffs, was caused to a cargo of linseed in bags, belonging to the plaintiffs, through the unseaworthiness of the steamship and the breaches of duty or contract of the defendants or their servants. The defendants relied on the terms of the bill of lading, and in particular alleged that "during the voyage heavy seas and the straining and labouring of the vessel strained and depressed a deck beam and strained and cracked a deck plate, tore the steam-pipe covers from the deck, damaged the iron chairs and brackets all in the way of No. 3 hold, and split the tarpaulins covering No. 3 hatch." So that broadly speaking the issue between the parties was whether the plaintiffs' damage was sustained because this ship was unseaworthy, or whether it was sustained in consequence of bad weather, and whether, if sustained through unseaworthiness, the shipowners are responsible having regard to the terms of the bill of lading. The case seems to have taken a rather curious course, because I find in the record that the plaintiffs called three witnesses—one a marine surveyor, another a consulting engineer, and the third a surveyor—and the case presented by them was that this damage was done owing to a small crack in a plate near No. 3 hatch, which let the water through; and that that plate was so corroded as to be in an absolutely defective condition. The defendants called first of all the master, the mate, and the boatswain, Mr. Foster, a marine surveyor, Mr. Cockrill, a marine surveyor, Mr. Chas. Hall, who repaired this particular damage, a boiler maker, a marine superintendent, and one or two formal witnesses—Mr. Redman, of Lloyd's Register, and Mr. Nair, a draughtsman. At the close of the case the learned judge felt himself in so much doubt about the case that on the application of Mr. Lambert, for the defendants, he gave leave to both sides to call further evidence. It is important to recollect, in considering a case of this kind, that if a *primâ facie* case of perils of the seas is made out, and the plaintiffs allege unseaworthiness, it is upon the plaintiffs that the burden of proving unseaworthiness rests. That is an important matter to consider in a case of this kind. Then the case seems to have been adjourned for nearly six months, after which the plaintiffs called a marine surveyor who had not seen the ship, and the defendants called a naval architect, who does seem to have known the ship, and Mr. Collins, Lloyd's surveyor, at Cardiff, who had had a good deal to do with her also. After that evidence had been given, the learned judge delivered his judgment, and this is the commencement of it: "I have already stated that on the question of fact as to what the condition of the cracked plate was, I believe the evidence called by the defendants, and do not believe that of the plaintiffs' experts. It is extremely discreditable that on a question of fact of this sort there should be such a conflict of testimony. Half a dozen persons of position, and on whose evidence the court ought to be able to rely, and who all saw the plate, say, as to two at least of them, that it was corroded away to the thinness almost of a sheet of paper, one thirty-second of an inch. Whilst others say it was not corroded away at all, and though in the ordinary course of things it had wasted slightly, the ship having been built in 1888, and the plates, therefore, having had the wear and tear of some sixteen years, there was nothing abnormal in this and nothing to attract attention or to call for repair or alteration. I accept this view substantially on account of the nature of the repairs ordered and carried out at the time." So that so far as credibility of the witnesses is concerned, the learned judge has held that he relies upon the defendants' evidence and not upon that of the plaintiffs. That is extremely important, when the plaintiffs' case is that the plate was corroded—a rotten old plate—whilst the defendants' witnesses say that this plate was not a defective plate, but was broken by the twisting and straining of the ship in the heavy sea-way. However, the learned judge, having the facts, proceeds to say—and this, I think, has led him into an erroneous view of the question of fact that is to be determined—that this plate broke and that the weather was not sufficient to account for it breaking, and that therefore the ship must have been unseaworthy. I cannot agree with the conclusion of fact to which he has come, because I think that he has not sufficiently appreciated the evidence as to the weather, which is beyond all question true, and is in accordance with the log, which we have had put before us; and that he has omitted to notice the extreme severity of the

weather described in that log, causing the ship to lie to on several occasions. I think that, broadly speaking, having regard to what is proved in the case, the evidence is really overwhelming that this ship met with exceedingly severe weather, and that the damage was done in consequence; and that the surveyors who said so were speaking the truth. As regards what they actually said he has believed them, though he does not think, I suppose, that they came to a right conclusion.

That being the state of things with regard to the facts, I come to the conclusion that the ordinary warranty of seaworthiness, which is that a ship shall be reasonably fit for the purpose of performing the voyage for which she has got the cargo, has been complied with.

To my mind there is another point, if the construction of the documents is such as I think it ought to be. Under the bill of lading—under which the plaintiffs sue—the goods were originally shipped by Mr. Simon Weiler, and freight was to be paid for the goods, "all other conditions" to be "as per charter-party, including negligence clause, dated Buenos Ayres, the 5th Dec. 1903." The charter-party so dated is a charter-party made between the owners of the *Northumbria* and Mr. Simon Weiler, and and it contains in clause 2, which has the marginal note "exceptions," numerous perils which are excepted, and proceeds to deal with other exceptions such as "losses occasioned by explosion, bursting of boilers, breaking of shafts, unseaworthiness or latent defect in hull, machinery or appurtenances, whether existing or not before or after the commencement of the voyage, not resulting from want of due diligence by the owners of the steamer, or by the ship's husband or manager." Clause 25 of the charter-party requires that the exceptions in clause 11, which is the one I have just referred to, should be incorporated in the bill of lading, and I think there is not the smallest possible doubt that Mr. Weiler, when he put the bill of lading forward in the printed form, containing reference to this negligence clause, intended to comply with the terms of the charter-party. I am afraid I cannot appreciate Mr. Aspinall's argument on this part of the case at all. It seems to me that any reasonable person, reading this bill of lading and having notice of the charter-party, because it is expressly referred to, would undoubtedly infer, and be right in inferring, that the whole of clause 11 was included, and that that being so, unseaworthiness is a matter for which the shipowner is not responsible, unless it results from want of due diligence by the owners of the steamer or the ship's husband or manager. It is not necessary here to consider whether those words include anybody for whom the shipowner is responsible. Whether it does or does not, the learned judge thought there was no evidence of negligence on the part of the owners, and it seems to me there is no such evidence of negligence. On the point of fact and the point of law I am of opinion that this judgment should be reversed.

BARGRAVE DEANE, J.—A Court of Appeal should always be very chary of revising on a question of fact the judgment of a court below. In this case the learned judge has found the facts one way, and in favour of the defendants; and he has distinctly found, I think, that this crack was a crack which was not of such a character as to render the vessel unseaworthy. Having found that, however, he has gone further, and has drawn the inference from the finding of fact I have mentioned that this vessel was unseaworthy. I cannot follow his reasoning.

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

Jackson and *Co.*, Hull, solicitors for the respondents.

Supreme Court of Judicature.

COURT OF APPEAL.

Nov. 2, 3, 6, 7, *and* 8, 1906.

(Before COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.)

SMAILES AND SON *v.* HANS DESSEN AND CO. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Delay in taking discharge of cargo—Custom of port—Demurrage—Discharging subject to lien—Reasonable conduct of shipowner—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 493, 494.

The consignees of a cargo, loaded under a charter-party which provided that the cargo should be discharged "in the manner and at the rate customary at each port," did not take any steps before the arrival of the ship to secure an unloading berth. When the vessel arrived, all the usual places for unloading such a cargo were occupied; but, after a delay of eight days, the discharge was commenced at a place not before used for the purpose. A usual place could not have been secured any earlier if the consignees had applied before the arrival of the ship.

After the discharge had commenced, the shipowners refused to continue the discharge until the freight was paid; and, after a delay of eight days, the cargo was landed subject to a lien for freight and demurrage, under the provisions of the Merchant Shipping Act 1894.

Channell, J. held that the shipowners were entitled to substantial damages for the earlier delay, and to demurrage at the agreed rate for the later delay.

Held (varying the judgment of Channell, J.), (1) that the shipowners were entitled only to nominal damages for the earlier delay; and (2) that they had in the circumstances of the case acted reasonably in not landing the cargo subject to lien at an earlier date than they did, and were, therefore, entitled to demurrage for all the later delay.

The Court of Appeal expressed no opinion upon the point of law decided by Channell, J. upon the construction of sects. 493 *and* 494 *of the Merchant Shipping Act* 1894: (10 *Asp. Mar. Law Cas.* 225; 94 *L. T. Rep.* 492).

APPEAL of the defendants from the judgment of Channell, J. at the trial of the action as a commercial cause.

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

The plaintiffs claimed 160*l.* for eight days' demurrage of the steamship *Mutual*; a declaration that they were entitled to a lien on the cargo shipped on board the said vessel, and upon 160*l.* deposited in respect of the said demurrage, and payment of the sum so deposited; and they also claimed damages for breach of contract contained in a bill of lading.

The claim for damages for breach of contract was in respect of delay in berthing and unloading the vessel on her arrival at the port of discharge.

The plaintiffs were the owners of the *Mutual*.

A cargo of pit props was loaded on the *Mutual* under a bill of lading given to one Schaumann, which was as follows so far as is material: "Shipped in good order and condition by W. Schaumann . . . upon the . . . steamship *Mutual* . . . now lying in . . . and bound for Barry, 750 cubic fathoms of pit props . . . to be delivered in like good order and condition at . . . Barry . . . unto order, he or they paying freight for the said goods and all other conditions according to the charter-party dated the 4th May 1904."

By the charter-party made between the plaintiffs and Messrs. Capper, Alexander, and Co., agents for merchants, it was provided:

That the said steamship shall proceed to . . . and there load a full and complete cargo of usual short pit props . . . and being so loaded shall therewith proceed to one of the destinations hereinafter mentioned at charterers' option . . . and there deliver the same at such wharf or in such dock or berth as ordered always afloat; freight to be paid as follows. . . . The cargo to be supplied to and received from the steamer in the manner and at the rate customary at each port during customary working hours, and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at 20*l.* per day. . . . Owners to have an absolute lien on cargo for all freight, dead freight, and demurrage, in consideration whereof charterers' liability to cease on shipment of cargo.

The port of discharge was Barry, and the vessel arrived there on the 26th June 1904. Owing to the space usually used for unloading cargoes of pit props being engaged by other merchants, the vessel did not get to a discharging berth until the 4th July, when she was berthed at a place which had not previously been used for the discharge of such cargoes, and where the discharge was more expensive than at the usual places.

The defendants had not taken any step to secure a discharging berth before the vessel arrived at Barry. If they had applied for a berth at an earlier date, they could not have got one.

At Barry the discharge is done by the Barry Railway Company. On the 5th July the discharge was commenced, part of the freight having been advanced. The balance of freight not being paid, the discharge was stopped on the 7th July. Negotiations proceeded as to payment, or security for payment, of the freight, it being for some time uncertain as to who would be liable to pay. During these negotiations the plaintiffs acted under legal advice.

The freight not being paid or secured, notice was given by the plaintiffs on the 13th July that the cargo would be discharged subject to lien for freight and demurrage, under the provisions of the Merchant Shipping Act 1894.

The discharge of the cargo was recommenced on the 15th July, and was finished on the 21st July.

Under ordinary circumstances the discharge commencing on the 5th July ought to have been finished on the 13th July.

The amount due for freight was subsequently paid to the plaintiffs by the defendants. The defendants further deposited the sum of 160*l.* with the Barry Railway Company in respect of the plaintiffs' claim for demurrage, in order to release the cargo, which they then received. This deposit was made upon the terms that the defendants should be treated for the purposes of any legal proceedings which the plaintiffs might take as if they were at the time of the arrival of the ship, and at all material times thereafter, the indorsees of the bill of lading for the cargo and owners thereof.

The action was tried before Channell, J., and the learned judge gave judgment for the plaintiffs for 140*l.* damages for default in not being ready to receive the cargo when the vessel arrived, and for 160*l.* for demurrage after the 5th July.

Channell, J. did not decide whether the plaintiffs acted reasonably or not in keeping the cargo on the vessel until the 15th July instead of giving notice at an earlier date under sect. 494 of the Merchant Shipping Act 1894; but he held that they had no right to land the cargo under those provisions of the Act at an earlier date: (10 Asp. Mar. Law Cas. 225; 94 L. T. Rep. 492).

The Merchant Shipping Act 1894 (56 & 57 Vict. c. 60) provides:

Sect. 493 (1). Where the owner of any goods imported in any ship from foreign parts into the United Kingdom fails to make entry thereof, or, having made such entry thereof, to land the same or take delivery thereof, and to proceed therewith with all convenient speed, by the times severally hereinafter mentioned, the shipowner may make entry of and land or unship the goods at the following times: (*a*) If a time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the time so expressed. (*b*) If no time for the delivery of the goods is expressed in the charter-party, bill of lading, or agreement, then at any time after the expiration of seventy-two hours, exclusive of a Sunday or holiday, from the time of the report of the ship. (2) Where a shipowner lands goods in pursuance of this section he shall place them, or cause them to be placed: (*a*) If any wharf or warehouse is named in the charter-party, bill of lading, or agreement as the wharf or warehouse where the goods are to be placed and if they can be conveniently there received, on that wharf or in that warehouse; and (*b*) in any other case on some wharf or in some warehouse on or in which goods of a like nature are usually placed; the wharf or warehouse being, if the goods are dutiable, a wharf or warehouse duly approved by the Commissioners of Customs for the landing of dutiable goods. (3) If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed to do so, and his entry shall in that case be preferred to any entry which may have been made by the shipowner.

Sect. 494. If at the time when any goods are landed from any ship, and placed in the custody of any person as a wharfinger or warehouseman, the shipowner gives to the wharfinger or warehouseman notice in writing that the goods are to remain subject to a lien for freight or other charges payable to the shipowner to an amount

mentioned in the notice, the goods so landed shall, in the hands of the wharfinger or warehouseman, continue subject to the same lien, if any, for such charges as they were subject to before the landing thereof; and the wharfinger or warehouseman receiving those goods shall retain them until the lien is discharged as hereinafter mentioned, and shall, if he fails so to do, make good to the shipowner any loss thereby occasioned to him.

The defendants appealed.

Horridge, K.C. and *Bailhache* for the appellants.—They contended that, assuming that there was a breach of contract by the defendants because they did not take any step to secure a discharging berth before the vessel arrived at Barry, yet the plaintiffs were not entitled to more than nominal damages, inasmuch as it was clear from the evidence that it would have been impossible to obtain a discharging berth according to the custom of the port before the 4th July 1905, when the vessel was berthed. They further contended that the plaintiffs were not entitled to recover the sum of 160*l.* for demurrage after the 4th July, because they ought to have discharged the cargo subject to lien, under the provisions of sect. 494 of the Merchant Shipping Act 1894, at a much earlier date than they did, in which case the vessel would not have been delayed at all, or at any rate for a much shorter period. They also argued that the decision of Channell, J. as to the meaning of sect. 494 of the Act was wrong. They cited

Sewell v. *Burdick*, 5 Asp. Mar. Law Cas. 376; 52 L. T. Rep. 445; 10 App. Cas. 74;
White v. *Furness*, 7 Asp. Mar. Law Cas. 574; 72 L. T. Rep. 157; (1895) A. C. 40;
Lyle Shipping Company v. *Cardiff Corporation*, 9 Asp. Mar. Law Cas. 23, 128; 83 L. T. Rep. 329; (1900) 2 Q. B. 638;
Postlethwaite v. *Freeland*, 4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599.

Scrutton, K.C. and *A. Adair Roche* for the respondents.—The judgment of Channell, J. was right, and ought to be affirmed. It is clear that the plaintiffs are entitled to damages for the breach of contract in not securing a quay berth for the discharge of the cargo. The defendants have agreed to be in the same position as if they had been the indorsees of the bill of lading at the time of the arrival of the vessel. Therefore they are liable to pay damages for that breach of contract. The learned judge rightly held that the defendants were liable to pay damages for the delay from the 26th June to the 4th July. The berth at which the cargo was ultimately unloaded could have been obtained by the defendants at an earlier date, and they must pay damages for the whole period of delay. Upon the second part of the case, having regard to all the facts, and to the uncertainty as to who, if anybody, would be liable to pay freight, and whether or not the freight would soon be either paid or secured, the shipowners acted reasonably in not landing the cargo subject to lien, under the provisions of the Merchant Shipping Act 1894, at any earlier date than they did. Further, the shipowners acted under legal advice, and, having regard to the uncertainty as to the legal rights of the parties, it was reasonable for them so to act. The judgment of Channell, J. upon the construction and meaning of sects. 493 and 494 of the Act was right.

Bailhache replied.

Collins, M.R.—This case is certainly one of very considerable complication, inviting a discussion on a great many different points. It has been argued before us for several days, and I am bound to say that we have received the greatest possible assistance from the learned counsel on both sides in illuminating the points which alone come up for decision, and which are comparatively simple. Now, to begin with, there is one peculiarity in the case which has been the cause of a good deal of perplexity, and that is that the defendants in this case are not the real persons whose doings, or misdoings, form the ground of action; but, by a convention between the parties, they have been placed in the position of a person who is liable in the action. The terms upon which they come into the litigation are contained in a letter of the 24th Nov. 1904. It is a letter from the solicitors on the one side to the solicitors on the other, and it is in these terms: "Our clients have already paid to the dock company the deposit of 160*l.* 15*s.*, and they agree that in consideration of your accepting that deposit as if it had been made at the same time that the previous deposit was made (but, of course, with notice by our clients to the dock company to retain this amount, and not to hand same over to the shipowner) they are to be treated for the purposes of any legal proceedings which the shipowners may be advised to take as if they were at the time of the arrival of the ship, and at all material times thereafter, the indorsees of the bill of lading for the cargo and owners thereof. Perhaps you will send us a line confirming this." The action is brought by the shipowners against the defendants, who have accepted the position described in that letter, and therefore we are to treat them as the persons who at all material times were entitled, as holders of the bill of lading for value to whom the property had passed, to call for performance by the shipowners of their contract, and, on the other hand, to accept the obligations imposed upon them thereunder. Now, the bill of lading incorporates the terms of the charter-party; and the charter-party is made between Schaumann who is a merchant in Sweden, and the plaintiffs, who are shipowners. and that charter contains one or two material clauses. On the first page it says that the vessel being so loaded with a cargo (of pit props) shall proceed to one of the destinations mentioned at charterers' option as ordered on signing bills of lading. Then comes this provision: "The freight to be paid on unloading and right delivery of the cargo in cash," and so on. Then it says: "The cargo to be supplied to and received from the steamer in the manner and at the rate customary at each port during customary working hours, and, if the ship be further detained through the fault of the charterers, ten days on demurrage over and above the said laying days at 20*l.* per day." Then it says: "Owners to have an absolute lien on cargo for all freight, dead freight, and demurrage, in consideration whereof charterers' liability to cease on shipment of cargo." Nothing turns on that cesser clause, although, I believe, there was some discussion about it at the trial. Now, the effect of the bill of lading incorporating the charter-party is that the obligation of the receiver of the cargo is not an absolute obligation; all that he is bound to do is to use reasonable care to give

the ship the discharge that she is entitled to under the terms of the charter-party. Therefore his obligation is not as though he had undertaken absolutely to discharge that ship within the given time or any given time; he is only bound to use all reasonable care to see that all the facilities available in the particular port are used for the purpose of giving the ship its due dispatch. Amongst other things, that would involve the initial step to be taken by him, in view of the ship being about to arrive with the cargo, to secure for it a berth and the means of discharging it in the manner customary at the port.

Now, a point has arisen in the course of the discussion, which seems to have been emphasised a good deal before Channell J. and to have influenced his judgment considerably in the matter, and is a source of complication in this case. That point is, that as between the original charterer, Schaumann, and one Gibson, a merchant carrying on business in Cardiff, there had been a contract whereby Schaumann had undertaken to sell to Gibson a certain quantity of pit props. Schaumann, finding that the vessel which he had chartered was capable of holding a considerably larger quantity than he had contracted to sell to Gibson, loaded all that amount upon the ship, and drew out one bill of lading for the whole and sent it to Gibson. Now, there is an incident which possibly had some influence on Gibson's action in this matter; that is to say, it appears that the price of timber had fallen between the date of Gibson's contract and the date of the arrival of the ship. Whether that had anything to do with the matter or not, Gibson was not inclined, if he could avoid it, to take more timber than he had really bought, and, finding that this ship consigned to him contained a great deal more than he wanted, he was not prepared to accept the position of the holder of the bill of lading to whom the property had passed by acting in the matter as consignee. Before he made up his mind on the matter he had taken proper steps, as he was consignee of the cargo, to secure a berth for the ship when she did arrive, but, when he had made up his mind and ascertained distinctly that the cargo was much larger than he had ordered, he changed his mind as to receiving the vessel, and gave notice to the harbour authorities cancelling the order which he had given to reserve her a berth. Under these circumstances the vessel arrived, and what happened then raises the first question in this case. The vessel arrived in port on the 26th June 1904, but as a matter of fact she did not get to a discharging berth until the 4th or 5th July—or rather she got there on the 4th and was able to commence discharging on the 5th. For the delay between those two dates the defendants are treated, as to the first cause of action which is alleged to be a breach, as the person bound as receiver to take all such reasonable steps as the facilities of the port made it possible to secure the immediate discharge of this vessel on her arrival. Upon that it seems to be obvious, and the case was so treated below, that the custom of the port is a most essential factor. We have had evidence which is quite uncontradicted, and which, I think, is tolerably clear, as to what the custom of that port is as to the delivery of this class of cargo. It is a port where this class of cargo is very commonly received, and special arrangements are made for the purpose. The cargo was pit props; and the evidence in this case showed clearly what was the proper mode of dealing with a pit prop cargo at Barry. That evidence shows that the spaces in the dock where pit props are landed are recognised spaces where pit props are dealt with; and that space is appropriated, not in the absolute strict sense, but practically is appropriated to certain merchants (as Channell, J. mentions in his judgment), who have by reason of such arrangement a prior claim when they have cargoes ready to take advantage of it; but they have no exclusive monopoly of the land, and if a ship comes into Barry and the space is unoccupied by these merchants by their cargoes, the ship is berthed so as to be able to discharge upon this piece of land. But at the time when this vessel arrived, as appeared from the evidence, there was no quay berth at all, because it so happened that all the quay berths were being used. The cargo of, I think, two of the ships belonging to Gibson were actually spread upon the land, and therefore it was quite impossible to unload the cargo in question upon that land; and that was one of the points raised in the course of the discussion which now is happily conceded, namely, that the person who had contracted to take this cargo had himself occupied this space, the only available space in the port for the discharge of it, and that he could not take advantage of the fact brought about by his own doing as an excuse for not unloading the cargo. Now, however, counsel on both sides have agreed that the defendants in this case do not stand in the shoes of Gibson, the original consignee of the cargo, and Gibson's conduct in the matter appears to me to be immaterial. The defendants do not stand in his shoes; but this fact remains, that, inasmuch as the defendants did not come into this discussion at all until a very late stage, and then under the convention I have described, they cannot take advantage of the fact that Gibson made arrangements to secure a berth, because, as we have heard, Gibson countermanded that order and nothing came of it; but, inasmuch as the defendants were not interested in the venture, they took no part themselves to secure a place, and therefore there is undoubtedly a breach established against them on that matter. Channell, J. was of opinion—in fact, it is the governing factor in his judgment—that the defendants must accept the fact that they took no steps beforehand to secure the berth, though they were not charterers of the cargo at the time it arrived for the perfectly obvious reason that they were mere strangers to the whole transaction at that time. That, however, is not enough to decide this case, because, even if a breach involved a claim for damages, a great deal more must be shown; it must be shown that, by reason of the failure to take proper steps to secure a berth, the vessel was delayed and lost the opportunity of discharging. Now, upon that part of the case Channell, J. has given no opinion. He has stopped at the finding that there was a breach, and he has assumed that damages would follow upon that breach, and has left it to the parties to settle the number of days which ought to be taken into consideration. It seems to me that in doing that the learned judge has for the moment forgotten, at all events he has not given due consideration to, the undisputed evidence as to what was the state of the dock notwithstanding the order given beforehand by Gibson—that is, whether in point

of fact the state of congestion of business in the dock rendered it possible for this cargo to have been discharged even if an order had been given beforehand, the failure to give which order is the only breach which he has, on this part of the case, found against the defendants. It seems to me conclusively established upon the undisputed evidence that delivery according to the custom of the dock was not possible under the existing conditions of congestion in the dock, and did not become possible until the 4th or 5th July. It has been clearly held now in this court, and in the House of Lords, that where the conditions of a charter-party are such as this, and where the conditions of the port are such as to make it impossible for the consignee, acting reasonably and with all diligence, to secure a loading berth for the ship, he is not under an absolute obligation and is absolved from liability because he has failed to find a berth for the ship. I think the case of *Postlethwaite* v. *Freeland* (4 Asp. Mar. Law Cas. 302; 42 L. T. Rep. 845; 5 App. Cas. 599) is an authority on that point, and certainly the more recent case, which was elaborately discussed in this court, of *Hulthen* v. *Stewart* (9 Asp. Mar. Law Cas. 403, 285; 88 L. T. Rep. 702; (1903) A. C. 389). That being so, it seems to me that we are really not differing from anything that the learned judge decided upon this part of the case. No doubt it is a question of fact, and there does not appear to be any difference between us and Channell, J. as to the law applicable to this part of the case; but he has really not addressed his mind to the question of fact whether or not this dock was ever in such a condition as to make it possible for a vessel with this class of cargo to be discharged or to commence its discharge on any day after its arrival at the port of Barry before it actually did commence. It seems to me that on that part of the case the evidence is all one way; and unless the charterers had done something, or the persons receiving the cargo had taken a step which they were not bound to take, if their rights were measured by the custom of the port, to secure a place that had never been theretofore used and certainly, therefore, not a customary place upon which to deposit this cargo, in my opinion there was no means of procuring a discharge for the ship according to the custom of the port in the customary manner up to the date upon which the actual discharge did commence. Now, the discharge did commence on the 5th July, because arrangements had been made whereby this land, which had never been used before for that purpose, had been cleared so as to permit a cargo being deposited upon it; even so it involved something which was not the usual mode of unloading, because it involved not unloading direct from the ship on to land in the customary manner where the cargo could be laid and sorted, but involved transport of the cargo after being delivered over the ship's rail to land at a considerable distance on the other side. The usual place being on the south side and this land being on the west side of the dock, it involved a transport of the cargo to that place when unloaded, and the expense incidental to that transaction was an additional expense that had to be faced by somebody, though no doubt, when incurred, the wharfingers retained their lien on the cargo for such expense, and it was not quite clear who ultimately had to pay that; but nobody could get dominion of the cargo ultimately without having to make good that element of expense. If the charterers wanted to secure the unloading of the cargo, they would have to make their bargain, and that might involve a payment, by themselves separately or with the purchasers of the cargo, of this extra expense. It seems to me that, this method of unloading involving this obligation and putting upon the charterers an unwonted mode of discharge of the ship at an unwonted place and the onerous conditions thereto attaching, it was not a method of unloading that they were bound to adopt, having regard to the terms of the charter-party. Therefore it seems to me that on that part of the case, although it is a breach, it is a breach sounding only, as Mr. Bailhache put it, in nominal damages, which is the main part of the discussion before us. Upon that, with all possible respect to Channell, J., and not differing from anything he has decided, but only differing from him in the result which arises from something which he has abstained from deciding, it seems to me on that part of the case the damages must be reduced to one shilling.

Then we have to deal with another matter which, by the assistance of counsel, has been greatly simplified. We now begin with the actual unloading of the cargo which had commenced at this unwonted place under unwonted conditions on the 5th July. After a certain amount of the cargo had been taken out, the shipowners on the 7th July, finding themselves in considerable uncertainty as to who was going to pay the freight, or whether they were going to get paid at all, refused to go on discharging unless they could find somebody to be answerable for the freight, though they were quite willing to make any reasonable arrangement and take the security of any responsible persons for the payment of it. They were in a great difficulty; they could not find out who was going to be, if anybody was going to be, responsible for the receipt of the cargo and payment of the freight. What happened upon that was this. Having begun on the 5th July, they stopped delivery on the 7th and then negotiations ensued. There was trouble between the persons having to deal with the cargo—that is, Schaumann, the original charterer, and Gibson, the person to whom it was shipped. Gibson had refused to take it, and some negotiations between him and Schaumann ensued whereby he was constituted for certain purposes agent for Schaumann; but even then there was a hitch about it, because after Gibson had been appointed agent, though he had declined to take the cargo, he had still kept the bill of lading; the bill of lading remained in Gibson's possession until Jones, I think it was, succeeded in getting it from him, and it was only on the 9th July that Schaumann became possessed of the bill of lading. Up to that time it had remained in Gibson's custody, and Gibson certainly was not going to pay or to take any steps which would involve the personal liability of himself. The point that arises on this part of the case is, inasmuch as the ship refused to unload, and properly so refused, because there was nobody there to pay the freight, and therefore, there being default on the part of the person who was bound to pay the freight, whether it was the duty of the owners of the ship to miti-

gate the damages which were increasing for every day the ship was kept there waiting to discharge —that is, whether there was an obligation on the shipowners to enforce their rights under the Merchant Shipping Act by landing the cargo and securing their lien without keeping the ship there as a warehouse. That really is the only answer on this part of the case to the admitted breach by the receiver of the cargo resulting in damages, that the shipowners had not taken steps to mitigate the damages which, if they had taken them, would have resulted in their not having to complain of the ship being detained. Upon that point we have had a very able argument from Mr. Scrutton to-day, and he has satisfied me that, having regard to the confusion as to the rights of the parties with respect to this cargo, which might have been in the minds of the shipowners themselves, it was quite impossible for them as reasonable men to determine what attitude they should ultimately take with regard to the state of facts arising from the refusal of any person to pay the freight in return for the cargo. As pointed out by Mr. Scrutton, the people with whom they were dealing up to the 9th July were not even in possession of the bill of lading, quite apart from the question whether the property in the goods comprised in the bill of lading had passed to them; and it was not until the 9th July that the now defendants, who are agents of Schaumann, ever got possession of the bill of lading at all. The negotiations seem to me to have been such as to make it very reasonable for the shipowners to expect that, by waiting a day or two to hear the result of Jones' inquiries, the freight would be forthcoming; and it seems to me that it would be most unreasonable for them then to have taken this step of landing the goods and relying upon the lien with the consequences involved thereunder instead of simply continuing to assert their rights from the moment when they were kept waiting for their freight. That state of things really continued until the 11th July at all events; and on the 11th there was another interview, with the result that certain arrangements were made with a view to the freight being forthcoming. Another hitch, however, occurred on that occasion—namely, as to whether there was any person to whom, according to the custom, the freight could be paid without the authority of the master; and the master, who was the only person who could give such authority, happened to be away, and the only person in authority on the ship was the mate; and the question was then whether the mate was a person who could give that authority, and that simply interposed a delay in payment of the freight, which at the then present moment it was thought by all persons would be forthcoming at all events within a day or two. It seems to me that, while that state of uncertainty prevailed, and the negotiations were all tending towards a payment of freight, it would have been still unreasonable on the part of the master to take the extreme course of landing the cargo under the lien; at all events it would have been perfectly reasonable for him to refuse to do so. So matters continued. The negotiations had secured this, that the shipowners, in the expectation of getting their freight, had begun to renew the discharge of cargo on the 11th July, this being done on an expectation based on what they had been told—namely, that the freight would be forthcoming; but, finding even then that the freight was not forthcoming, they stopped again about noon on that day. That takes us up to Monday, the 11th. Having waited till Tuesday and no freight being forthcoming, on Wednesday, the 13th, they caused the necessary notice to be given to the wharfingers under the Merchant Shipping Act 1894 with a view to enforce the provisions of that Act and to protect the cargo under the lien. What is the head and front of their offending in this matter? Up to that date they had asserted their right of treating the ship as a warehouse and keeping it there at the expense of the receivers of the cargo; and unless in doing that they acted unreasonably, then no defence or no mitigation of damages arises on that. On that part of the case it seems to me that, in the confused condition of the rights of the parties entitled to the cargo if they paid the freight, and in the continuous probability of it being paid that was held out to the master and the shipowners, they were abundantly justified as reasonable men in not standing on their extreme rights, but in letting matters go on. There is, further, another element which, to my mind, is of great importance in this matter, and that is that during the course of the discussion as to the freight the shipowners were in continuous consultation with their lawyers, and it is clear that the lawyers' advice was taken on the question whether the master could prudently, and with reasonable certainty as to the law and his rights under it, exercise his rights under the Merchant Shipping Act 1894, and that the advice was that it would be unsafe to do so. I throw that into the discussion to see whether, in a complicated matter of this kind, as reasonable men they were bound to risk their own position for the benefit of the wrongdoers in order to mitigate the damages they would have to pay. I find no such obligation. It seems to me it would be demanding a great deal too much, a great deal more than it has ever been sought to impose on a person who suffers wrong at the hands of another person. A man is bound to act reasonably. Reasonableness begins at home, and he has a right to look at his own interests before he considers how far he can mitigate damages imposed upon the other person. I do not think a plaintiff is bound to jeopardise any of his own rights in the hope of mitigating damages that may be payable by his opponent. It seems to me to be asking too much to say that the shipowners have lost their right of action for damages against the defendants, who have taken up this position and broken their contract, and that they have lost their right of action for damages because they have abstained from exercising statutory rights under very difficult statutory provisions by reason of the advice of their lawyers. In my opinion, therefore, for the reasons I have given, the judgment of Channell, J. must be varied to the extent I have described.

COZENS-HARDY, L.J.—I am of the same opinion. I only wish to add a few words about the second point. Channell, J. has decided that, according to the true construction of sects. 493 and 494 of the Merchant Shipping Act 1894, the plaintiffs could not in point of law have exercised their right under that Act which it is said they ought to have exercised by way of mitigating damages, and, that being so, the

question of reasonableness or unreasonableness in not taking the step to mitigate damages did not arise. Speaking for myself, I do not desire to be taken either as agreeing with or as differing from the view expressed by the learned judge upon the true construction of the effect of those two sections; but, assuming in the defendants' favour that it was competent to the plaintiffs at the material date to exercise the rights conferred by sect. 494 alone, or sects. 493 and 494 taken together, I still think, for the reasons assigned by the Master of the Rolls, that they acted perfectly reasonably in not taking those steps until the date when they did take them—namely, on the 13th July.

Farwell, L.J.—I am of the same opinion, and have only a very few words to add on the first point as we are differing from Channell, J. In my opinion the construction of the charter-party is really plain beyond argument since the decision of the House of Lords in the case of *Hulthen* v. *Stewart* (*ubi sup.*). I do not myself see under what possible conditions it could bear any construction which would make it a fixed lay-day contract, or make it anything other than such a contract as was described and held to have been entered into in that case in the House of Lords. Looking at the whole of the evidence, I cannot see how it is possible to hold that the customary mode of discharge at the port of Barry would include this piece of land which, at the time when the vessel arrived, had never been used for the purpose and was not then available for use for port purposes, and for which extra payment had to be made. I agree that it is not clear on the evidence that the extra payment had to be made for the user; but payment had in fact to be made because of the extra distance which the cargo had to be carried. It is difficult to suppose that the fact of payment which would be so obtained did not enter into the consideration of the dock company when they said they would clear out this space of ground. I only say that because I do not desire in any way to express any opinion contrary to Mr. Scutton's suggestion as to the elasticity of a port according to the exigencies of business by extending the ambit of the dock before, at any rate, a given ship arrives. Here, however, the ship had arrived first. So much for the first point.

The second point upon which I wish to say a word is this. It was pressed upon us that the shipowners were bound to give notice at once in order to mitigate damages, and it was strongly pressed upon us that the advice of the shipowners' lawyers had nothing to do with the matter. I think I might make clear my meaning best by putting it in this way. The Act of Parliament says the shipowner may do something. If the Act of Parliament had said the shipowner shall do so and so, I might agree with Mr. Horridge that the shipowner has got to construe the Act of Parliament at his own risk, and cannot escape from legal liability by pleading the advice of counsel, however eminent. But when it is a question of discretion, and the Act says he may do it, then the true rule is not, I venture to think, that put forward for the defendants—namely, that it is his duty to exercise it; the duty is to act reasonably, and the question whether it is reasonable to give notice, or not, depends upon a variety of considerations, one of which, undoubtedly, is whether he has clearly got the right to do it or not. No wise layman would be likely to act in such a matter on his own initiative in construing an Act of Parliament like the Merchant Shipping Act 1894, and I think he may reasonably take the best legal advice before he acts on any view of his own. That disposes of one of the points. On the facts of the case it appears to me that it was absolutely impossible for the shipowners to have done otherwise than they did. Looking at all the facts and circumstances, I cannot see that there was any unreasonable delay by the shipowners in giving notice under the Act; or that they did anything which an ordinarily prudent man would not have done in that case. I think that Channell, J., if he had not been so attracted by the pleasures of construing the Merchant Shipping Act 1894, would have found this as a fact, instead of expressing an opinion just short of a finding and deciding it on the construction of the Act. I confess there is some difficulty about the construction of the Act, and I desire to express no opinion either disagreeing or agreeing with what Channell, J. has decided to be, or appears to be, the plain object of the Act. *Judgment varied.*

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

Solicitors for the respondents, *Botterell and Roche.*

Saturday, Nov. 10, 1906.

(Before Collins, M.R., Cozens-Hardy and Farwell, L.JJ.)

The Birnam Wood. (*a*)

Admiralty—Action in rem—*Defence in part successful—Ship freed from lien—Defendant's solicitors' bill unpaid—Sale of ship—Mortgage of ship—Constructive notice—Solicitors' lien—Charging order—Property "recovered or preserved"—Solicitors Act* 1860 (23 & 24 *Vict. c.* 127), *s.* 28.

The master of a barque instituted proceedings in rem against her to enforce a maritime lien for wages and disbursements. The managing and registered owner of sixty-four sixty-fourths employed solicitors to oppose the claim, and ultimately the ship was released, the master getting about 300*l. less than he had claimed. The managing owner then acquired or controlled all the shares in the barque, and afterwards sold her to the B. W. Ship Company, all the shares in which were held by the managing owner or his family. The company then mortgaged the barque, and the mortgagees registered their mortgage. Some months later the solicitors made an* ex parte *application and obtained a charging order on the barque on the ground that they had preserved the* res, *and so had under sect.* 28 *of the Solicitors Act* 1860 *a lien on the* res *for the amount of their costs. They also obtained an order for a receiver. The mortgagees took out a summons asking that the charging order should be discharged or postponed to their mortgage. The summons was supported by the ship company.*

(*a*) Reported by L. F. C. Darby, Esq., Barrister at-Law.

Held (*affirming the decision of Sir Gorell Barnes, President*), *that, even assuming that to defend property against a lien was to preserve it, the property on which the charging order was obtained was not at the time it was obtained the property of the persons for whom it had been preserved; that the purchasing company could not be held to have had constructive notice of the solicitors' right to a lien; and that, as the solicitors had allowed six months to elapse before attempting to get a charging order, it was not a case in which the court would exercise its discretion in their favour, and that the order would be discharged.*

Held, further, that a charging order should only be made ex parte *under very exceptional circumstances.*

Appeal by solicitors acting for the late owner of the barque *Birnam Wood* against the decision of Sir Gorell Barnes, President of the Admiralty Division, discharging a charging order made under sect. 28 of the Solicitors Act 1860.

On the 22nd June 1905 Llewellyn Cook, master of the *Birnam Wood*, issued a writ *in rem* against the *Birnam Wood* claiming 625*l.* 11*s.* 3*d.* for wages and disbursements.

John Wotherspoon, who was managing owner of the *Birnam Wood* and registered owner of sixty-four sixty-fourths of the vessel, though only as trustee for the master, the master's brother, and some members of his own family for thirty-three sixty-fourths, instructed Messrs. Lightbound, Owen, and MacIver to oppose the claim.

On the 26th July 1905 the master's action came before Bargrave Deane, J., when the claim and a counter-claim in respect of a loss on a former voyage of the *Birnam Wood* was referred to the district registrar at Liverpool.

On the 17th Nov. 1905 the registrar certified that the sum of 429*l.* was due to the master on the claim which had originally been put forward for 625*l.* 11*s.* 3*d.*, and that 108*l.* 5*s.* 9*d.* was due from the master to the owners of the *Birnam Wood* in respect of the counter-claim.

On the 24th Nov. judgment was entered for the master for 320*l.* 14*s.* 3*d.*, which was 304*l.* 17*s.* less than the amount claimed.

On the 29th Nov. the owners of the *Birnam Wood* took over the master's interest in the vessel, satisfied the judgment, and gave an undertaking to pay the master's taxed costs, whereupon the *Birnam Wood* was released from arrest.

Early in December Wotherspoon bought the interest of the master's brother, which left him and three members of his family interested in the *Birnam Wood*.

The *Birnam Wood* was then transferred to a company, the Birnam Wood Ship Company Limited, whose registered office was at No. 51, South John-street, Liverpool, where Wotherspoon carried on business. The company had no directors, and under the contract of sale to the company Wotherspoon was appointed manager for life.

On the 27th Dec. the company mortgaged the *Birnam Wood* to Parr's Bank Limited to secure an account current. On the 28th Dec. the mortgage was registered by the bank.

The solicitors then ascertained that the vessel had been sold, and on the 7th Feb. 1906 sent their bill of costs to Wotherspoon. The bill amounted to 281*l.* 9*s.* 5*d.*, but, as Wotherspoon had paid 20*l.* in June 1905 on account of disbursements, the amount due was 261*l.* 9*s.* 5*d.*

On the 20th June 1906 the solicitors made an *ex parte* application at chambers asking, as solicitors for the defendants the owners of the *Birnam Wood*, for a charging order on the *Birnam Wood* for their costs, charges, and expenses of and in reference to the action of *Cook* v. *Owners of the Birnam Wood*, except that the barque should to the extent of 320*l.* 14*s.* 3*d.*, the amount of the judgment recovered by the master, be free from the operation of the charging order, and the order was made by Bargrave Deane, J.

The solicitors, for the purpose of enforcing that order, took out a summons before Bargrave Deane, J., which was served on Parr's Bank, but not on the Birnam Wood Ship Company, and on the 30th July obtained an order that a receiver should be appointed to receive the freights and profits in respect of the barque *Birnam Wood*; that, if necessary, possession might be taken; and that the *Birnam Wood* should be sold for the purpose of paying off the amount due under the charging order, but that such sale should not be carried into effect without a further order of the court, and that the proceeds of sale, when lodged in court should not be paid out without leave, the order to be without prejudice to other claims and to all questions of priority, with liberty to apply.

Parr's Bank, the mortgagees, who had 498*l.* 12*s.* 3*d.* owing to them on the account current, gave notice to the solicitors and to the owners of the barque that they would apply to Bargrave Deane, J. on the 8th Aug. for an order that the charging order made on the 20th June might be discharged or postponed to their mortgage, and that the order for sale might be set aside.

The summons was adjourned into court and heard by Sir Gorell Barnes, President, on the 29th Oct. 1906.

The Solicitors Act 1860 (23 & 24 Vict. c. 127), s. 28, is as follows:

In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any court of justice, it shall be lawful for the court or judge before whom any such suit, matter, or proceeding has been heard or shall be depending to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made such attorney or solicitor shall have a charge upon and against and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such court or judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such court or judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void and of no effect as against such charge or right: provided always, that no such order shall be made by any such court or judge in any case in which the right to recover payment of such costs, charges, and expenses is barred by any statute of limitations.

A. D. Bateson for the mortgagees, Parr's Bank, in support of the summons.—There was no property preserved within the meaning of the section. Even if there was, it had been dealt with and was beyond the power of the court before the solicitors made their application for a charging order, so none should have been made:

Shippey v. *Grey*, 42 L. T. Rep. 673 (1880).

The making of the order is discretionary, and it was too late to apply for such an order after six months had passed. The bank is entitled to have the order set aside as they have applied promptly:

Re Deakin, 82 L. T. Rep. 776; (1900) 2 Q. B. 489.

The bank had no notice of the solicitors' lien, and their mortgage ought not to be postponed to it:

Ross v. *Buxton*, 60 L. T. Rep. 630 (1889); 42 Ch. Div. 190.

It has been held that a mortgage created by the client for the benefit of a person having no notice of the litigation would not be superseded by a charging order subsequently obtained by the solicitor:

The Livietta, 49 L. T. Rep. 411; 5 Asp. Mar. Law Cas. 132, 151 (1883); 8 P. Div. 209.

Dawson Miller, for the Birnam Wood Ship Company, supported the application.—The company knew nothing about these costs when they obtained this property; no property has been preserved in this case. The preservation of an easement has been held not to be a preservation of property within the meaning of the section:

Foxon v. *Gascoigne*, 31 L. T. Rep. 289 (1874); L. Rep. 9 Ch. 654.

If the value of property is enhanced by the exertions of a solicitor, he may be entitled to a charging order:

The Philippine, 16 L. T. Rep. 34; L. Rep. 1 A. & E. 309;

Pelsall Coal and Iron Company v. *London and North-Western Railway Company*, 8 Ry. & Ca. Tr. Cas. 146.

The charging order should only be on the value enhanced—namely, 304*l.* 17*s.*

H. C. S. Dumas, for the solicitors, in support of the charging order.—The charging order and the order for sale are final, and cannot be set aside except by the Court of Appeal. The charging order once made cannot be rescinded:

Re Suffield and Watts, 58 L. T. Rep. 911; 20 Q. B. Div. 693.

The solicitors were retained by and acted for the registered owners of the barque. They enhanced the value of the property to the extent of 304*l.* 17*s.*, and to that extent at least they are entitled to a charging order on the property, for they are entitled to a charging order on all property recovered in the action:

Scholey v. *Peck*, 68 L. T. Rep. 118; (1893) 1 Ch. 709.

The order is effectual both against the present owners and the mortgagees, for the lien is in the nature of salvage and can be enforced against those who have taken the benefit of the work:

Greer v. *Young*, 49 L. T. Rep. 224; 24 Ch. Div. 545.

The transfer to the company in effect defeats the charge, and ought not to be allowed to do so:

The Paris, 73 L. T. Rep. 736; 8 Asp. Mar. Law Cas. 126; (1896) P. 77.

The company are not *bonâ fide* purchasers for value without notice, and, as the mortgagees cannot have a better title than the mortgagor, the solicitors' claim ranks before that of the mortgagees. The claim against which the ship was defended was a claim based on a maritime lien, so the solicitors' claim ought to be given the same priority as the defeated claim would have had. The lien of the solicitors relates back to the time of the institution of the suit and takes precedence of claims arising after that:

The Heinrich, 26 L. T. Rep. 372; 1 Asp. Mar. Law Cas. 260; L. Rep. 3 A. & E. 505.

The President.—In this case there was an application on the part of Parr's Bank Limited, the mortgagees of the barque *Birnam Wood*, which was supported by the present owners of the vessel, a limited company. The application is that a certain charging order made on the 20th June 1906 may be discharged, or that it may be postponed to the bank's mortgage, and that a certain order for the sale of the barque made on the 30th July may be set aside. The facts are these: The *Birnam Wood* was originally owned by one Wotherspoon, who held all the shares, but held them partly on his own account and partly on behalf of others, amongst others the master of the vessel, and, I think, one of his brothers. The master of the vessel, Mr. Cook, brought a suit in June 1905 against the vessel for wages and disbursements, and the then managing owner, Mr. Wotherspoon, instructed Messrs. Lightbound, Owen, and MacIver to defend the suit. The action was tried and referred, a claim for 625*l.* 11*s.* 3*d.* being made. After the reference judgment was entered for 320*l.* for the plaintiff, which was arrived at by finding that he had a good claim for 429*l.*, but that the defendant had a good cross-claim for 108*l.* The original claim was therefore cut down by 196*l.*, and it was further cut down by the cross-claim being allowed. That money, the 320*l.*, was paid over, and I understand that the ship was released from arrest and an undertaking given to pay the costs of the plaintiff. Shortly afterwards, in Dec. 1905, Wotherspoon purchased the interest of Cook, the brother of the captain, and the interest of the captain, and that left Wotherspoon and his family, I suppose, sole owners of the ship. On the 20th Dec. 1905, a company having been formed, the ship was transferred to the company, Wotherspoon holding the greater number of the shares. A small number were in the names of members of his family or others with whom he was connected On the 28th Dec. the company mortgaged the ship to Parr's Bank Limited, the mortgage being to secure an account current between the Birnam Wood Ship Company Limited and Parr's Bank Limited. The mortgage is one of the common forms of mortgage to secure accounts current. At that time the bank appears to have had no notice of any proceedings against the ship by Cook in the suit which I have referred to, and they registered their mortgage shortly after it was executed. On the 15th June 1906 the solicitors I have referred to made an application for a charging order, and

on the 20th June an order was made that the solicitors should have a charge upon the barque *Birnam Wood* for their costs of the action, except that the *Birnam Wood* should to the extent of 320*l.* 14*s.* 3*d.*, the amount recovered by the plaintiff, be free from the operation of this charging order. I confess to feeling some difficulty in at present knowing how that order came to be made in the form in which it appears, because it is quite clear, whatever view is taken of this case, even if it be correct to say the property was recovered or preserved, it was certainly not the whole of the barque which was preserved, but only the interest of those persons who were instructing the solicitors to oppose the claim of the captain. However, the order was drawn up in that form. On the 27th July 1906 a summons appears to have been served upon the other parties for the purpose of having the charging order enforced, and on the 30th July an order was made appointing a receiver of the profits and freights. It was also ordered that the barque should be sold and the profits of sale lodged in court, but such sale was not to be carried into effect without a further order of the court. It was also provided that the proceeds should be lodged and not be paid out without leave, and that the order should be without prejudice to other claims against the proceeds and all questions of priority of payment which were thereby reserved. Any of the parties were to be at liberty to apply as they might be advised. The bank and the ship company were, it is said, each served with notice of that application, but the former were by some mistake not present when it was made.

The object of the bank and the present owners is to get rid of the charging order, and there are several grounds on which it is put. This order was made *ex parte*, and counsel for the solicitors takes the point that, having once been made, although made *ex parte*, this court has no jurisdiction whatever to consider any application to rescind the order, and that the only place where it can be considered is in the Court of Appeal. That appears to me to introduce something extremely novel, because all *ex parte* applications which affect the interests of other persons are subject to those other persons applying within a reasonable time to set them aside. There is not the slightest doubt in my mind that this application can be made, and that the question to be considered is whether, having heard all the parties, that order ought to have been made. Further, it is admitted in this case that the making of such an order is a discretionary matter, and therefore I have to consider it afresh in this case, having heard those who are really affected by it. To my mind the matter is really free from serious doubt. There may be a question whether, strictly speaking, it can be said that the action of the solicitors in this case did preserve or recover property. I feel some doubt as to whether they did, as to whether or not the arguments in favour of the present application are not sound, that there really is no preservation of property in this case, but I do not think it necessary to decide the present case upon that point at all, because there are others on which one can clearly dispose of the matter.

It may well be that, if there is a claim of lien upon some property and solicitors are employed to defend against that claim of lien, that saving the property from that lien may, if, as one of the learned judges has said, this section is to be construed literally, be a preserving of the property. But in the present case the dates which I have already given show that for a long time after these costs were incurred, and this matter, so far as the interests of the defendants in the original action were concerned, was at an end, from Nov. 1905, when the sum of 320*l.* was paid over and the ship was released, until the month of June 1906 the solicitors took no steps to enforce their charge or to obtain their charge. In the meantime the ship had passed from being the property of the original owners to being the property of the company, and, although it may be that Mr. Wotherspoon was fully aware of all that had occurred, yet there is nothing to show that he had present to his mind the fact, at the time of the transfer and mortgage, that there might possibly be some claim by the solicitors to have a charging order. Certainly the bank had no idea of any such charge or claim, but counsel for the solicitors contends that it is quite immaterial whether when the property was charged any other persons had acquired an interest in it before any application was made for a charging order, and that a charging order may relate back. That is an extremely novel doctrine, because there is no charge upon the property until application is made and a charging order is made by the judge. There is then only a discretion to make it if the judge thinks it a fit case in which to make it. Yet it is contended that, if, acting as a matter of discretion, the judge make the order, that order relates back and affects people who have *bonâ fide* acquired an interest in the property. I cannot take that view. It appears to me that at the time this charging order was made this property was not the property of the person or persons on whose behalf the original suit was defended. It had become the property of the company, and I think it had become subject to a mortgage granted without any notice at the time to the mortgagees of anything affecting their rights. The matter was therefore one in which I do not think there was any power to make the order which has been made. Certainly, if that is not the correct view to take, it was not an order which ought in the exercise of judicial discretion to be made. If solicitors wait six months they ought not to be preferred to those who acted *bonâ fide* in acquiring interests in such property. It must not be forgotten that we are dealing here with shipping property, and as regards the mortgagees they acquired their title in the proper way. There is not the slightest reason why they should not be preferred to persons who had let their rights, such as they were, go to sleep for many months. Therefore, in my opinion, this charging order should be set aside, and also the order for the sale of the barque. That leaves the mortgagees and the owners free from the charging order. The application will be allowed with costs against the solicitors, Messrs. Lightbound, Owen, and Co.

The solicitors appealed from the order discharging their charging order in so far as the ship company were concerned; they did not appeal against the order in so far as it dealt with the rights of the mortgagees.

Nov. 10.—*Leslie Scott* for the appellants.—The appellants do not now contend that the charging order in respect of their costs takes priority of the bank's mortgage. It is, however, submitted that in respect of the sum of 304*l.* 17*s.*, the difference between the master's claim for wages and disbursements and the amount actually recovered by the master, the property was preserved. The property was under arrest when the costs were incurred, and the action taken by the solicitors freed it from arrest and decreased the claim made against it. The change of ownership of the ship from Wotherspoon to the ship company was not known to the solicitors. The company was John Wotherspoon; it was a one-man company, and the company would know the costs had not been paid. Wotherspoon was all along promising to pay, and, when it was found he had left the country, application was at once made to obtain the charging order, so there was no real delay. By an oversight the present owners of the ship were not served with notice of the application to appoint a receiver and for the sale of the vessel, but that order was so worded that it was inoperative except in so far as it stopped freight from getting into Wotherspoon's hands. The court below had no jurisdiction to discharge the order, and, even if it had, it ought not to have exercised the discretion to do so. Even though the sale took place before the charging order was obtained, the sale cannot defeat the order, for the company are not *bonâ fide* purchasers without notice. The vendor of the property and the promoter of the company are one and the same person—Wotherspoon—so the company must have had constructive notice that the vendor had not paid these costs. Where mortgagees who knew of a suit advanced money without inquiring whether the solicitors' costs had been paid and the solicitors obtained a charging order, it was allowed to rank before the mortgagees' claim:

Faithfull v. *Ewen*, 37 L. T. Rep. 805 (1878); 7 Ch. Div. 495.

If the company had notice of the suit by the master, they must be held to have notice of the solicitors' right to a lien. The words "without notice" in sect. 28 of the Solicitors Act 1860, in the provision avoiding conveyances made to defeat a charging order, means without notice of the solicitor's right to a lien:

Cole v. *Cole*, 70 L. T. Rep. 892; (1894) 2 Q. B. 350.

The case is covered by the principle laid down in *Re Hampshire Land Company* (75 L. T. Rep. 181; (1896) 2 Ch. 743). Wotherspoon was in a fiduciary position to the ship company as he created the company and was selling it property:

Erlanger v. *New Sombrero Phosphate Company*, 39 L. T. Rep. 269 (1878); 3 App. Cas. 218;
Salomon v. *Salomon*, 75 L. T. Rep. 426; (1897) A. C. 22.

Dawson Miller, for the respondents, the Birnam Wood Ship Company Limited, was not called upon.

Cozens-Hardy, L.J.—I think the decision of the President was correct, and it is hardly necessary I should add anything to his judgment; but perhaps it is right I should state the facts which influence me. An action was instituted by the captain against the ship on the 22nd June 1905. It ended in judgment for a less sum than was claimed by the plaintiff, the difference being a sum of 300*l.*; and it is said—and I assume for the purposes of the present decision that it is correctly said—that to that extent the defendants' solicitors preserved the ship under arrest. I do not decide that, but I assume it for the purposes of my decision to-day. The ship was released from arrest on the 29th Nov., but the solicitors for the defendants did not send in their bill of costs to their client, John Wotherspoon, till the 7th Feb. 1906. In the meantime Wotherspoon, who was the registered owner of all the shares in the ship, had transferred her for a valuable consideration to a limited company. That was in Dec. 1905, and that limited company executed a mortgage in favour of Parr's Bank, which was also registered in Dec. 1905. The solicitors, who sent in their bill of costs on the 7th Feb. to Wotherspoon, allowed it to remain unpaid, with knowledge that the ship had been sold and a mortgage executed, until the 15th June 1906, when they applied to the learned judge of the Admiralty Division for a charging order. They applied *ex parte*, and I think it is right to say that in my judgment no such order ought, except in very exceptional circumstances, to be made *ex parte*. That principle has been laid down emphatically by this court in appeals from the King's Bench Division, where *ex parte* orders for a receiver at one time were habitually made in chambers. I have the sanction of the Master of the Rolls for saying that he thinks the same principle should be applied in Admiralty cases.

Well, the order was made. I do not pause to say more than that the order was, it seems to me, wrong both in form and in substance. After that had been made an application was made for a receiver of the freight, and an order was made, again without any service or affidavit of service on the then owners of the ship, appointing a receiver and ordering a sale of the ship, but at the same time proceeding to add words which rendered the order for the sale wholly inoperative at that stage. On the 8th Aug. an application was made by Parr's Bank, the mortgagees, to discharge the charging order, and the order for a receiver and sale. That, after adjournment, came before the President, and he discharged the order for a charging order, and consequently the order for a receiver and sale, on grounds which seem to me to be amply sufficient for the purpose. This is a discretionary jurisdiction, and the court must, of course, have regard to all the circumstances and the conduct of the parties. It is almost, if not quite, conceded that the order cannot be supported if we hold that the limited ship company was a purchaser for value without notice. A more accurate way to put that proposition would be to say, I think, that the order cannot be supported unless you are satisfied by the argument of counsel for the appellant and by the evidence that the limited company, being a purchaser for value, had notice of the circumstances which might result in a charging order being made. I have heard nothing which leads me to arrive at that conclusion. It is called a one-man company, which is taken, I suppose, more or less to be a term of abuse, but it is none the less a limited company, and I can conceive no principle whatever for holding that a limited company ought to be affected by knowledge or notice not of an existing charge, not of anything

which it is to their interest they should have knowledge, but simply of this, that the vendor of the ship was in such a position, apparently, that after the bill of costs was delivered, two months later, he might then be unable to pay his bill of costs, and that six months after the sale of the ship to them an order for a charging order might be made. I think that really would be carrying the doctrine of implied notice to an extent which would be quite shocking and must interfere with honest and legitimate business dealings. If the purchaser of a ship was bound to ask his vendor these questions: "Your ship was arrested a year or so ago and has now been released, may I ask you if you have paid your bill of costs? It has not yet been delivered. When it is delivered will you be able to pay?" I think it is easy to say what the answer would be. I think the judgment of the learned judge was perfectly correct, and for the reasons he gave. The appeal must be dismissed, with costs. The Master of the Rolls has been obliged to go away on public business, but he desired me to say that he had come to the same conclusion.

FARWELL, L.J.—I agree. I should be quite content to rest the matter upon the ground that the learned President exercised his discretion in a way which seems to me correct, but in deference to the ingenious arguments I have heard I wish to state my views upon two points. In the first place, I think an order for a charging order ought not to be made *ex parte*. It never is in the Chancery Division, and I see no reason why the same principle should not apply in other divisions I do not say there is no jurisdiction to make these orders *ex parte*, but it ought not to be done except under very special circumstances. Apart from real estate, the Act merely gives a discretionary power in aid of the common law lien which is not affected by the Act: (*Re Born*, 83 L. T. Rep. 51; (1900) 2 Ch. 433). Whether the solicitor has or has not lost or parted with this lien, the court ought not to interfere, either to aid it or to supply a substitute for it, without hearing the other side. The second point is this: It has been pressed upon us that the limited company must be fixed with notice—that is, constructive notice—of the liability of the promoter of the company for his solicitors' costs; and the case of *Erlanger* v. *New Sombrero Phosphate Company* (*ubi sup*) has been cited. In that case the company claimed rescission of a contract against their vendor on the ground of the fiduciary relation in which he stood to them, and the duty arising therefrom to make a full disclosure. That is very remote from the present case, where it is sought to fix the company with a liability on the footing that the vendor must be deemed to have disclosed the possibility of an inchoate charge, or that, if he did not, the company were guilty of gross and culpable negligence in not ascertaining it. Of late years the courts have been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts which it is morally certain they had no knowledge of whatever. It is extravagant to assume that this man Wotherspoon would have said anything whatever to the company about his unpaid bill of costs, though I do not think it is necessary to impute any dishonest design to him at all. The solicitors were not without their remedy. They could have acted sooner. They could have proceeded against Wotherspoon immediately the action was at an end. In my opinion the learned President was quite right, and the appeal must be dismissed with costs.

Solicitors for the appellants, *Charles Russell* and *Co.*, for *Lightbound, Owen*, and *MacIver*, Liverpool.

Solicitors for the respondents, *W. W. Wynne* and *Sons*, for *H. Forshaw* and *Hawkins*, Liverpool.

Solicitors for the mortgagees, Parr's Bank, *A. Bright* and *Son*.

Tuesday, Jan. 22, 1907.

(Before Sir GORELL BARNES, P., FARWELL and BUCKLEY, L.JJ.)

SIBERY *v.* CONNELLY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Seaman—Wages—Ship carrying contraband of war—Non-disclosure that cargo is for belligerent port—Refusal by seaman to proceed.

A seaman signed articles at Glasgow for a voyage on the British steamship G. of "not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, via the Bristol Channel, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master." The vessel proceeded to Cardiff, where she was loaded with a cargo of coal. At the time the articles were signed a state of war existed between Russia and Japan, and both Powers had declared coal to be contraband of war. The master knew at the time of the loading of the vessel at Cardiff that the cargo was destined for the Japanese port of Sasebo, but did not disclose this information to the crew. Sasebo was within the limits prescribed by the articles. Upon arrival at Hong Kong the seaman discovered the port of destination, and refused to proceed in the vessel. He remained at Hong Kong until she returned, when he rejoined her and returned to Cardiff.

Held, that the seaman was entitled to wages and maintenance while he was waiting at Hong Kong.

Caine and others *v.* Palace Steam Shipping Company (*Dec.* 14, 15, 21, 1906; 122 *L. T. Jour.* 226) *followed.*

Decision of the Divisional Court (*Lord Alverstone, C.J., Lawrance and Ridley, JJ.*, (1905) 10 *Asp. Mar. Law Cas.* 221; 94 *L. T. Rep.* 198) *affirmed.*

APPEAL from the decision of the Divisional Court (*ubi sup.*).

J. A. Hamilton, K.C., *John Sankey*, and *Herman Cohen* for the appellant.

A. Neilson for the respondent.

Their Lordships (Sir Gorell Barnes, P., Farwell and Buckley, L.JJ.) being of opinion that the case was governed by the decision of the Court of Appeal in *Caine and others* v. *Palace Steam Shipping Company* (Dec. 14, 15, 21, 1906; 122 L. T. Jour. 226) dismissed the appeal without hearing any argument.

Appeal dismissed.

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

Solicitors for the appellant, *Botterell* and *Roche*, agents for *Vaughan* and *Roche*, Cardiff.

Solicitors for the respondent, *Robinson* and *Stannard*, agents for *H. Morgan Rees*, Cardiff.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Tuesday, July 31, 1906.

(Before WALTON, J.).

SCHLOSS BROTHERS *v.* STEVENS. (*a*)

Insurance — Policy — Lloyd's form — Transit by train, river, boat, and mules—Damage to goods — Delay — Exposure to damp — Accidental wetting — Damage by worms — "Including . . . all risks of damage by insects"—Attached clauses—"Including . . . all risks from the warehouse . . . while in transit by railway or any conveyances . . . and all risks by land and by water by any conveyance until safely delivered. . . . Including risk from act of God . . . and all other dangers and accidents of the seas, rivers . . ."—All risks whatsoever.

Goods were carried from S. to M. partly by rail, partly by river steamer, and partly by mules. Part of the goods was damaged by exposure to damp due to abnormal delay in the transit arising from unusual and accidental causes; part by accidental wetting as distinguished from damp; and part by accidental wetting and by injury by worms.

There was a policy of insurance on the goods for the ocean transit to S. The policy for the inland transit was in the ordinary Lloyd's form, into which was written the following clauses: On goods "at and from on board the import vessel at S. . . . to any place or places in the interior of the Republic of C., with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices and (or) elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects, and all clauses as attached." The following clauses (inter alia) *were attached: "Including . . . all risks by land or by water." "Including risk from the act of God . . . fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof. . . ." "Including all risks excepted by the negligence clause which may be inserted in or attached to charter-party and (or) bill of lading."*

Held, that the words "all risks by land and by water" meant all risks whatsoever, and covered all losses by any accidental cause of any kind, and therefore the underwriters were liable under the policy.

Pink *v.* Fleming (6 *Asp. Mar. Law Cas.* 554 (1890); 63 *L. T. Rep.* 413; 25 *Q. B. Div.* 396) *distinguished.*

COMMERCIAL LIST.

Action tried before Walton, J. sitting without a jury.

The plaintiffs' claim was in respect of damage to certain bales of merchandise under a marine policy of insurance. The defendant (one of the underwriters) alleged concealment of a material fact, and denied that the damage was caused by a peril insured against.

The policy, which was dated the 28th Aug. 1901, was on goods

At and from on board the import vessel at Savanilla and (or) Cartagena to any place or places in the interior of the Republic of Colombia, with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices, and (or) elsewhere, including all risks of robbery with or without violence, all risks of damage by insects, and all clauses as attached.

There was a second policy which covered the ocean transit to Savanilla.

The facts as found were as follows:—

The import vessel arrived on or about the 20th Aug. 1901 at Savanilla, a port in the Republic of Colombia. The goods were in transit to a town in the interior of the republic called Medellin, and the route or transit covered by the policy was in stages, from Savanilla by train to Barranquilla, and from there up the river by boat to Puerto Berrio, then by rail from there to Caracolli, and thence to the destination of the goods by mules.

A revolution had broken out in the Republic of Colombia in the latter part of 1899, and civil war was still proceeding during the period material in the present case. The claim made in the action was for damage to the goods.

The learned judge was inclined to believe that the railway service and the river service from Savanilla to Medellin—the transport arrangements at the best of times did not appear to be very perfect—were, in the latter part of 1901, during 1902, and until the earlier part of 1903, abnormally disorganised, probably in consequence of the strain put upon all the transport arrangements by the revolution that was going on. The policy sued upon was warranted free from capture, seizure, and detention, and the consequences thereof, but there was no defence set up under that clause; therefore, when it was said that the disorganisation of transport was primarily due to the revolution, that did not afford a defence to the action. There was great delay in forwarding the goods in question at Barranquilla, and again at Puerto Berrio. The goods arrived at Savanilla in Aug. 1901, and they were delivered at their destination in the first half of 1903, so that there was undoubtedly very great delay.

It appeared from the evidence that the climate in Colombia was damp, and possibly the warehousing and storage accommodation was not very perfect. It was, at any rate, very likely that if there was any unusual delay in the forwarding of the goods they would be exposed to damage from damp. Owing to the disorganisation and delay, there was also the possibility of damage being done to the goods by rain. To some extent the delay was aggravated by causes connected with the weather, and there also appeared to have been a landslip, which interfered with the transport of the goods by railway for some time during the period in question. The damaged bales were fourteen in all. With regard to the nature of the damage and its cause, as to twelve of the bales the loss arose from the extraordinary delay and the abnormal exposure of those bales to damp. As to one bale, the conclusion was that

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

it was damaged by accidental wetting as distinguished from damp. It might have been wetted by rain or possibly it got wet on the steamer in the river. As to the other bale, the conclusion was that it suffered from accidental wetting and also from injury by worms.

The policy was in the ordinary Lloyd's form.

At the top of the policy was written in the following clause:

On board the import vessel at Savanilla and (or) Cartagena to any place or places in the interior of the Republic of Colombia, with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices, and (or) elsewhere, including all risks of robbery with or without violence, all risks of damage by insects, and all clauses as attached.

Written in the margin were the following clauses:

Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Including all clauses, liberties, and exceptions as per bills of lading or charter-party.

The following were the attached clauses:

With leave to call at all ports and places on the passage, intermediate or otherwise, for any purpose whatsoever, and all liberties as per bills of lading. Including all risk of craft or boats to and from the vessel, and all risks (including fire) from the warehouse, factory, or calender, while in transit by railway or any conveyances, and while in warehouse and (or) shed, or on wharf whilst awaiting forwarding or shipment, and of transhipment, and all risks by land and by water by any conveyance, until safely delivered into the consignees' warehouse or elsewhere.

With leave to land, reship, unload, and reload the property by the same steamer or any other conveyance, and to let the goods remain at the option of the assured anywhere until it is thought fit or convenient to send them forward.

General average and salvage charges payable as per foreign adjustment, or per York-Antwerp rules, both or either if required.

Any deviation and (or) transhipment and (or) change of voyage not covered by this insurance, and (or) any inaccuracy in description of voyage, interest, name of vessel, clauses, or conditions, to be held covered at an adequate premium to be hereafter arranged.

Including risk from the act of God, the King's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof.

Including all risks excepted by the negligence clause which may be inserted in or attached to charter-party and (or) bill of lading. Seaworthiness admitted.

J. A. Hamilton, K.C. and *Maurice Hill* for the plaintiffs.—The words "all risks by land and by water by any conveyance until safely delivered" mean all risks whatsoever. The policy covers loss by all risks whatever between the times of taking the goods from the import vessel at Savanilla and delivery into consignees' warehouse or elsewhere. The policy was intended to cover more than the ordinary risks. "All clauses as attached" incorporate into the policy all the attached clauses:

Jacob v. *Gaviller*, 87 L. T. Rep. 26; 1902, 7 Com. Cas. 116.

The condition of Colombia being known to the underwriters, there was no concealment of a material fact.

Scrutton, K.C. and *F. D. Mackinnon* for the defendants.—"All risks" do not mean all risks whatsoever. There is special reference to risks of robbery with or without violence, &c., and to risk from the act of God, which would be unnecessary if "all risks" meant all risks whatsoever. "All risks" cannot include ordinary dampness arising from the climate. The following cases were referred to:

Taylor v. *Dunbar*, L. Rep. 4 C. P. 206;
Pink v. *Fleming*, 6 Asp. Mar. Law Cas. 554 (1890); 63 L. T. Rep. 413; 25 Q. B. Div. 396.

On the question of non-disclosure, *Harrower* v. *Hutchinson* (3 Mar. Law Cas. O. S. 434 (1870); 22 L. T. Rep. 684; L. Rep. 5 Q. B. 584) is in point.

Cur. adv. vult.

July 31.—Walton, J.—The plaintiffs' claim is upon a marine policy on certain goods. The policy, which is dated the 28th Aug. 1901, is on goods "at and from, on board the import vessel at Savanilla and (or) Cartagena to any place or places in the interior of the Republic of Colombia, with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices, and (or) elsewhere, including all risks of robbery with or without violence, all risks of damage by insects, and all clauses as attached." [The learned judge then stated the facts as set out above, and continued:] The question is whether the defendant, who is one of the underwriters, is liable for his proportion of the loss which has occurred. It was said first on behalf of the defendant that he is not liable because when the policy was effected there was a concealment or a non-disclosure of a material fact known to the assured, and which would have influenced the mind of a reasonable underwriter in considering the risk and the amount of premium. The facts which it was alleged ought to have been disclosed were contained in four letters received by the assured before the policy was effected. These letters referred to the disorganised condition of the transport between Savanilla and Medellin. Upon this question I come to the conclusion on the evidence that, having regard to what was known, and must have been known, as to the condition of Colombia—a revolution being in progress—there has been no concealment of facts which were material to the risk, and therefore that the defendant is not exempt from liability under the policy on that ground.

Then comes the question, assuming the policy to be binding, does it cover the loss in question? That depends largely upon the construction of the policy, and I feel great difficulty in dealing with this point. It is necessary to look closely at the terms of the policy to see what are the risks insured against. The policy is in the ordinary Lloyd's form, with clauses added. I have already read the clause written in at the top of the policy, which describes the transit, and these words are added—"including all risks of robbery with or without violence." Those words were added to make the policy cover robberies which would not be covered by the ordinary printed form. The clause then proceeds, "all risks of damage by insects and all clauses as attached." Damage by insects would not, I think, be covered by the ordinary printed form, so the words I have read were intended to add

something to the risks insured against. I must look at the clauses attached, which must be read as if they were added after the words written in at the top of the policy. The attached clauses are on a slip pasted on. The first clause is in these terms: "With leave to call at all ports or places on the passage intermediate or otherwise for any purpose whatsoever and all liberties as per bills of lading." That had nothing to do with the risks in the sense in which the word had been used in the passage I have read—that is to say, the causes of loss insured against; the clause merely relates to an extension of the voyage. The next clause is as follows: "Including all risk of craft or boats to and from the vessel, and all risks (including fire) from the warehouse, factory, or calender, while in transit by railway or any conveyances, and while in warehouse and (or) shed or on wharf whilst awaiting forwarding or shipment and of transhipment and all risks by land and by water by any conveyance until safely delivered into the consignees' warehouse or elsewhere." Then follows this clause: "With leave to land, reship, unload, and reload the property by the same steamer or any other conveyance and to let the goods remain at the option of the assured anywhere until it is thought fit or convenient to send them forward." That refers rather to the voyage than to causes insured against. The next clause is as follows: "General average and salvage charges payable as per foreign adjustment or per York-Antwerp rules, both or either if required." That is followed by a clause as to deviation and transhipment; then comes a clause which is peculiar: "Including risk from the act of God, the King's enemies, fire, and all other dangers and accidents of the seas, rivers, and navigation, and errors and default thereof." That is a curious clause, as most of the risks mentioned there would be covered by the ordinary perils contained in the printed form of policy. That cannot be said as to the act of God, which is rather wider. The words seem to be an echo of the ordinary exception clause in a bill of lading, the intention being that the owner of the goods should be protected by his policy in respect of losses as to which he would have no claim against the shipowner or carrier. The next clause is no doubt intended for the same purpose; it is, "including all risks excepted by the negligence clause which may be inserted in or attached to charter-party and (or) bills of lading. Seaworthiness admitted." Looking at the policy, including the written words and the clauses attached, it covers in the first place all losses occurring from any of the perils in a Lloyd's policy in the ordinary form; it undoubtedly includes other risks—risks of robbery with or without violence, damage by insects, risk from the act of God, &c., some of which may not be within the ordinary printed words of a Lloyd's policy. It is plain, therefore, that the policy was intended to cover something more than the ordinary risks. For the plaintiffs it was contended that during this transit the policy protected the assured from loss by all risks whatever from the time the goods were taken from on board the import vessel at Savanilla until they were delivered at the consignees' warehouse or elsewhere. The plaintiffs said that the words "all risks by land and by water," &c., meant all risks whatsoever. It is very difficult to arrive at a conclusion with any certainty as to what the true view of the intention of the policy is. In considering such a policy—a marine policy—one is bound to give effect to all the well-known customs, which are perfectly understood in the insurance business, as to the interpretation of such documents; but, after all, the rights of the parties depend upon the terms of the contract they have entered into. Marine policies have, no doubt, a somewhat interesting history, and a long series of decisions have affected their interpretation. Particular methods of interpreting the ordinary language of policies have become fixed by decisions, and so there has grown up the law of marine insurance, which is really nothing more than the law of the contract between assured and underwriter in respect of marine policies. What I have to do is to look at the whole of the policy, not, of course, forgetting any well-known customs or conventions as to the interpretation of its words, in order to ascertain what the parties meant.

In my view it would be wrong to be astute or too subtle in trying to find out what the underwriters probably meant by clauses of this kind from a consideration of similar, but not identical, clauses which had come before the court from time to time. One cannot overlook the expression "all risks." The phrase, in clauses somewhat similar, might mean nothing more than the risks insured against in the body of the policy. Taking the common clause, "all risk of craft," that might do no more than extend to the goods while in craft the insurance contained in the policy which is primarily upon the goods while on board the vessel in which they have been carried; and, no doubt, in many of such clauses the true construction is that the clause merely applies all the risks in the body of the policy to something which might be described as an extension of the voyage, and that it does not enlarge the causes of damage insured against. On the other hand, I do not know of any case where it has been decided that such words, "all risk of craft," add nothing to the perils insured against which are mentioned in the body of the policy. Sometimes underwriters are careful to explain that "all risks" is to be limited to the risks previously mentioned. There might be a difference where the expression is "all risk of craft" and where, as in this policy, there is also the expression "all risks . . . while in transit . . . and all risks by land and by water." The words are very general—"all risks by land and by water." Of course, where parties desire to cover all risks of every kind, that can be done by simply saying "all risks whatsoever"; and that is not said in the policy I am dealing with. The contract is not logically arranged, nor are the words happily used. It was contended for the defendant that, if all risks were covered, why refer specially to risks of robbery with or without violence, negligence, &c.? On the other hand, it is very common to find in such contracts, although perfectly general words are made use of, including practically all risks, special reference to particular perils to which it is desired to draw special attention. The case of *Jacob* v. *Gaviller* (*ubi sup.*) is an illustration of this being done. There the words were: "This insurance is against all risks, including mortality from any

cause . . . ," and it was held that the clause meant all risks of every kind, and that the assured desired to call special attention to mortality as a special risk. Reading the present policy as I think it would be reasonably understood by any merchant or insurance broker, I come to the conclusion that the words "all risks by land and by water," &c., must be read literally as meaning all risks whatsoever. I think they were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered come within that category? Was the damage from some accidental cause? There must be a casualty. I think the loss was so caused. With regard to the twelve bales, there was an unusual, an abnormal, delay in the transit, and that necessarily involved an exposure of the goods to damp. In the case of the twelve bales, therefore, the loss was an accidental loss and is covered by the policy. *A fortiori* the loss of the two remaining bales is covered. The case differs from *Pink* v. *Fleming* (*ubi sup.*). There goods were insured against (*inter alia*) damage consequent on collision. The ship on which the goods were shipped came into collision with another vessel and had to go into port for repairs. For the purpose of such repairs the goods, which were of a perishable nature, had to be discharged, and they were damaged by the handling necessary for their discharge and reshipment and by the delay. It was held that the collision was not the proximate cause of the loss, and that the underwriters were not liable. There, to entitle the assured to recover, a loss had to be proved as the direct result of the collision. Here, if all accidental causes of damage are included—and I have held that they are—all that has to be considered is whether the damage that happened was the direct result of some such accidental cause, and I consider that it was the direct result of an accidental cause. There must, therefore, be judgment for the plaintiffs.

Judgment for the plaintiffs.

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

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

July 20, 23, *and Aug.* 11, 1906.

(Before Walton, J.)

(1.) McDougall and Bonthron Limited *v.* London and India Docks Company.

(2.) Page, Son, and East Limited *v.* London and India Docks Company. (*a*)

*Dock dues—Exemption for lighters—Entering, staying in, and departing from dock—Duration of exemption—Sunday—*Bonâ fide *discharging or receiving—Reasonable time—After discharge remaining beyond first available tide—Acquiring fresh exemption without leaving dock—Entering prior to tide preceding vessel's arrival—London and St. Katharine Docks Act* 1864, *ss.* 132, 133, 136—*East and West India Dock Company's Extension Act* 1882, *ss.* 25, 26, *schedule, Part* 1—*London and St. Katharine and East and West India Docks Act* 1888, *s.* 57—*London and India Docks Amalgamation Act* 1900, *s.* 39.

(1.) *A lighter entered the St. K. Dock to discharge into a vessel lying therein on a Friday about noon. The discharge was completed on Saturday at* 5 *p.m. The vessel left on the next high tide, thirty minutes after midnight of the Saturday. The lighter attempted to leave at* 1 *a.m. on Monday on the early morning tide, but was detained by the dock company, who claimed certain dues. The dues were levied under the following rates:—The L. and I. D. Company's rates on shipping, Third class III. provides: "Subject as hereinafter provided, lighters which, having discharged or received ballast or goods to or from on board of a . . . vessel, shall remain in dock beyond the first available tide after such lighter shall have completed the discharge or receipt of the ballast or goods: For lying in the dock for any period not exceeding one week from the tide next following the completion of the discharge or receipt of the . . . goods and for departing therefrom, per ton register,* 6*d.* . . ."

The L. and I. D. Company's rules and regulations provided: "(15) . . . nor are they" (vessels) "allowed to pass from one basin to another on Sundays . . ." "(52) . . . no cargo shall be loaded or unloaded, nor shall any unnecessary work be done or permitted to be done, on Sunday."

Held, that Sunday was a working day, and that the lighter stayed beyond the first available tide. The lighter, under sect. 136 *of the London and St. Katharine Docks Act* 1864, *was entitled to enter the dock free and to stay in the dock free so long as was reasonably necessary for* bonâ fide *discharging or receiving to or from a vessel lying therein and was free to depart therefrom.*

The rate charged was bad and could not be enforced. If it was levied for lying in and for departing from the dock the barge was exempt from the latter and only liable for the former if more than a reasonable time had expired, and then only if an appropriate rate had been made. Such a charge would have to be limited to the rate of 2*d. per ton register per week under sect.* 25 *and Part* 1 *of the schedule of the East and West India Dock Company's Extension Act* 1882 (*made applicable by* 51 *&* 52 *Vict. c. cxliii., s.* 57), *and the* 6*d. rate as claimed could not be charged. The lighter stayed in dock longer than was reasonably necessary for discharging, but the exemption was not wholly lost, the right of free departure still existed.*

(2.) *A lighter entered the R. A. Dock on a Thursday to discharge into a vessel lying therein. Owing to want of space the lighter's cargo was shut out. The vessel sailed at noon on the Saturday, but the lighter remained in dock until Monday and was ordered to discharge into another vessel which was expected and which did in fact arrive in dock at noon on the Monday. The discharge thereupon commenced, and was completed about eight days later.*

The dock company claimed dues by virtue of the L. and I. D. Company's rates on shipping, which provided:—Third class II.: ". . . lighters with or for ballast or goods for or from a ship or vessel and entering the dock earlier than one tide before the arrival within such dock of such ship or vessel: For entering into the dock and for lying therein for a period not exceeding one week from the date of entrance, awaiting the

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

arrival of such ship or vessel, per ton register, 6d."

Held, the lighter did not lose its privilege because the cargo was shut out by the first vessel, and was therefore exempt for a reasonable time after noon on Saturday. No charge could be made for the Thursday, Friday, or Saturday. If the lighter stayed in dock longer than necessary after its cargo was shut out, a charge might be made if there was an appropriate rate. The rate was bad. The lighter was exempt to enter the dock for the first vessel and to leave, and, if an appropriate rate was made, the lighter might be charged for staying longer than was necessary, but the exemption was not lost. The lighter was an exempt lighter on the Monday morning, and, as the lighter then went to discharge cargo to another vessel, the exemption continued. It was not necessary to leave the dock and come in again to acquire a fresh exemption. The date of the lighter's arrival for the second vessel only dated back until, being an exempt lighter in the dock, the lighter, instead of leaving, received orders to go to the second vessel.

COMMERCIAL COURT.

Actions tried before Walton J. sitting without a jury.

The plaintiffs McDougall and Bonthron Limited claimed 1*l.* 10*s.* 6*d.* for money had and received by the defendants to the plaintiffs' use; alternatively for that sum as money paid by them to the defendants under protest to release the lighter *St. Thomas*, which was unlawfully detained in the St. Katharine Dock by the defendants. The tonnage of the lighter was 61 tons, and the 1*l.* 10*s.* 6*d.* was the amount of dues at 6*d.* per ton.

The plaintiffs Page, Son, and East Limited claimed 19*s.* for money had and received by the defendants to the plaintiffs' use; alternatively that sum as money paid under protest being dock dues unlawfully charged by the defendants on the plaintiffs' barge *Jew* in the Royal Albert Dock. The tonnage of the barge was 38 tons, and the dues were charged at the rate of 6*d.* per ton.

On the 24th Nov. 1905, in the morning, the *St. Thomas* entered the St. Katharine Dock with a cargo for the steamship *Pladda* which was lying in the dock.

By 5 p.m. on Saturday, the 25th Nov., the *St. Thomas* had discharged her cargo into the steamship *Pladda*. The steamship *Pladda* left on the next tide, which was about midnight of the 25th Nov. The *St. Thomas* lay in the dock throughout Sunday, the 26th Nov., her owners alleging that Sunday was a non-working day. On Monday, the 27th Nov. the *St. Thomas* attempted to leave the dock on the early morning tide, but was stopped by the defendants, who demanded 1*l.* 10*s.* 6*d.* as dues. Those dues were levied under the London and India Docks Company's rates, Third class III., which provided:

Subject as hereinafter provided, lighters which, having discharged or received ballast or goods to or from on board of a ship or vessel, shall remain in the dock beyond the first available tide after such lighter shall have completed the discharge or receipt of the ballast or goods: For lying in the dock for any period not exceeding one week from the tide next following the completion of the discharge or receipt of the ballast or goods and for departing therefrom, per ton register, 6*d.*; for lying in the dock beyond one week from the date of entrance, waiting the arrival of such ship or vessel, per ton register per week, 2*d.*

By the defendants' rules and regulations it was provided:

(15) Vessels are not permitted to lie in the entrance basins except after entering or when about to quit the docks, and then only for twenty-four hours, unless appointed by the company to discharge or load their cargoes therein; nor are they allowed to pass from one basin to another on Sundays or holidays. . . .

(52) . . No cargo shall be loaded or unloaded, nor shall any unnecessary work be done or permitted to be done, on Sunday.

The London and St. Katharine Docks Act 1864, s. 132, provides that:

The amalgamated company from time to time may demand and take in respect of every vessel for entering into any of the docks, basins, cuts, locks, or entrances, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton according to the registered tonnage of the vessel as the amalgamated company from time to time appoint.

Sect. 133. Provided that the tonnage rate which the company from time to time may demand and take in respect of any lighter, barge, or other like craft shall not exceed the rate or sum which from time to time is charged in respect of vessels loading coastwise between the Port of London and any port or place in the United Kingdom.

Sect. 136. All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from payment of any rates so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods.

The London and St. Katharine and East and West India Docks Act 1888 contains the following provisions:

Sect. 57. The rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London Company, and for lying therein and departing therefrom respectively, shall not exceed the rates specified in Part 1 of the schedule to the East and West India Dock Company's Extension Act 1882, and sect. 25 of the last-mentioned Act shall extend and apply not only to and in the case of the docks authorised by that Act, but to and in respect of all the docks and basins of the East and West India Company.

The East and West India Company's Extension Act 1882, s. 25, is as follows:

The company may from time to time demand and take in respect of every vessel for entering their new dock, lock, or tidal basin, or for lying therein or departing therefrom respectively, exclusively of the charge for loading or unloading, such reasonable, rate, rent, or sum for every ton according to the registered tonnage of the vessel as the directors shall from time to time appoint not exceeding the dock tonnage rate, rent, or sums specified in Part 1 of the schedule to this Act. . . .

Sect. 26. The tonnage rate which the company may from time to time demand and take in respect of any lighter, barge, or other like craft entering their new dock, lock, or tidal basin, and for lying therein shall not exceed the rate, rent, or sum which from time to time is charged by them in respect of vessels loading coastwise between Port of London and any other port or place in the United Kingdom. Provided always that any lighter, barge, or other like craft entering the new

dock, lock, or tidal basin to discharge or receive ballast or goods to or from on board of any vessel lying therein shall be exempt from the payment of any rate, rent, or sum so long as such lighter, barge, or other like craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid. . . .

Part 1 of the schedule was as follows:

Dock tonnage rates. Vessels entering to load or discharge cargo, 1s. 6d. per ton registered. . . . Rent to commence from date of entrance or at such time thereafter as may be from time to time fixed by the company—2d. per week per ton register.

The London and India Docks Amalgamation Act 1900 (63 & 64 Vict. c. cxi.):

Sect. 39. All the by-laws, rules, and regulations of the London Company, or the East and West India Company, or the joint committee relating to the management, use, or control of the undertaking of either of the two companies shall, notwithstanding the transfer of the undertaking of the East and West India Company to the London Company and the dissolution of the East and West India Company and of the joint committee, continue to be in force and applicable to and in respect of the undertaking of the London Company after the date of amalgamation, and shall and may be enforced by and available to the London Company in their own name as well as for the recovery of penalties as for all other purposes as if the same respectively had been originally and duly made by the London Company until the same respectively are rescinded or other by-laws, rules, and regulations are duly made by the London Company in their stead.

Scrutton, K.C. and *Cranstoun* for the plaintiffs McDougall and Bonthron Limited.—The dues should not have been demanded or taken. The defendants had no power to do so, for by the London and St. Katharine Docks Act 1864, the East and West India Dock Company's Extension Act 1882, and the London and St. Katharine and East and West India Docks Act 1888 the lighter was exempt from dues. The *St. Thomas* could not have been treated other than as an exempt lighter. The *St. Thomas* endeavoured to leave on the next available tide—viz., the Sunday-Monday tide—for by the defendants' regulations Sunday is a non-working day. The *St. Thomas* was exempt from dues for entering and leaving the dock. The *St. Thomas* was exempt while in the dock, because the period of exemption had not expired. the next available tide not being until the Sunday-Monday tide. The defendants are trying to charge the lighter for lying in and departing from the dock. It was not unreasonable to wait till the Sunday-Monday tide. The exemption was not wholly lost even if the lighter stayed longer than was reasonably necessary for discharging. If the lighter overstayed such reasonable period, dues for lying in could be charged (but not for departing) only if there was an appropriate rate. If a separate charge for lying in was made, it would have to be a 2d. rate under the East and West India Dock Company's Extension Act 1882. No such separate charge had been made. The charges were unreasonable. They were unequal, and were in excess of the charges made by the Surrey Commercial Dock and by the Millwall Dock. The rate was bad.

Hamilton, K.C. and *G. Wallace* for the defendants.—The steamship *Pladda* left on the Saturday-Sunday tide. That was the next available tide, and there was no reason why the lighter should not have left on it. The exemption period ceased after midnight of Saturday, the 25th. When an opportunity was given of leaving the dock after the lighter had discharged her cargo, the exemption ceased. By the defendants' regulations vessels are not allowed to pass from one basin to another on Sundays, but it is the common practice for craft to enter or leave the docks on Sundays. The regulations therefore do not protect the plaintiffs. When the lighter overstayed her period of exemption, the exemption wholly ceased. Further, there was no statutory prohibition against charging departure dues. The charges were not invalid, unreasonable, or unequal.

The facts in the case of *Page, Son, and East Limited* v. *London and India Docks Company* were as follows:—

On the 23rd Nov. 1905 the barge *Jew* with a cargo entered the Royal Albert Dock to discharge to the steamship *Matiana* then lying therein.

On Saturday, the 25th Nov., at noon, the steamship *Matiana* completed her loading, and left the dock on the same day on the midday tide. The cargo on the *Jew* was shut out for want of cargo space.

The *Jew* remained in the dock over Sunday, the 26th Nov.

On Monday, the 27th Nov., the steamship *Somali* came into dock on the midday tide. The *Jew* was in the dock on the steamship *Somali's* arrival, and discharged the cargo into the latter.

The *Jew* completed discharging on the 5th Dec.

On the 5th Dec. the *Jew* went to the steamship *Rappahannock*, which had come into the dock on the 3rd Dec., and received a quantity of timber.

On the 10th Dec. the *Rappahannock* left the dock. On the same day, about noon, the steamship *Maryland* entered the dock, and the *Jew* received more timber. The discharge from the *Maryland* to the *Jew* was completed on the 19th Dec. On the 20th Dec. the *Jew* left the dock. The defendants claimed dues from the *Jew* under their rates, Third class II., but made no claim subsequent to the *Jew's* discharge to the *Somali*.

The London and India Docks Company's rates provided, Third class II.:

Subject as hereinafter provided, lighters with or for ballast or goods for or from a ship or vessel, and entering the dock earlier than one tide before the arrival within such dock of such ship or vessel: For entering into the dock and for lying therein for a period not exceeding one week from the date of entrance, awaiting the arrival of such ship or vessel, per ton register, 6d.; for lying in the dock beyond one week from the date of entrance, awaiting the arrival of such ship or vessel, per ton register per week, 2d.

Scrutton, K.C. and *Cranstoun* for the plaintiffs Page, Son, and East Limited.—The *Jew* was an exempt barge: (London and St. Katharine Docks Act 1864, and the Acts to be read therewith). The defendants therefore could not demand or take the dues. The *Jew* entered the dock for the purpose of discharging to the steamship *Matiana*, but, when that was impossible, discharge was given to another vessel and cargo received from other vessels. That was a *bonâ fide* discharging. The London and St. Katharine Docks Act 1864 exempts a barge from dues as long as there is a *bonâ fide* discharging or receiving, and that is not limited to the period of actual discharge or

receipt. It is not unreasonable for a barge to enter the dock on the Saturday for the discharge to a vessel expected in on the Monday. The *Jew* did not remain in dock for an unreasonable time. The *Jew* could remain in dock, and the exemption extended, until the early tide on the Monday morning. A barge is entitled to enter the dock one tide before the vessel to which discharge is to be given enters. The *Somali* entered the dock on the Monday midday tide, and therefore, as the *Jew* was rightly in the dock on the Monday morning, it was unnecessary to pass out of the dock and re-enter at once. Further, for the same reasons as in the case of the lighter *St. Thomas*, the charge was invalid. No dues under the circumstances were leviable on the *Jew*.

Hamilton, K.C. and *G. Wallace* for the defendants.—The *Matiana* was the vessel lying in the dock for which the *Jew* entered in order to discharge cargo, but there was no discharge to that vessel. The Act of 1864, s. 136, refers to discharge to a vessel lying in the dock, and gives an exemption to the barge while so discharging: that means while so discharging to the vessel for which the barge entered the dock. The *Jew* did not enter for the purpose of discharging to the *Somali*, and therefore the discharge to the *Somali* was not subject to the exemption. There cannot be a *bonâ fide* discharge to a vessel after the latter's departure:

Knight, Bevan, and Sturge v. *London and India Dock Joint Committee*, unreported, Jan. 28, 1895, Div. Ct.

When it became apparent that there could be no discharge to the *Matiana*, the exemption ceased, and the *Jew* should have left the dock. The purpose for which the barge had entered was gone; when that occurs and an opportunity of leaving is given, the exemption ceases. There was no reason why the *Jew* should not have gone out and re-entered on the Monday morning, one tide before the *Somali's* arrival. If the barge-owner terminates the exemption, he is not entitled to leave without paying a departure due. If it was unreasonable to leave on the Saturday, the *Jew* at any rate should have gone out on the Sunday. That would not have been contrary to the by-laws. The rate was not bad; the barge was not charged more than a coasting vessel, nor was it unequal or unreasonable. The East and West India Dock Company's Extension Act 1882 and the London and St. Katharine and East and West India Docks Act 1888 do not prohibit the charging of a departure due if no exemption exists.

The following cases were referred to:

Stockton Railway Company v. *Barrett*, 11 C. & F. 590;

Stowbridge Canal (Proprietors of) v. *Wheeley*, 2 B. & A. 792;

London and India Docks Company v. *Union Lighterage Company*, unreported, May 23, 1905, Div. Ct.;

London and India Docks Company v. *Thames Steam Tug and Lighterage Company*, 22 Times L. Rep. 636, under the name *London and India Docks Company* v. *Union Lighterage Company Limited*.

Cur. adv. vult.

WALTON, J.—These are two cases in each of which the London and India Docks Company are the defendants. Each case raises a question as to the rates chargeable upon lighters making use of the docks. In the case of the lighter *St. Thomas*—that is, *McDougall and Bonthron* v. *London and India Docks Company*—the claim by the plaintiffs, who are the owners of the lighter, is for 1*l.* 10s. 6*d.*, which they paid under protest to the defendants, their contention being that that sum was not payable. The *St. Thomas* went into the dock with a cargo for the steamship *Pladda* on the morning of Friday, the 24th Nov. 1905. The *St. Thomas* discharged her cargo and it was loaded on board the steamer before 5 p.m. on Saturday, the 25th Nov. The next tide was at about midnight, and on that tide the *Pladda* left. The *St. Thomas* remained in the dock over the Sunday, and left the dock on Monday. Before the lighter left the defendants required payment of this rate of 1*l.* 10s. 6*d.* That rate was claimed in accordance with the published rates of the dock company. The rate in question, being No. 3 of the third class, is as follows: "Subject as hereinafter provided, lighters which, having discharged or received ballast or goods to or from on board of a ship or vessel, shall remain in the dock beyond the first available tide after such lighter shall have completed the discharge or receipt of the ballast or goods: For lying in the dock for any period not exceeding one week from the tide next following the completion of the discharge or receipt of the ballast or goods and for departing therefrom, per ton register, 6*d.*" There is no doubt the *St. Thomas* remained in the dock for a certain period beyond the first available tide after she had completed the discharge of the goods into the steamship *Pladda*, because she did not leave, as she might have done, on the tide on the Saturday night, but remained in the dock until Monday.

Two questions arise. It is said that Monday was the first available tide; and that the lighter left the dock as soon as she reasonably could. The lighter did not finish discharging until 5 p.m. on the Saturday, and the plaintiffs' case is that Sunday was not a working day, and that therefore the lighter was not bound to go out on the Sunday, and she did leave on the Monday. The first question is: Did she leave by the first available tide, giving a reasonable construction to those words? Certain rules and regulations made by the defendants were referred to. I need not refer to them. For the plaintiffs it was pointed out that a number of these rules referred to certain things not being done on Sundays. I do not think any one of these rules really applies to the present case. The practice is that lighters do leave the dock and come into the dock on Sundays very frequently. This dock is the St. Katharine Dock. From the particulars for the St. Katharine Dock for Oct., Nov., and Dec. 1905, there is no doubt that lighters do come in and go out of the St. Katharine Dock on Sundays. I find that 260 came in on Sundays, and eighty nine went out on Sundays, during those three months; and there are similar figures for other docks. With regard to the Royal Albert Dock, 317 came in and 304 went out on Sundays.

In my opinion Sunday is a working day, and although, in one sense, it is not at all an unreasonable thing for the lighter to remain in the dock over the Sunday—no one complains of it, and no one alleges that the owner was acting

unreasonably—it was a very reasonable convenience, and probably the more convenient thing to do; but if it was a reasonable convenience to the owner, it seems to me equally reasonable, if the dock company are entitled to charge for the Sunday, that they should do so. If the one is reasonable, so is the other. I do not think I can find that the Sunday was not a working day. I find, therefore, in fact that the *St. Thomas* did remain in the dock beyond the first available tide after she had completed the discharge of her cargo. It is said, however, that, even if that is so, the rate is bad and cannot be enforced, and that therefore the plaintiffs are right even although Sunday is a working day. In an unreported case in the Divisional Court before the Lord Chief Justice, Kennedy, J., and Ridley, J. on the 23rd May 1905, it was decided that where a lighter has come into the dock with a cargo for a steamer in dock or to receive cargo from a vessel in dock and the lighter remains in the dock for a longer time than is reasonably necessary, the dock company cannot make a charge in respect of such unreasonable delay unless they have made some rate fixing the amount to be paid. I have already read the rate which the defendants have made, and the question whether that rate is a bad rate, as is alleged, has to be considered. The London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii), s. 132, provides that: "The amalgamated company" (as it was then) "from time to time may demand and take in respect of every vessel for entering into any of their docks, basins, locks, cuts, or entrances, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the amalgamated company may from time to time appoint." That section is the foundation of the power to levy the rates, so far as the St. Katharine Dock is concerned. Sect. 136 of the same Act provides that: "All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever." Sect. 132 provides for the charging of a rate for three things—(i.) entering the dock, (ii.) lying therein, and (iii.) departing therefrom. Sect. 136 exempts lighters and craft entering into the dock to discharge or receive ballast or goods to or from on board any ship or vessel lying in the dock from the payment of any rates either for entering the dock, or lying in the dock, or departing from the dock. The entering and departing seem to me to be rather different from the lying in. Entering the dock is an act, and an act in which the dock company has to concur—that is to say, it involves work which at any rate in part has to be done and provided by the dock company. The same may be said of departing—that is, the act of departing involves work which has to be done at any rate in part by the dock company. The charge for lying in dock is rather in the nature of rent which is paid in respect of the occupation of the dock by the vessel or lighter for a certain length of time, and as I read sect. 136, it means that all lighters coming into the dock to discharge or receive ballast or goods to or from on board any ship or vessel shall be exempt from any rate for entering the dock, or for going out of the dock, or for lying in the dock—occupying the dock for a certain length of time—so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods. The lighter may come in; she may remain in so long as she remains in only for such length of time as is reasonably required for discharging or receiving the ballast or goods; and she may go out. That is the exemption. The case of *London and India Docks Company* v. *Union Lighterage Company* (*ubi sup.*), to which I have already referred, shows that the lighter does not lose its exemption or its privilege under sect. 136 altogether by staying in the dock too long. The lighter may become liable to be charged for delay, but by staying in the dock too long she does not lose the benefit of the exemption altogether. The words in sect 136, "so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods," do not express a condition. They do not mean that the barge or lighter is exempt only if she remains in the dock long enough and for no greater time than is reasonably required for discharging or receiving the ballast or goods. It is not a condition; it is a limitation. If the lighter stays longer than is necessary, then she may be charged for staying longer if an appropriate rate is made. The Act of 1882, which is an Act to authorise the East and West India Dock Company to extend their dock system by constructing and maintaining a new dock and other works in connection therewith, provides by sect. 25 that "the company may from time to time demand and take in respect of every vessel for entering their new dock, lock, or tidal basin, or for lying therein, or for departing therefrom respectively, exclusively of the charge for loading or unloading, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the directors shall from time to time appoint, not exceeding the dock tonnage rates, rents, or sums specified in Part 1 of the schedule to this Act." To the terms of the schedule I shall presently refer. That Act does not of itself apply to the present case, but by sect. 57 of 51 & 52 Vict. c. cxliii., which is the London and St. Katharine and East and West India Docks Act 1888, it is provided: "The rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London Company, and for lying therein and departing therefrom respectively, shall not exceed the rates specified in Part 1 of the schedule to the East and West India Company's Extension Act 1882, and sect. 25 of the last-mentioned Act shall extend and apply not only to and in the case of the docks authorised by that Act, but to and in respect of all the docks and basins of the East and West India Company." That section makes sect. 25 of the Act of 1882 and the schedule apply to the present case.

That being so, is this rate a good rate? It states that if the lighter remains in the dock beyond the first available tide after the lighter shall have completed the discharge of the goods (in this case it was the discharge of the goods), then the rate is for lying in the dock for any period not exceeding one week

from the tide next following the completion of the discharge or receipt of the ballast or goods, and for departing therefrom. The dock company have got a right to make a rate for the time during which the lighter remains in dock beyond the time that is reasonably necessary for discharging or receiving the goods; but if the lighter is an exempt lighter, and does remain longer than is necessary, I do not think that that entitles the dock company to impose a rate upon that lighter for departing from the dock. The dock company may impose these charges, as I have said, for entering, lying in the dock, and departing therefrom; but if the lighter is an exempt lighter, it certainly is exempt in respect of entering, and I think it is exempt in respect of departing, and it is exempt in respect of lying in the dock, so long as it does not lie longer than is reasonably necessary for the purpose of discharging or receiving cargo, and therefore, if by this rate the dock company imposed a charge upon this lighter, which was an exempt lighter, for departing from the dock, then I think it is a bad rate.

If it were treated as a charge merely for the time occupied beyond what was reasonably necessary, as a charge for lying in the dock, then I think that it is a bad rate, because if it is good, it must be good within the terms of sect. 25 of the Act of 1882 and Part 1 of the schedule. Part 1 of the schedule which gives the maximum rate is this: "Vessels entering to load or discharge cargo, 1*s.* 6*d.* per ton register." This lighter was exempt for entering. Then rent, and this is the only rate for rent which is given in the schedule: "Rent to commence from date of entrance or at such time thereafter as may be from time to time fixed by the company, 2*d.* per week per ton register." I am of opinion that for lying in the dock longer than is necessary the dock company cannot charge more than 2*d.* Therefore I think this rate is bad, and that the plaintiffs are entitled to judgment for the amount which they claim with costs.

As to the second case, *Page, Son, and East Limited* v. *London and India Docks Company*, that is a case in respect of a lighter called the *Jew*, belonging to the plaintiffs, and the claim is for the return of 19*s.*, being 6*d.* per ton on 38 tons, the tonnage of the lighter. The *Jew* went into the Royal Albert Dock on the 23rd Nov. 1905, in the morning—on the Thursday in the same week as in the other case—with goods for a steamer called the *Matiana*. The *Matiana* finished her loading on Saturday, the 25th, about noon. As I understand it, the *Matiana* left the dock, immediately after she finished loading, by the midday tide. I think the effect of the evidence is that she left by the midday tide, but she did not take the goods which had been brought for her on board the *Jew*. They were shut out. The *Jew* did not leave the dock; she remained in just as the *St. Thomas* remained in. The *Jew* remained in the dock on the Sunday, and until Monday morning. On the Monday morning, the 27th, the lighter was ordered not to leave the dock, but to transfer the cargo to the steamship *Somali*, which was expected, and which arrived in dock about noon on the Monday. The *Jew* thereupon went to the *Somali* to put the goods which she had on board the *Somali*. The payment in question which the plaintiffs are seeking to recover back was demanded on the 28th. The money was paid under protest. The *Jew* remained alongside the *Somali*, and finished discharging her cargo into the *Somali* on the 5th Dec. The steamship *Rappahannock* arrived in dock on the 3rd Dec. with timber. When the *Jew* had discharged her cargo into the *Somali* and was empty, she went the same day alongside the *Rappahannock*, and received timber from the *Rappahannock*. On the 10th Dec. another steamship, the *Maryland*, came in, and the *Rappahannock* left. The *Jew* on the same day, having finished with the *Rappahannock*, went at once to the *Maryland*, and on the 19th Dec. she finished taking cargo from the *Maryland*, and on the 20th she left the dock. The *Jew*, therefore, entered the dock on the 23rd Nov., and the *Somali*, the vessel to which she discharged her cargo, entered on the 27th. It appears to me that the dock company cannot charge in respect of the 23rd, 24th, or 25th Nov. That seems to follow from the decision of the court in *London and India Docks Company* v. *Thames Steam Tug and Lighterage Company* (*ubi sup.*), the case which was before Kennedy, J. and A. T. Lawrence, J. The effect of that case is that the lighter does not lose its privilege because the cargo which it brought in for some vessel was shut out, and, therefore, so far as the *Matiana* is concerned, the lighter is exempt. That takes the lighter, assuming that the cargo was shut out at noon on Saturday, up to at any rate a reasonable time after noon on the Saturday. The *Somali* did not enter until the 27th. It seems to me that here one comes within the case I have already decided. The *Jew*, if she stayed in dock after the cargo was shut out of the *Matiana* longer than was necessary (assuming that she was not discharging cargo to any other vessel in the dock), might then be made to pay if there was an appropriate rate, but, if I am right in my decision, the rate which was made would not apply because it is a bad rate; the case up to this point would then be exactly the same as the *St. Thomas*. She stayed in over the Sunday, then on the Monday she was still exempt, but liable perhaps to an extra charge for staying longer than was necessary in the dock. She was exempt to come in for the *Matiana*, and she was exempt to go out again, and if she stayed longer than was necessary, and there was an appropriate rate made for the purpose, she might be made to pay something for staying too long, but she did not lose her exemption. The *Jew*, therefore, was an exempt lighter on the morning of Monday, the 27th. The lighter was then ordered to deliver her cargo to the *Somali* and she did so. The defendants contend that the lighter is liable to a charge because she entered the dock on the 23rd, and that is a very long time before the *Somali* came in—*i.e.*, the 27th. The dock company say that at any rate she cannot claim the exemption is respect of the discharging of her cargo to the *Somali* because she did not enter the dock for that purpose; in other words, if she had gone out and come in again on the Monday, then I suppose it would have been all right. I do not see how they could have objected. The lighter then would have acquired, so to speak, a new exemption in respect of the *Somali*. Was she bound to do that? Her first exemption was perfectly good,

except that she might be liable for staying too long. I do not know that they have made a charge for that; but, if so, then it is exactly the same as the other case. If the charge is made in respect of her coming in to discharge to the *Somali*, then my decision is this: I do not think it was necessary for the lighter to go out and come in again. It would be a useless proceeding, because it would involve a certain amount of work upon those in charge of the lighter, and also upon the servants of the dock company, and I do not think the law ever does require that sort of idle form to be gone through. Take the old authority, where a payment of 1000*l.* is made by A. to B. and a payment of 1000*l.* is made by B. to A. at the same time and at the same interview; it is never necessary that the money should be handed backwards and forwards. So I think here the exemption applies, not merely to a barge or lighter that comes in to discharge or receive cargo; but if the lighter or barge has discharged her cargo to one steamer, then she may go to another, even although she had received no orders to go to that steamer until after she had discharged her cargo to the first steamer. When she has discharged her cargo to the first steamer, then she may go straight away and receive cargo from another steamer, and she remains exempt, and she has not, so to speak, to acquire a new exemption in respect of the second steamer by going out of the dock and coming back again. If, however, the lighter occupies the dock longer than is reasonably necessary either for the purpose of discharging her cargo into the first steamer, or of receiving cargo from the second steamer, then, according to the decision of the Divisional Court to which I have referred, the the bargeowner may be made to pay for that occupation of the dock beyond what is necessary for the purpose of discharging or receiving cargo (as the case may be) if there is an appropriate rate made.

For the reasons which I have stated I think that rate No. 3, which applies where the lighter remains too long, is bad, because it is a charge made not merely in respect of the lighter remaining longer than is necessary, but apparently it is in respect of the lighter remaining longer than is necessary and also in respect of departing. The charge is 6*d*, and I think all they can charge is rent for the occupation of the dock for an unreasonable time, and the maximum charge they can make for that I think is 2*d*.

With regard to the second case, the case in which I am now giving judgment, it was said by the defendants that it came under rate 2 which is: "Subject as hereinafter provided, lighters with or for ballast or goods for or from a ship or vessel, and entering the dock earlier than one tide before the arrival within such dock of such ship or vessel: For entering into the dock and for lying therein for a period not exceeding one week from the date of entrance, waiting the arrival of such ship or vessel, per ton register, 6*d*." In this case the *Jew* came in as an exempt lighter for the other vessel, and was an exempt lighter, possibly liable to some charge in respect of lying in the dock over the Sunday, but still an exempt lighter, free to go out without any extra charge for departing on the Monday morning. That was her position on Monday morning, and she was ordered to go to another vessel to receive cargo. It seems to me that if she did that she remained exempt, and that it was not necessary for her to go out and come in again in order to acquire, so to speak, a fresh exemption. The date of her arrival in the dock for the purpose of discharging cargo to the second vessel, the *Somali*, does not date back to the time when she came into the dock to discharge cargo into the other vessel, the *Matiana*, but dates back only to the time when, being an exempt lighter in the dock, instead of going out she gets orders to go to the other vessel. Those orders were received on the Monday morning and obeyed at once. I do not think the case comes within rate 2. There must be, in this case also, judgment for the plaintiffs, with costs.

Solicitors for the plaintiffs, *Keene, Marsland, Bryden*, and *Besant*.

Solicitors for the defendants, *E. F. Turner* and *Sons*.

Jan. 11 *and* 14, 1907.

(Before Bray, J.)

London County Council *v.* General Steam Navigation Company Limited. (*a*)

River Thames—Piers—Acquisition by London County Council—Power to levy tolls—Transference—"Rights and privileges"—"Rights and powers"—Thames River Steamboat Service Act 1904 (4 *Edw.* 7, *c. cciii.*).

By two private Acts of Will. 4 *the Greenwich Pier Company was authorized to make and maintain a pier, and were authorized to take certain rates, duties, and tolls prescribed by such Acts.*

Woolwich Pier was constructed as a private undertaking, and the lease became vested in the T. S. Company, who made certain charges for the use of such pier.

Under the Thames River Steamboat Service Act 1904 *the L. County Council bought from the G. Pier Company "their undertaking (including therein all the property, estates, rights, and privileges . . . of the Greenwich Company"), and they also purchased the W. Pier "and any rights and powers connected therewith."*

By sect. 15 *of the Act of* 1904 *the L. County Council could "charge and levy in respect of vessels calling at the piers and landing places a toll not exceeding the amount stated in the schedule to this Act."*

Held, that the L. County Council had no statutory right to charge any tolls in respect of G. Pier or W. Pier beyond those chargeable by virtue of sect. 15 *of the Act of* 1904; *and that they were not entitled to charge the tolls prescribed by the private Acts of Will.* 4 *in respect of G. Pier, or any reasonable sum in addition to the tolls prescribed by the Act of* 1904 *in respect of W. Pier.*

Any facilities, however, provided by the L. County Council which they were not bound to provide under the Act of 1904 *would have to be paid for by the person at whose request express or implied they were provided.*

Special case.

The action was commenced on the 22nd Jan. 1906 by a writ of summons whereby the plaintiffs

(*a*) Reported by W. de B. Herbert, Esq., Barrister-at-Law.

claimed a declaration that the plaintiffs are entitled to charge in respect of passengers landing at or embarking from the pier known as Greenwich Pier from or in the vessels of the defendant company the rates or duties formerly chargeable by the Greenwich Pier Company in respect of such passengers. A declaration that the plaintiffs are entitled to charge in respect of passengers landing at or embarking from the pier known as Woolwich Pier from or in the vessels of the defendant company the same tolls or charges as were or might have been levied or charged by the Thames Steamboat Company (1897) Limited in respect of such passengers prior to the purchase by the plaintiffs of Woolwich Pier from that company. Further, or in the alternative, a declaration that the plaintiffs are entitled to prescribe and require the defendants to pay charges at each of such piers (beyond the calling toll) for special facilities, services, and accommodation afforded and rendered by the plaintiffs to the defendants.

The plaintiffs were constituted by the Local Government Act 1888 (51 & 52 Vict. c. 24).

The defendants are a steamship company registered under the Companies Acts, and maintain during the summer season in each year by means of their own fleet of steamships a passenger service on the river Thames between London and Southend and places beyond the Nore.

The defendants' steamships on their way up and down the river call regularly at Greenwich Pier and Woolwich Pier and Tilbury Pier for the purpose of embarking and disembarking passengers and their luggage, if any.

Both Greenwich Pier and Woolwich Pier were recently transferred to or acquired by the plaintiffs under or in pursuance of the Thames River Steamboat Service Act 1904 (4 Edw. 7, c. cciii.), which is hereinafter referred to as the council's Act. The terms of such transfer or acquisition are stated in later paragraphs of this case. Questions have now arisen between the parties as to the charges to be made to the defendants in respect of the user by their steamships in manner above mentioned of the two piers.

Greenwich Pier was constructed in or about the year 1840 under the powers of two Acts of Parliament (which may be referred to as part of this case), 6 & 7 Will. 4, c. cxxviii., and 7 Will. 4, c. lvi., by the Greenwich Pier Company, which was thereby incorporated and empowered to make, maintain, and manage such pier, and such pier was thereafter maintained and managed by the Greenwich Pier Company as part of its undertaking authorised by the two Acts until it was taken over by the plaintiffs in anticipation of the above-mentioned transfer or acquisition.

By the former of the two Acts the Greenwich Pier Company were authorized to take the rates and duties or tolls prescribed by the following enactments:

Sect. 53. And be it further enacted that the master of every packet, boat, and other vessel carrying passengers, and every other ship, vessel, boat, or other craft who shall embark or disembark such passengers, or lade or unlade, take on board, or discharge any goods, wares, or merchandise at the said pier, wharf, or jetty, shall pay to the said company in regard thereof the several rates or duties set down in figures against the words applicable to the same respectively in the schedule hereunto annexed.

Sect. 54. And be it further enacted that every passenger who shall land from or embark in any ship, packet, vessel, boat, or other craft, and every person who may land at or embark from the said pier, wharf, or jetty, and every person who shall walk on the said pier, wharf, or jetty, or the approaches thereto, shall pay to the said company in respect of every such landing or embarkation and of every time of entering or coming upon such pier, wharf, or the approaches thereto such sum as the said directors shall direct not exceeding the sum mentioned in the schedule and set down in figures against the words respectively applicable to such landing, embarkation, or walking, and the money payable by or in respect of passengers shall be collected and received by the master of the ship, vessel, boat, or other craft carrying such passengers before the departure of such passengers from on board such ship, packet, vessel, boat, or other craft, and shall be by such master with all convenient speed paid over to the collector for the time being or other person to be appointed by the said directors for that purpose; provided always that it shall be lawful for the officers of the said company to prevent every person from walking on the said pier, wharf, or jetty, avenues, and approaches except persons landing at or embarking from the said pier, wharf, or jetty from or in any ship, boat, or vessel, and persons paying the said toll or duty or compensation for the same.

The schedule referred to by the foregoing Act:

For every passenger or other person who shall and from any vessel, boat, wherry, or other machine plying between New Windsor, in the county of Berks, and Yantlet Creek, in the county of Kent, on the pier, landing places, wharf, or other works, or embark or go on board of any such vessel, boat, wherry, or other machine so plying as aforesaid from the said pier or landing place, quays, wharfs, or works, or any part thereof, for each and every time not exceeding ... ... 2*d*.

For every passenger or other person who shall land from any vessel, boat, wherry, or other machine plying from or to any place without the boundaries aforesaid on the pier, landing places, wharf, or other works, or embark or go on board of any such vessel, boat, wherry, or other machine so plying without the said boundaries as aforesaid from the said pier or landing place, quays, wharfs, or works, or any part thereof, for each and every time not exceeding ... ... 6*d*.

For every person who shall use the said pier or wharf for the purpose of walking for exercise, pleasure, or otherwise, per day, not exceeding 1*d*.

The Act also contained (sect. 60) a power to demise the tolls and duties for any term not exceeding three years, (sect. 61) a power to reduce and again to raise any of the duties and tolls, and (sect. 62) required the company as a condition of their right to collect the same to fix up at conspicuous places a list of the rates and duties for the time being authorized to be taken.

A copy of the schedule was up to and at the time of the passing of the council's Act exhibited on the pier and has since continued to be there so exhibited, but it is not to be taken that the tolls mentioned in the said schedule were in fact enforced by the Greenwich Pier Company.

In the case of the defendants' vessels and passengers an arrangement between the defendants and the Greenwich Pier Company was at the time of passing the council's Act and had for some years been in force by which the defendants had regularly paid to the Greenwich Pier Company for and in respect of each of the defendants' passengers embarking or landing at the Green-

wich Pier with or without luggage an inclusive sum of 2*d*. Such payment included facilities, services, and accommodation generally similar to those hereinafter described. The Greenwich Pier Company had somewhat similar arrangements with one or more other steamship company or companies.

Pursuant to sect. 6 of the council's Act the plaintiffs on or about the 26th Nov. 1904 gave to the Greenwich Pier Company such a notice as is in that section referred to. Pursuant to such notice and to the award of an arbitrator under the provisions of the Lands Clauses Acts the undertaking of the Greenwich Pier Company has now by a conveyance dated the 26th Feb. 1906 been conveyed by the Greenwich Pier Company to the plaintiffs in consideration of the payment by the plaintiffs to the company of a sum of 21,765*l*. The property, rights, matters, and things expressed to be conveyed by the company to the plaintiffs were as follows: (1) The fee simple in possession of the freehold portion of the pier; (2) a lease for a term of 10,000 years of a strip of land to form an access to the pier; (3) the residue of a term of eighty years granted to the Greenwich Pier Company by the Lords Commissioners of His Majesty's Admiralty of and in the said pier other than the said freehold portion, which term will expire on the 24th June 1917; (4) the undertaking of the Greenwich Pier Company and the right to levy tolls, rates, and duties, and all other rights, privileges, authorities, and powers vested in or exercisable by that company under the two Acts above referred to; (5) all other the property, estates, rights, and privileges of the Greenwich Pier Company except certain sums of money in the hands of or due or owing to the company or their liquidators or at their bankers.

The plaintiffs have afforded to the defendants in respect of their steamers calling at Greenwich Pier, or to the passengers travelling by such steamers, the facilities, services, and accommodation hereinafter described, and the defendants have availed themselves of such facilities, services, and accommodation. (*a*) For booking passengers the plaintiffs have allowed the defendants to place and retain a booking-box or office on the pier rent free. (*b*) A special portion of the pier is set aside for the use of the defendants' steamships, and is kept clear of any other vessel and traffic when such steamships call at the pier. Stairways at the lower end of the pier are specially reserved for the defendants' use so as to enable them to keep their traffic separate from other traffic. The arrangements described in this sub-paragraph are made in the interests of both the plaintiffs and the defendants. (*c*) The plaintiffs have allowed the defendants' servants when engaged upon the defendants' business, whether in connection with the booking-office, catering department, or otherwise, to come and be upon the pier without charge. (*d*) The defendants' steamers have on many occasions arrived and been received at the pier after 9 p.m., the hour at which the plaintiffs' own steamers cease running and the plaintiffs' pier staff would otherwise cease work. During the summer of 1905 the defendants' steamers occasionally arrived so late as between eleven and twelve o'clock at night. The plaintiffs' pier staff consists of six men. Whenever the defendants' steamers have arrived after 9 p.m. the plaintiffs have had to retain on duty more than half of their pier staff, paying them overtime at the rate of time and a half. (*e*) Passengers' luggage is frequently landed at the pier unaccompanied by the owner, who is travelling or has travelled by another of the defendants' boats. Such luggage is conveyed by the plaintiffs' men to the piermaster's room and there taken care of without charge until demanded by the defendants or their passenger. (*f*) The plaintiffs have from time to time allowed material for the repair and upkeep of and catering stores for the defendants' steamers to be taken delivery of at the pier and shortly afterwards delivered to the defendants' vessels on their arrival and have made no charge for so doing. (*g*) The plaintiffs provide and keep at Greenwich Pier for the use of the larger steamships calling there, including the defendants' steamships, two brows or gangways larger than would be required for smaller vessels, and permit such brows or gangways to be used by the defendants' steamships for the landing and embarking of passengers and their luggage. (*h*) The plaintiffs render the acccounts of the pier charges to the defendants monthly.

Woolwich Pier was constructed as part of a private undertaking some time before the year 1871. By a lease dated the 24th May 1871, made between Sir John Maryon Wilson of the first part, George Loaden and William Thomas Wade of the second part, and the Woolwich Steam Packet Company Limited of the third part, Woolwich Pier and certain other hereditaments were demised to the Woolwich Steam Packet Company Limited for the term of seventy years from Lady-day 1871 at the rent in the lease mentioned. This lease afterwards became vested for the residue of the term thereof in the Thames Steamboat Company (1897) Limited, which thereafter maintained and managed Woolwich Pier as part of its undertaking referred to in the council's Act.

Until Woolwich Pier was taken over by the plaintiffs as aforesaid, the Thames Steamboat Company (1897) Limited charged and the defendants paid in respect of the user of Woolwich Pier by the defendants and their steamships as aforesaid, including facilities, services, and accommodation similar to those referred to in the next paragraph hereof, the the sum of 2*d*. for each of the defendants' passengers embarking from or disembarking at Woolwich Pier.

Pursuant to sect. 14 of the council's Act the Thames Steamboat Company (1897) Limited on the 11th Oct. 1904 gave notice in writing to the plaintiffs to purchase the piers of the company, including Woolwich Pier, and pursuant to an award of Mr. Boydell Houghton, dated the 5th Aug. 1905, an indenture of underlease, dated the 30th Jan. 1906, was executed by and made between the company of the first part, Arnold Frank Hills and the Honourable Sydney George Holland of the second part, and the plaintiffs of the third part whereby Woolwich Pier and certain adjoining premises and rights were demised to the plaintiffs for the term of thirty-six years from the 25th March 1905 less the last day thereof. The plaintiffs have afforded to the defendants in respect of their steamers calling at Woolwich Pier and to the passengers travelling by such steamers certain facilities, services, and accommo-

dation—that is to say, they have allowed the defendants' servants to come and be upon the pier free of charge, and, in order to meet the requirements of the defendants and one or two other companies whose steamships call regularly at Woolwich Pier, the plaintiffs maintain and employ there a larger staff than would be required if such steamships did not call at Woolwich Pier.

The plaintiffs took over the position and maintenance of both piers before the commencement of the season of 1905, and for the purposes of this case they are to be taken to have acquired them as from the date when they so took them over.

By-laws have been made by the plaintiffs under the council's Act, but no charge for the use of stages or other appliances has been prescribed by any by-law.

The plaintiffs since they took over Greenwich Pier have exhibited a list of rates and duties, but no other list of rates and duties.

Soon after the beginning of the season of the year 1905 questions arose and correspondence passed between the parties as to the sums to be paid by the defendants to the plaintiffs in respect of the user by the defendants and their steamships of the two piers respectively, but the parties were unable to reach any agreement as to such sums, and for the purposes of this case such correspondence is to be taken to have been without prejudice to the rights of either party.

This action has been commenced and this case stated for the purpose of obtaining the decision of the court as to the charges which the plaintiffs are entitled to make by statute or otherwise in respect of such user as aforesaid. The parties have come to an arrangement whereby so soon as the plaintiffs' rights of charging have been ascertained and defined the amount payable by the defendants to the plaintiffs in respect of such user as aforesaid will be determined and paid.

The plaintiffs contend that they are entitled to charge in respect of Greenwich Pier, the sums formerly chargeable by the Greenwich Pier Company—that is to say, the statutory rates and duties or tolls provided by the enactments set out above in this case, with the addition of a reasonable charge for the facilities, services, and accommodation above referred to; in respect of Woolwich Pier, reasonable charges for such user, including the facilities, services, and accommodation above referred to, the charges formerly made by the Thames Steamboat Company (1897) Limited being taken by the plaintiffs as the basis for such charges.

The defendants contend that they are only liable to be charged at each of such piers in respect of such user as aforesaid the toll of 6*d.* provided by sect. 15 of the council's Act, and, in addition, a reasonable charge for the use of any stages, moorings, mooring-chains, buoys, and other appliances provided by the plaintiffs under the council's Act when used by the defendants' vessels.

The questions of law for the opinion of the court are as follows: (1) Are the plaintiffs entitled to charge in respect of the defendants' passengers disembarking at or embarking from Greenwich Pier the rates and duties or tolls formerly chargeable by the Greenwich Pier Company under the Act 6 & 7 Will. 4, c. cxxviii.? (2) Are the plaintiffs entitled under their statutory powers or otherwise to make a charge or charges to the defendants for any and which of the facilities, services, and accommodation mentioned above if afforded to the defendants and their steamships at Greenwich Pier? (3) Are the plaintiffs entitled to make in respect of the defendants' user of Woolwich Pier (including any special facilities, services, or accommodation when afforded to the defendants) the same charges as the Thames Steamboat Company (1897) Limited might have made? (4) If the answer to the third question shall be in the negative, are the plaintiffs entitled under their statutory powers or otherwise to make a charge or charges to the defendants for any and which of the facilities, services, and accommodation mentioned above if afforded to the defendants and their steamships at Woolwich Pier? (5) Have the plaintiffs power to prescribe the charges for any facilities, services, or accommodation other than the use of stages, moorings, mooring-chains, buoys, and other appliances provided by them under the council's Act? (6) Have the plaintiffs power to prescribe charges under sect. 15 of the council's Act otherwise than by by-law made under that Act? (7) Are the plaintiffs entitled to charge the calling toll of 6*d.* in respect of the defendants' steamships calling at (*a*) Greenwich Pier, (*b*) Woolwich Pier?

By the preamble of the Thames River Steamboat Service Act 1904 it is provided:

> And whereas it is expedient with a view to making proper use of the river as a highway for the convenience of the public that provision should be made for the acquisition by the London County Council (hereinafter referred to as "the council") of the piers and landing places or some of them within the said limits and the improvement of piers and landing places so acquired and the establishment of an efficient passenger boat service: And whereas the existing piers and landing places and works connected therewith on the river within the administrative county of London are for the most part vested in and under the management of the conservators of the river Thames, but there are other piers, landing places, and works within the county belonging to other persons, and it is expedient with a view to the improvement of such piers, landing places, and works, and the provision of new piers, landing-places, and works that powers should be conferred upon the council and the conservators and such other persons respectively as in this Act set forth: And whereas by an Act of the sixth and seventh years of His late Majesty King William the Fourth, intituled "An Act for making and maintaining a pier, wharf, and other works at Greenwich, in the county of Kent," the Greenwich Pier Company was incorporated and by that Act and an Act amending the same the said Greenwich Pier Company was empowered to erect and maintain a pier, wharf, and other works incidental thereto in the parish of Saint Alphege, Greenwich, in the county of Kent: And whereas the pier constructed by the said Greenwich Pier Company in pursuance of the said powers (hereinafter referred to as "Greenwich Pier") is as to a portion thereof erected on lands held by the said Greenwich Pier Company on lease from the Lords Commissioners for executing the office of Lord High Admiral of the United Kingdom of Great Britain and Ireland as successors of the Commissioners of Greenwich Hospital and as to the remainder thereof upon land belonging or reputed to belong to the said Greenwich Pier Company: And whereas it is expedient that the council should own and control a pier for the purposes of this Act on the south side of the river Thames

at or in close proximity to the site of Greenwich Pier and accordingly that the council should be empowered to acquire the undertaking and property of the said Greenwich Pier Company.

And by sect. 4:

It shall be lawful for the council on the one hand and the conservators on the other hand to enter into and carry into effect any agreement or agreements with respect to the following matters or any of them: (1) The transfer or granting to the council by the conservators of any piers, landing places, or other similar works, and any moorings, mooring-chains, buoys, or other appliances belonging to the conservators within the limits of this Act, or any approaches or accesses to or any estate or interest in such piers, landing places, works, and appliances. (2) The transfer to and exercise by the council of any powers and rights of the conservators with respect to the levying of tolls, rates, and charges at and the maintenance, management, and regulation of any piers, landing places, approaches, accesses, moorings, mooring-chains, buoys, and other works and appliances so transferred.

And by sect. 5:

It shall be lawful for the council to enter into and carry into effect agreements with the owners of and persons interested in any piers, landing places, moorings, mooring-chains, buoys, and works on the river Thames within the limits of this Act for the transfer or granting to the council of such piers, landing places, moorings, mooring-chains, buoys, and works respectively or any of them together with any lands and property belonging thereto or occupied therewith respectively or any estate or interest in such piers, landing places, works, lands, or property and all or any rights and privileges exercisable at or in respect of such piers, landing places, moorings, mooring-chains, buoys, or works, but subject to the payment to the conservators of any rents which at the time of such transfer or grant shall be payable in respect thereof to the conservators, and to the performance of any covenants and conditions enforceable by the conservators in respect thereof.

And by sect. 6:

At any time within three years after the passing of this Act the council may by notice in writing require the Greenwich Company to sell and the Greenwich Company shall thereupon sell to them their undertaking (including therein all the property, estates, rights, and privileges, and subject to all the liabilities and obligations of the Greenwich Company) and the council shall purchase the same upon such terms and conditions as may be agreed upon between the council and the Greenwich Company or as may failing such agreement be settled by arbitration in manner provided by the provisions of the Lands Clauses Acts with respect to the purchase and taking of lands otherwise than by agreement, and for such purpose in construing the said provisions the term "lands" used therein shall be construed to mean the undertaking of the Greenwich Company.

And by sect. 14:

For the protection of the Thames Steamboat Company (1897) Limited (in this section referred to as "the company") the following provisions shall unless otherwise agreed in writing between the council and the company have effect (that is to say): (1) The company may at any time within three months after the passing of this Act give to the council notice in writing requiring them to purchase the piers of the company situate on the river Thames within the limits of this Act. (2) If the company shall within the said period give such notice as aforesaid the council shall purchase and the company shall sell to them all the said piers and any rights and powers connected therewith. (3) The price to be paid by the council to the company on such sale and purchase shall be such a sum as may be agreed between the council and the company or as may failing such agreement be ascertained by arbitration under the provisions of the Arbitration Act 1889. Provided that the company shall not claim or be entitled to any compensation for severance of the said piers from the remainder of the undertaking of the company or for any injury to the remainder of the said undertaking resulting from such purchase.

And by sect. 15:

The council may charge and levy in respect of vessels calling at the piers and landing places a toll not exceeding the amount stated in the schedule to this Act, which shall be payable by the owner, master, or person in charge of such vessel, and the collector of the said tolls at any such pier or landing place may prevent any vessel the master, owner, or person in charge of which shall neglect or refuse to pay on demand the proper amount of toll payable in respect of such vessel from making fast to or mooring or touching at such pier or landing place. The council may permit any stages, moorings, mooring-chains, buoys, or other appliances provided by them under this Act to be used by any vessels on such terms and conditions and on payment of such charges as they may from time to time prescribe.

And by sect. 30:

(1) It shall be lawful for the council from time to time to close or prohibit or limit the access of the public to any of the piers and landing places or any of the vessels used for the purpose of the service by this Act authorised with a view to the prevention of danger or to the convenience of passengers and persons using the piers and landing places and vessels. (2) Any person entering or having entered upon any of the piers and landing places or any such vessel as aforesaid which has been closed or to which access has been prohibited under this section or entering or having entered upon any such pier, landing place, or vessel to which access has been limited under this section in contravention of such limitation shall, subject as hereinafter provided, be liable on summary conviction to a penalty not exceeding 40*s*. (3) The council may remove from any such pier, landing place, or vessel any person so entering or having entered as aforesaid, or any person entering or having entered upon any such pier, landing place, or vessel in breach of any by-law of the council, or any person conducting himself in such a manner as to cause any annoyance or inconvenience to passengers. (4) The council shall give or cause to be given notice of the closing or prohibition or limitation of access to any such pier, landing place, or vessel, either by means of placards posted at the entrance of the pier or landing place or the gangway of such vessel, or by word of mouth, and no person shall be liable to a penalty under this section for entering or having entered upon any pier, landing place, or vessel in respect of which such notice shall not have been given.

And by sect. 38:

Every pier maintained by the council under this Act shall (subject to the provisions of this Act and to the payment of the tolls and charges payable under this Act and so far as reasonably compatible with the conduct of the service of vessels by this Act authorised) be open to all persons for the embarking and landing of passengers.

The schedule to the Act provided:

Maximum Tolls and Charges.

Tolls for Vessels calling at Piers and Landing Places.

	s.	*d.*
For each time of any vessel calling at any pier or landing place	0	6

Charges for Passengers and Parcels.

For each passenger—		
For any distance not exceeding one mile ...	0	1
For every additional mile or part of a mile ...	0	1

For parcels—	s.	d.
For a parcel not exceeding 112lb. in weight ...	0	6

Macmorran, K.C. and *Daldy* for the plaintiffs.

Pickford, K.C. and *Maurice Hill* for the defendants.

Bray, J.—The main question in this case as regards Greenwich Pier—because the two piers Greenwich and Woolwich, are different—is whether the plaintiffs are entitled to charge the tolls prescribed by sects. 53 and 54 and the schedule to the Act of Will. 4. That is the case as regards Greenwich, and I will deal with that case first. Now, it seems to me reasonably clear that by sect. 38 of the Act of 1904 the London County Council are obliged to keep Greenwich Pier open to all persons for the embarking and landing of passengers, subject to the provisions of this Act and to the payment of the tolls and charges payable under this Act. I do not think the "provisions of this Act" include any provisions with regard to tolls and charges; it rather refers to sect. 30, I think, which gives the London County Council certain powers of regulation for the purpose of keeping proper order on those piers. Therefore it comes to this, that, before I can find the London County Council are entitled to make these charges, I must find that the payment of these tolls and charges were payable under this Act. I refer first to sect. 15. It is to be observed, before I go any further, that the section of the Greenwich Act which imposes or gives that company the right to charge tolls is a section which makes the master responsible for paying for every passenger embarked or disembarked. It is either 2*d.* or 6*d.*, as the case may be. That is what he has to pay for calling at the pier. Sect. 15 says this, that the council may charge and levy in respect of vessels calling at the piers and landing places a toll not exceeding the amount stated in the schedule to this Act, which shall be payable by the owner, master, or person in charge of such vessel, and the collector of the tolls at any such pier or landing place may prevent any vessel the master, owner, or person in charge of which shall neglect or refuse to pay on demand the proper amount of toll payable in respect of such vessel from making fast to or mooring or touching at such pier or landing place, and so on. *Primâ facie*, it would seem that that section prescribes the toll and the only toll payable by the master of a vessel which calls at a pier. I think it would require fairly clear words, at all events, to show that any additional tolls were payable than that one toll. *Primâ facie*, it fixes the toll—viz., "a toll not exceeding the amount stated in the schedule, which is put, if I recollect right, at 6*d.* So that, when I come to consider the rest of the Act, I must bear in mind that, *primâ facie*, in sect. 15 the Legislature has intended to fix the toll and the only toll payable. Of course, there may be express words in other sections which entitle them to receive other tolls, but it would require, it seems to me, fairly clear words. Now, I have to go back and see what words there are in the Act which confer the right of imposing a toll further and beyond that in sect. 15. The sections which are relied upon, as I understand, are sects. 5 and 6. Sect. 4 is not relied upon, because, of course, it only applies to the piers which belong to the conservators, but it is referred to, and therefore I will deal with it. By that section it shall be lawful for the council on the one hand and the conservators on the other hand to enter into and carry into effect any agreement or agreements with respect to the following matters or any of them: (1) The transfer or granting to the council by the conservators of any piers, landing stages, and so on; and (2) the transfer to and exercise by the council of any powers and rights of the conservators, charges, and so on. Therefore, in that case, when they are dealing with the case of the conservators they say that the agreement may provide for the transfer to and exercise by the council of the conservators' rights of levying tolls. That would come within the words "tolls payable under this Act."

It seems to me that, though that section has been regarded as in favour of the council, it really is, when it is looked at fairly, rather against them, because it may be said with reference to the Act that, when it was intended they should have this power of levying the tolls, that power was expressly given, and it is expressly given to them in the case of the conservators. Now, I come to sects 5 and 6. As I am dealing with Greenwich, I will deal with sect. 6, because I need not trouble about sect. 5; it does not carry it any further, and perhaps not so far. That section provides that at any time within three years after the passing of this Act the council may by notice in writing require the Greenwich Company to sell and the Greenwich Company shall thereupon sell to them their undertaking, and so on; and the council shall purchase the same upon such terms and conditions as may be agreed upon between the council and the Greenwich Company, or as may, failing such agreement, be settled by arbitration in manner provided by the provisions of the Lands Clauses Act, and so on. Now, I am far from saying that, under some circumstances, there might be included in the words "rights and privileges" a right to take tolls; but I do not think that is the natural meaning of those words, and certainly I do not think that section can be construed as giving a power to the London County Council to require the payment of tolls and charges, and I do not think that any right they may acquire under sect. 6 can properly be said to give them the power of exacting payment of tolls and charges under sect. 15. The object, as it seems to me, of that section was to define what it was that the Greenwich Company were to sell; they were to sell them all their property and all their rights and privileges connected with it, and they were to be paid compensation for that. I cannot help saying that, no doubt, inasmuch as the property did include the right to take tolls, the Greenwich Company would be entitled to compensation for that; but it does not seem to me that there was any intention to transfer to and permit the London County Council to exercise the rights and powers with respect to the levying of tolls in the same way that they were to have those rights under sect. 4. Now, that really covers the whole case. But it was said: "Well, but then was it intended that the London County Council should pay this large amount of 20,000*l.*, or whatever it was, which was the price of this pier, and get very little for it?" I do not know what this 6*d.* calling toll

amounted to, I have not the least idea, and I do not know whether it would recoup them for this 20,000*l.*, or not, but it seems to me when I look at the preamble that it was intended that the London County Council should do this, in a great measure, for the benefit and in the interests of the public. It says: "And whereas it is expedient with a view of making proper use of the river as a highway for the convenience of the public that provision should be made for the acquisition by the London County Council of the piers and landing places or some of them within the said limits, and the improvements of piers and landing places so acquired and the establishment of an efficient passenger boat service." It may well be, therefore, that it was intended (I suppose any deficit would fall eventually upon the rates) that the public should be provided with these conveniences, and any additional cost of providing these conveniences should come out of the rates; that is the only conclusion I can come to. The contention of the London County Council amounts, and necessarily amounts, to this, that, so far from any additional convenience being given to the public with regard to Greenwich Pier, there was an additional toll made payable under sect. 15—viz., an addition of 6*d.* for every time they called. I cannot think that that was the intention of the Act; therefore it seems to me it is not true that with regard to Greenwich there were any tolls and charges payable under this Act except the tolls and charges payable under sect. 15. So much with regard to Greenwich. Before I leave that, I might say this, there was power for the London County Council to erect new piers, and apparently it was contemplated that they might erect another pier near Greenwich. If that be so, it would be clear that they would have no power under this Act to exact any tolls beyond that in sect. 15, and therefore, if they erected a pier just the half-mile outside Greenwich, they would be charging the one toll of 6*d.* for that and a very much larger toll in respect of the Greenwich Pier which they had bought. I do not think that that was intended. I think it was intended to have a uniform scale of charges which should be not exceeding 6*d.* Of course, I need not refer to the section with regard to preference. They must charge everybody alike; steamers of the same class must be charged 6*d.*, 5*d.*, and 4*d*, as the case may be, whatever they choose, but all must be charged the same.

Now, with regard to Woolwich, it seems to me that the case of the London County Council is much weaker, because it is only by sects. 5 and 14, if at all, that they can say that any charges or tolls were payable under this Act. I need not read sects. 5 and 14. What they were to buy were the piers, landing places, works, lands, or property, and all or any rights and privileges exercisable at or in respect of such piers, landing places, and so on. Mr. Daldy felt considerable difficulty in saying that the rights and privileges would include the tolls, there being no special power in the Woolwich Company to charge any tolls; they were in the position of an ordinary landed proprietor who had a pier and could make an agreement with any persons to call there at such a price as might be agreed upon. The alternative here is this, that the London County Council are not only entitled to charge under sect. 15, but, in addition, some other reasonable sum, whatever that may be. In other words, the Act is completely silent as to what the toll should be on the vessel calling at Woolwich Pier. I cannot think that that is right. I think that goes to show that, as regards Woolwich and as regards Greenwich just in the same way, sect. 15 was intended to comprise the only tolls that were to be charged. Therefore, looking at the special case, my decision must be as regards (1) No. As regards (2), practically there is now no dispute between the parties. Any facilities which the London County Council are not bound to render with respect to the levying of tolls, rates, and under the Act must be paid for by the defendants, if there be any express or implied request by them to give those facilities. When one comes to look at all the facilities, it all comes back to the question as to how far they are bound to give these facilities or not. Mr. Pickford admits they are not bound to place and retain booking-offices on the piers rent free, and, if the defendants expressly or impliedly ask them to do so and they do it, then they must pay either an agreed sum or a reasonable sum, whatever it may be. Just in the same way with regard to (*b*), if they require some special facilities—some special stairways—to be kept free for them, they must pay for it; if, on the other hand, they make no request, and the London County Council find it to their convenience to reserve these special stairways, they are not bound to pay for them. With regard to (*c*), it is obvious they are not bound to give those facilities; therefore, if the defendants choose to ask them to do it, they must pay for it. With regard to (*d*), it does not seem to me, and it is so far conceded, that the London County Council are bound to keep people all night to render the facilities which they render during the day; they are only bound to carry out their statutory liability to keep the piers open, and to keep such staff as they think necessary for protecting themselves, and if the defendants want a special staff to be kept for them, which otherwise would not be kept, they must ask for it and they must pay for it. With regard to (*e*), passengers' luggage, of course they cannot make the master of the vessel pay for the facilities rendered to passengers. They are not bound to render those facilities to passengers, and, no doubt, if passengers ask for them they must pay for them, and, if the defendants think it to their advantage that those facilities should be rendered, they may make a contract with the county council to provide those facilities, and they will have to pay for them. The same thing applies to (*f*) and (*g*). So that that answers, I think, question 2. They are payable, not under statutory powers, but otherwise, by reason of a request to render these additional facilities. Now, as regards (3), my answer is, No. That is the same as (1), but with regard to Woolwich Pier. Then, as regards (4), it is just the same as my answer with regard to (2). Now, "(5) Have the plaintiffs power to prescribe the charges for any facilities, services, or accommodation other than the use of stages, moorings, mooring-chains, buoys, and other appliances provided by them under the council's Act?" I understand there have been no by-laws, but it is again a question of agreement. They may not prescribe by by-laws, because I do not think there is any power to prescribe by by-laws, but they may refuse to render the facilities unless

the defendants agree to pay for them. Then, "(6) Have the plaintiffs power to prescribe charges under sect. 15 of the council's Act otherwise than by by-law made under that Act?" I think sect. 15 does not give them a right to do it otherwise than by by-law; I think "prescription" means prescription by "by-law." Are the plaintiffs entitled to charge the calling toll? Yes. I think that answers all the questions.

Judgment accordingly.

Solicitors: *Seager Berry; Cattarns* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

July 26, 27, *and* 30, 1906.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE KATE. (*a*)

Collision—Damage — Towage contract—Contract of indemnity—Damage caused by neglect or default of any servant of the company—Shipowners' undertaking to indemnify—Third-party notice.

The steamship M., *one of the Tyser Line, was being repaired by ship repairers under a contract which provided that they would bring the* M. *back to the A. Dock to load. By a rule of the dock company no tugs except those of the dock company could be employed to bring a vessel into the docks. The contract under which the tugs were hired from the dock company was signed by H. B., the marine superintendent of the Tyser Line, but it was a term of the contract that the hire of the tugs was payable by the ship repairers. The contract provided that "the masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property . . . and to indemnify the company (if so required) against any claims for . . . injury . . . to any vessel or property of any other person . . . whether such damage, loss, or injury be occasioned by . . . neglect or default of any such masters, crew, or men or any servant of the company . . . or by any other cause of any kind in connection with the towage or transport." The* M. *having been moved into a berth, another tug, not supplied under the contract, and some men from the tugs supplied under the contract to tow the* M. *were directed by the dockmaster to move certain barges, the* K. *being amongst them. By the negligence of the men the* K. *collided with the propeller of the* M. *and was damaged. The owners of the* K. *sued the dock company, who admitted liability and claimed to be indemnified in respect of the damage by the owners of the* M.

Held, that the persons with whom the dock company had contracted were the ship repairers and not the owners of the M., *and that the latter were not liable in an action under the contract.*

Held, further, that, even if the contract had been entered into by the owners of the M., *the men and the tug whose negligence caused the damage were not employed under the towage contract when the accident happened, and that the owners of the* M. *could not in any event be liable, as the towage contract only made the servants of the dock company actually employed in the towage and transportation the servants of the person contracted with.*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

ACTION of damage.

The plaintiffs were Bellamy's Wharf Limited, the owners of the barge *Kate* and her cargo; the defendants were the London and India Docks Company; the third parties were the Tyser Line Limited, the owners of the steamship *Marere*.

The facts were as follows:—

Messrs. R. and H. Green Limited contracted with the Tyser Line, the owners of the *Marere*, to repair her and return her repaired to the Royal Albert Dock, one of the defendants' docks. The defendant dock company had a rule forbidding the use of any tugs in the docks but their own, and accordingly application was made to them for the use of one or more of their tugs. The application was made on the 30th April 1906 on a form, and was in the following terms:

Please supply tugs to assist in transporting the vessel *Marere* from locks to berth. Such assistance, which includes the removal to and from any intermediate berth or mooring which the vessel may occupy, is subject to the conditions on the back hereof, and is supplied at your published rate for one charge only, payable by R. and H. Green Limited.—(Signed) H. BARNES.

The conditions on the back were as follows:

Notice is hereby given that tugs and (or) transporting men are supplied on the following conditions only. The masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to the person, or to the vessel or craft towed, or any cargo on board the same, or to any vessel or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss, or injury be occasioned by any actual or supposed act, neglect, or default of any such masters, crew, or men, or any servant of the company, or by any defect or insufficiency of the tugs or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport.

H. Barnes, who signed the application form under which the tugs were supplied, was the marine superintendent of the Tyser Line, but R. and H. Green Limited paid for the hire of the tugs as stated on the form.

Two tugs, the *Beatrice* and *Louise*, were supplied by the dock company, and on the 30th April 1906 the *Marere* was moved into a berth in the dock. The *Marere* was moored against the wharf ahead and astern, but 6ft. or 8ft. ahead of the spot where she was intended to lie, when it was seen that some barges would have to be moved from astern of her to enable her to get into the exact spot selected for her. She was quite fast,

and only had to heave on her own winches to get into position. Both the tugs had cast off.

The dockmaster then sent a tug called the *Rattler* to remove the barges. The headfasts of the barges were, with the headfasts of other barges, made fast to a buoy and were so entangled that it was necessary to break some of them and to let out others to enable the barge against the quay to be towed out. To do this the dockmaster ordered a man from the *Beatrice* and the *Louise* to get on to the buoy and deal with the headfasts. The headfasts were let out and the *Rattler* towed out the barges astern of the *Marere*, when the chain which fastened the barge *Kate* to the buoy was fouled and the *Kate* was swung against the starboard propeller of the *Marere*, causing the barge and her cargo to sink.

The owners of the barge *Kate* and her cargo issued a writ against the London and India Docks Company on the 10th May 1906 claiming the damage they had sustained by reason of the collision.

On the 24th May the London and India Docks Company, the defendants, issued a third-party notice claiming to be indemnified by the Tyser Line in respect of the damage and admitted liability to the owners of the barge *Kate*.

On the 3rd July the London and India Docks Company delivered a statement of claim to the Tyser Line, the third parties, in which they stated that the owners of the *Kate* claimed from them the damage caused by the collision between the *Kate* and the *Marere*, and in respect of which they claimed to be indemnified by the Tyser Line. They alleged that the towage ticket was signed by H. Barnes, the representative of R. and H. Green Limited, the agent and agents respectively of the third parties, and that the tugs were supplied on the terms of the towage ticket. They then set out the facts which led up to the collision, alleged that it was caused by the neglect or default of the defendants' servants, and that they had been compelled to admit liability to the plaintiffs, and claimed (1) a declaration that they were entitled to be indemnified by the third parties; (2) judgment against the third parties for any amount that might be found due from the defendants to the plaintiffs; and (3) judgment for the amount of any costs the defendants might have to pay the plaintiffs, and for their costs of the defence and third-party proceedings.

On the 13th July the third parties delivered a defence in which they admitted the facts as to the collision, but alleged that neither H. Barnes nor the said R. and H. Green Limited were the agent or agents of the third parties, nor had he or they any authority to bind the third parties in respect of the towage. They further alleged that the tugs were supplied to R. and H. Green Limited, and that the damage to the *Kate* was in no way caused or connected with the transporting or assisting of the *Marere* by the tugs. In the alternative they alleged that, if the towage ticket was signed on behalf of the third parties, the damage was not caused by an act done in pursuance of the contract or by persons in respect of whom any indemnity had been given. In the further alternative they alleged that, if they were liable to indemnify the defendants in respect of the damage, they were not liable to indemnify them in respect of the costs of the defence in resisting the claim of the owners of the *Kate*, as such defence was unreasonable.

On the 17th July the defendant dock company delivered a reply to the defence of the third parties by which they alleged that the third parties should not be admitted to deny the authority of R. and H. Green Limited and H. Barnes respectively to make the contract contained in the towage contract, because they had held out R. and H. Green Limited and H. Barnes and knowingly permitted them to appear as so authorised, and that the defendants had supplied the tugs relying on such apparent authority.

On the 21st July the defendant dock company amended their claim against the third parties by striking out the allegation that H. Barnes was the representative of R. and H. Green Limited and that the latter were agents of the third parties, and on the 23rd July amended the reply by striking out the allegation that the third parties had held out R. and H. Green Limited as their agents.

July 26 and 27.—J. A. Hamilton, K.C. and *George Wallace* for the defendant dock company.—The accident happened during the performance of the towage contract, and therefore the Tyser Line are responsible for the damage. The damage was done while the *Marere* was being taken into her berth. The dock company had no notice of any contract between R. and H. Green Limited and the Tyser Line. The marine superintendent of the Tyser Line signed the towage ticket, and ships owned by that line are frequently transported in the dock on the terms of the ticket, which are known to them. A somewhat similar contract of indemnity has been upheld:

The Millwall, 93 L. T. Rep. 429; 10 Asp. Mar. Law Cas. 113; (1905) P. 155.

Laing, K.C. and *Dawson Miller* for the Tyser Line.—The *Marere* was not being transported at the time of the accident. If she was being transported she was in the hands of R. and H. Green Limited. The transporting pilot was in the employ of R. and H. Green Limited, and they are responsible for the transporting. The statement of claim delivered by the dock company shows that they knew that Barnes, the marine superintendent of the Tyser Line, was in fact acting as agent for R. and H. Green Limited when he signed the towage ticket. Those words have since been struck out of the defence when it was amended.

[*Wallace* for the dock company.—Words struck out by way of amendment cannot be looked at: (*Hales* v. *Pomfret*, Daniel's Reports, 141)]

Laing, K.C.—The tugs were employed to transport the vessel, and any acts done by the dock servants causing damage which were not done by the tugs are outside the contract. The tugs supplied were the *Louise* and the *Beatrice*; the *Rattler*, which did the damage, was not working under the contract. The indemnity has no application to any of the acts which caused the damage.

Wallace in reply.—The terms on the ticket are wide enough to cover the negligent acts of others besides those on the tugs. [BARGRAVE DEANE, J.—The *Rattler* was not employed under the contract.] Those navigating the *Rattler* are

within the words "any servant of the company," and the negligence of the master of the *Rattler* was "in connection with the towage or transport" of the *Marere*.

Cur. adv. vult.

July 30.—BARGRAVE DEANE, J.—In this case the owners of the barge *Kate* brought an action against the London and India Docks Company for damages caused by the sinking of their barge in the Albert Dock. The docks company admitted their liability to the owners of the *Kate*, but they brought in as third parties the Tyser Line Limited, as owners of the steamship *Marere*, being the vessel against whose propeller the barge was brought. By reason of being brought against that propeller the barge was damaged and sank, and the docks company say that under the peculiar circumstances of the case the responsibility rested with the Tyser Line. There is no question of seamanship in the matter. It is entirely a question as to the interpretation which the court has to place upon a certain notice printed upon the back of an order given to the London and India Docks Company, the owners of this particular dock, to supply tugs to assist in transporting the *Marere* from the locks to her berth in the Albert Dock. What happened was this. The *Marere*, having come into the docks and unloaded her cargo, was taken out to Messrs. R. and H. Green's yard for the purpose of repairs, and placed in dry dock. When the time came that the repairs were completed, the vessel had to be brought back to the Albert Dock for the purpose of loading a fresh cargo. She had to be brought by outside tugs to the entrance of the dock, as the rule is that no tugs shall be employed for the purpose of bringing a vessel into the docks except tugs belonging to the docks company. That gave rise to the order I have referred to, to supply tugs for the purpose. Two tugs were supplied, the *Louise* and the *Beatrice*. One was made fast forward and the other aft, and the vessel had to be brought in and moored against No. 4 wharf on the port side as you come in. She was brought in by these two tugs and placed in a position at her wharf, where she had to be brought back some six or eight feet in order to get her exactly into the berth. She could not get exactly into the berth at that time because two barges were lying astern of the place where the *Marere* was lying, filling up part of the space she was to moor in. One of these two barges had to be removed.

Now, the evidence is that the *Marere* was moored by the head, and was moored by the stern, with one rope from the starboard quarter off to a buoy in the dock a hundred feet away from the quay, and with a steel spring on her port side, which passed through the port quarter and then led forwards to a bollard or something on the quay. She was absolutely fast, and in order to get her back six or eight feet as soon as opportunity offered, she had only to heave on her winches. In these circumstances it is sworn that the two tugs which had been supplied by the dock company had been finished with. They had not gone away, but their services were no longer required. At that moment the dockmaster proceeded to remove, or take steps for removing, one of these barges astern of the *Marere*. His task was rendered difficult by reason of several other barges being made fast to the buoy which I have mentioned. Those barges seem to have been left without anybody on board, and they were made fast by headfasts to the buoy. It appears from the evidence that those headfasts were so mixed up that it was necessary to break some of them and to let out the chains in order that the barges might be removed sufficiently far from the buoy to enable the barge against the quay to be towed out. The harbour master directed the whole of that operation, but having no men there, and finding that the tugs were no longer in use, he ordered a man from each tug to get on to the buoy and deal with those headfasts. The result was this, that the chain attaching the *Kate* to the buoy having been let out a certain distance, the tug *Rattler* was employed to tow out from the quay this barge astern of the *Marere*. As she was towed out she fouled the chain which connected the *Kate* with the buoy, which caused her head to pay off to port and her stern to swing in to starboard, and that brought her against the starboard propeller of the *Marere*, and caused the damage.

Under these circumstances the dock company, as I have said, admitted liability, but say that they are entitled to look to the owners of the *Marere* to meet the claim made against them. The matter is based upon a notice at the back of this order for tugs: "Royal Albert Dock. Please supply tugs to assist in transporting the vessel *Marere* from locks to berth. Such assistance, which includes the removal to and from any intermediate berth or mooring which the vessel may occupy, is subject to the conditions on the back hereof, and is supplied at your published rate for one charge only, payable by R. and H. Green Limited.—(Signed) H. BARNES.—April 30, 1906." The conditions on the back of the notice are as follows: "Notice is hereby given that tugs and (or) transporting men are supplied on the following conditions only. The masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to the person, or to the vessel or craft towed, or any cargo on board the same, or to any vessel or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss, or injury be occasioned by any actual or supposed act, neglect, or default of any such masters, crew or men, or any servant of the company, or by any defect or insufficiency of the tugs, or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport." That is a notice which the dock company say put on the Tyser Line responsibility for the damage occasioned to the barge *Kate*. The Tyser Line say this is not damage occasioned within the terms of that notice, but even if it were we have a further defence, namely, that we were not the persons engaged in the towage or transport, but it was the business of Messrs. R. and H. Green, the repairers, who gave this order for the tugs,

and who are the persons who should have been sued, if anybody, and not us.

I am of opinion that that last defence is a good one, because the dock company have this order, which on the face of it states that the assistance is to be supplied for one charge only, payable by Messrs. R. and H. Green. That is a distinct notice to them that R. and H. Green are the people to whom they are supplying the tugs, and whom they are recognising as the persons affected by the notice on the back of the order. I do not think that the fact that Mr. Barnes signed it is sufficient to say that the docks company thought they were dealing with the Tyser Company, to whom Barnes is the marine superintendent. They have distinct notice that the persons to whom they are supplying the tugs are not the Tyser Line, but R. and H. Green. It is not sufficient, however, for me to rest my decision simply upon saying that the action cannot be brought against the Tyser Line. I think it is necessary that I should state what, in my opinion, is the proper view to take of the conditions on the back of the order. It is a very complicated notice, but I have spent a good deal of time over it, trying to understand really what it means, and it seems to me the whole object of that notice is this—that the persons who are supplied by the dock company to the transporters of a vessel from outside to a berth in the docks are the servants for the time being of the persons so employing them. They are no longer *pro hac vice* servants of the dock company, but they are *pro hac vice* the servants of the transporting employers—in this case, as I have said, Messrs. R. and H. Green. For the purpose of argument, however, let us suppose that it was the Tyser Line. They employed two tugs and their crews, and those were the people who, I think, are to be considered, under this notice, as no longer servants of the dock company, but servants of the Tyser Line. This damage, however, is not suggested to have been caused by the tugs or their crews, and the damage was caused, I think, not by the dockmaster, but by the carelessness of the men he employed to cast off these barges from the buoy. If the barges had been properly cast off, especially the *Kate*, there would not have been this damage accruing by the tug swinging the *Kate* up against the starboard propeller of the *Marere*. It seems to me that it cannot be said that when the dockmaster, finding the two tugs had finished their work and were lying idle, took a man from each of them, he had any right to do so, unless he recognised that they had ceased to be the servants of the transporting company. I think by taking them he showed that he himself recognised the fact that the contract, so far as the hire of the tugs was concerned, was at an end, and these men had passed back to his own service, and he had a right to claim their service. For this reason I think this notice does not any longer affect the question.

The whole question is, Was there any person under this notice in the employment of the transporting company — Messrs. R. and H. Green, or the Tyser Line—who had anything whatever to do with this particular damage? I think we must read this notice as I say it ought to be read, and whatever might be said about the action of the man or men taken from these two tugs, their action was no longer action whilst in the service of the Tyser Line or of R. and H. Green. Their service to the Tyser Line or to R. and H. Green had ceased, and they had become altogether the servants of the dock company alone. For these reasons I do not think the defendants have established a right as against the third parties, and therefore I give judgment for the third parties.

Solicitors for the defendants, the London and India Docks Company, *E. F. Turner* and *Sons*.

Solicitor for the third party, the Tyser Line Limited, *Charles E. Harvey*.

Wednesday, Oct. 31, 1906.

(Before Sir GORELL BARNES, President, and Elder Brethren.)

THE TITAN; THE RAMBLER. (*a*)

Collision—Fog—Vessel moored to pontoon—At anchor—Duty to ring bell—Tyne By-laws 1884, *r.* 18 (*c*).

A steam-tug was lying in the river Tyne moored at a pontoon connected with the bank by a bridge when she was run into during a thick fog by a steam trawler.

The pontoon and bridge, which were the property of the Tyne General Ferry Company, were damaged.

The owners of the pontoon and bridge sued the owners of the tug for the damage they had sustained, and the owners of the tug sued the owners of the trawler for the damages sustained by the tug.

The two actions were heard together. The owners of the trawler charged the tug with not sounding her bell when anchored in the fog.

Held, that the action by the Ferry Company against the tug should be dismissed, for the damage to the pier and pontoon was not caused by the tug being at the pontoon, even if she was a trespasser.

Held, further, that the trawler was liable for the damage for being improperly under way and for excessive speed, and that the tug was not to blame for not sounding her bell in accordance with art. 18 (*c*) *of the Tyne By-laws* 1884, *as she was not at anchor.*

ACTIONS of damage.

The plaintiffs in the first action were the Tyne General Ferry Company (Incorporated), the owners of a pontoon and bridge connecting it to the shore in the river Tyne; the defendants were the owners of the steam-tug *Titan*.

The plaintiffs in the second action were the owners of the steam-tug *Titan*; the defendants were the owners of the steam trawler *Rambler*.

The plaintiffs in the first action by their statement of claim delivered on the 12th July 1906 alleged that about 3.15 a.m. on the 12th April 1906, the wind being calm, the weather foggy, and the tide flood, the defendants' steam-tug *Titan* was so negligently moored alongside the plaintiffs' landing that she was run into by the steam trawler *Rambler*, and thereby forced against the said landing, causing damage to it and to the gangway in connection therewith.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The negligence alleged against those in charge of the *Titan* was that they neglected to keep a good look out, that they moored in an improper place, and that they neglected to sound a bell or make any signal or exhibit a proper anchor light.

Alternatively they alleged that they had suffered damage by reason of the defendants trespassing on the pontoon by mooring their vessel to it.

The defendants, by their defence delivered on the 8th Aug. 1906, denied that they were guilty of any trespass or of any negligence, or that the damage caused was caused by any trespass or negligence of theirs. They further alleged that while the *Titan* was properly moored as she lawfully might be at the pontoon, with a proper watch being kept and a light exhibited, she was run into by the steam trawler *Rambler* and forced against the pontoon thereby causing the damage.

The owners of the *Titan* issued a writ on the 11th July 1906 against the owners of the *Rambler* claiming damages for the injury sustained by the *Titan*.

On the 11th Aug. they delivered a statement of claim in which they alleged that about 3 a.m. on the 12th April the *Titan*, a paddle steam-tug, was lying properly moored head up river at the North Shields Fish Quay Ferry Landing in the river Tyne. The weather was a dense fog and the tide was flood of the force of about three knots. The masthead and anchor light of the *Titan* were being duly exhibited and were burning brightly, and a proper watch was being kept on board of her. In these circumstances the steam trawler *Rambler* was so negligently navigated that she ran at great speed into the port side of the *Titan*, the stem of the *Rambler* striking the *Titan* on the port fore paddle beam and forcing her starboard side against the gangway of the ferry landing, injuring it and doing great damage to the *Titan*.

The owners of the *Titan* charged those on the *Rambler* with not keeping a good look out, with neglecting to keep out of the way of the *Titan*, with proceeding at an immoderate speed, with not sounding their whistle, with neglecting to let go their anchor, with neglecting to slacken their speed, or stop or reverse their engines in due time, and with being improperly under way and neglecting to moor out of the navigable channel as soon as practicable when overtaken by the fog.

The owners of the *Rambler* delivered a defence on the 13th Oct. in which they alleged that the collision was caused solely by the negligence of those on the *Titan*. The case made by the owners of the *Rambler* was that the *Rambler*, a steam trawler of 91 tons gross and 15 tons net register, manned by a crew of eight hands all told, was coming up the Tyne from a fishing voyage bound to the Fish Quay. The weather was a dense fog and calm, the tide was flood of the force of about a knot, and the *Rambler* on an up-river course for the Fish Quay was making about three knots over the ground. Her regulation lights were being duly exhibited and were burning brightly, her fog-whistle was being regularly sounded, and a good look-out was being kept on board of her. In these circumstances those on the *Rambler* saw, without having had any warning of her presence, the *Titan* close to about ahead, and, though her helm was starboarded and her engines were stopped as soon as possible, she ran into the *Titan*, striking the port sponson.

Those on the *Rambler* charged those on the *Titan* with not keeping a good look-out; with being negligently moored so as to obstruct or interfere with the access to the Fish Quay; with neglecting to carry and exhibit a proper anchor light; with neglecting to give any warning of her presence or to ring her bell; and with being negligently moored in the navigable channel.

The *Rambler* herself sustained no damage, and her owners entered into the following agreement with the Tyne General Ferry Company, the plaintiffs in the first action:

Rambler and *Titan*.—In consideration of your instructing Messrs. R and R. F. Kidd to bring and prosecute an action in your name against the *Titan* and her owners to recover damages for injury to your landing-stage and gangway at the Fish Quay, North Shields, by the collision between the above vessels, and in consideration of giving both them and us all information and assistance which may be in your possession for the purposes of such action, we undertake 1. To indemnify you against any costs, charges, or expenses of such action. 2. To hand over to you any sum recovered by judgment or otherwise in such action. 3. To indemnify you against the difference, if any, between the said sum recovered and the total amount of the damage to your said landing-stage and gangway as assessed by the Admiralty Registrar or agreed with 4 per cent. interest from the 4th May 1906 until payment together with interest, and any costs (to be taxed) which you may have incurred. 4. That the action shall be prosecuted to judgment or settlement without delay. 5. In the event of such action being unsuccessful then to pay you the amount of damage as provided by section 3 above.

Rule 18 (*c*) of the Tyne By-laws 1884 is as follows:

18. Every steam vessel shall be provided with a steam whistle or other efficient steam sound signal, so placed that the sound may not be intercepted by any obstructions, and with an efficient foghorn, and with an efficient bell. Every sailing vessel shall be provided with a similar foghorn and bell. In fog, mist, or falling snow, whether by day or night, the following signals shall be used:—(*c*) Upon a steam vessel and a sailing vessel if and when anchored, the bell shall be rung at intervals of not more than two minutes.

The following case was cited during the course of the argument on the duty of a vessel moored to another alongside a wharf to sound fog signals: *The Kennebec* (108 Fed. Rep. 300); and on the effect of the indemnity the case of *The Stormcock* (53 L. T. Rep. 53; 5 Asp. Mar. Law Cas. 470) was referred to.

Batten, K.C. and *A. D. Bateson* for the Tyne General Ferry Company and the owners of the *Rambler*.

Aspinall, K.C. and *Dawson Miller* for the owners of the *Titan*.

THE PRESIDENT.—These are two actions which are being tried together, and arise out of the same disaster. One is an action by the Tyne General Ferry Company (Incorporated) against the owners of the steam-tug *Titan*. That action is brought by the plaintiffs as owners of a landing at the Fish Quay at North Shields, for damage done to a pontoon and a bridge connecting it with the shore, by the *Titan* on the 12th April 1906. The defence to that action is that the defendants were guilty of neither a

trespass nor an act of negligence, and that the *Titan* was run into by the *Rambler*, a steam trawler, and forced against the landing, and that thereby the damage was done. The other action is an ordinary collision action between the owners of the *Titan* and the owners of the *Rambler*, in which the plaintiffs assert that the *Rambler* was to blame for running into the port side of the *Titan* when the *Titan* was moored at this landing, and in which the defendants say that they were not to blame at all, that there was no negligence on their part, and that there was negligence on the part of the plaintiffs' servants on the *Titan* in being improperly there, in not making proper signals, and in not exhibiting proper lights. The evidence in this case is in a very small compass, but the facts really dispose of the case.

The *Titan*, a small tug, was lying moored, head up the river, to this pontoon at the Fish Quay, and the reason why she was in fact there at the time was that she had gone there to pick up a pilot. The pilot did not come on board until shortly after 2 a.m. on the 12th April, and the fog was then so thick that they did not think it prudent to get under way and proceed to the ship to which the pilot had to be taken. They therefore stopped there, and whilst they were lying in that position, with a masthead light, an anchor light, fastened to the outside rail, and a stern light exhibited, the weather being a very thick fog, the *Rambler* came up the river and struck the *Titan* at an angle of some five or six points leading forward with such force that damage was done to the *Titan* and also to the pontoon and the bridge which connects the pontoon with the shore. It is singular to notice that, looking at the lie of the pontoon, according to the chart, the *Rambler* must have been heading very much across the river at the time this was done. Now, it seemed to me from the outset that it would be exceedingly difficult for the *Rambler* to escape liability, but her case has been very well put by her counsel, and I have to deal with some of the points raised. It is first suggested that the *Titan* must be treated as a trespasser, and all this damage was the consequence of that wrongful trespass. I do not take that view. It seems to me, although there is some doubt about it on the evidence, that there is what one may term a tacit licence to use this pontoon in the way it was used. It is true that it was said that a notice was put up that no tugboats were allowed to use the pontoon, but the notice does not seem to have been in existence for the last two years, and there is abundant evidence that tugs lie there to the knowledge of the owners of the pontoon and the knowledge of the harbour-master, and that no steps are taken to keep them away. In this case the *Titan* was there with a reasonable object, and waiting there in circumstances in which it was not unreasonable she should wait. I cannot entertain the view that this vessel was a trespasser or was, in the circumstances of the case, improperly at the place where she was moored. Again, even if it can be said the vessel was there improperly, no damage was done to this stage and this bridge by her being improperly there; and if through the negligence of their servants the defendants the owners of the *Rambler* allowed their vessel to be navigated improperly and to drive another vessel into the stage and damage it, it does not seem to me that this would be damage liability for which could be cast upon the owners of the *Titan*. I do not see how any principle can be adduced or any authority brought forward to support that proposition. Moreover, it depends upon the speed of the *Rambler* whether she would have escaped striking the pontoon even if the tug had not been there.

It is said that the *Titan* did not exhibit any warning lights or make any signal to attract the attention of the upcoming vessel. I do not think that, under the circumstances, she could be treated as an improper obstruction, but it is said she was, within the meaning of the Tyne rules, at anchor or anchored, and therefore ought to have had an anchor light and ought to have kept sounding her bell at intervals of not more than two minutes, in accordance with rule 18 (*c*). She had an anchor light, so that is not really attacked, because there is no doubt that the evidence on both sides shows there was one light there, and the witnesses from the tug say there were three. But then it is said that there ought to have been a bell rung. It is said by those who know the locality, however, that it is not usual for vessels moored at the sides of the river to ring bells, and the Elder Brethren do not think it would have been reasonable in the circumstances of this case to ring a bell. I can quite understand that if all the vessels moored to the banks of a river were to ring their bells there would be perfect pandemonium. Moreover, it has been suggested to me that in a position like this it might be misleading, because it might, and probably would, be taken to indicate that she was really at anchor, in which case it should be possible to pass on either side of her, and other vessels would be surprised if they ran into the pontoon in trying to pass on the starboard side of her. The result is, that even if it could be said the *Titan* was wrongfully there, it is quite clear that the *Rambler* could, by the exercise of proper and reasonable care, have avoided her. The *Rambler* was moving about in weather which was extremely thick, and very nearly had run into the South Pier, and was coming up with so much speed as to do the damage I have already indicated; and she neglected the warning which I think she must have received from the people at the hailing station. This is a case of improperly moving about at the entrance to the Tyne in very thick weather, and of excessive speed. The only other remarkable feature about the case is that the plaintiffs, who are suing for damage to their pier, made no claim in the first instance against the owners of the *Titan*. They thought the *Rambler* was to blame, and made a claim against her owners. Then they seem to have arranged to take an indemnity from the owners of the *Rambler*, so that the owners of the *Rambler* and the plaintiffs in the first action should together fight the case against the *Titan*. It is a very odd position. I should have thought it would have been much more satisfactory if the Tyne Ferry Company had sued either of the other parties in the alternative, especially when I find that the party they arranged to fight against was the one they did not think responsible, and the party they arranged to fight with was the one they did think responsible. Judgment must be for the defendants in the action against the *Titan*, and for the plaintiffs in the action against the *Rambler*.

Solicitors for the *Rambler* and Tyne Ferry Company, *Williamson, Hill,* and *Co.*, agents for *R.* and *R. F. Kidd,* North Shields.

Solicitors for the *Titan, Pritchard* and *Sons,* agents for *Wilkinson* and *Marshall,* Newcastle-on-Tyne.

Friday, Nov. 9, 1906.

(Before Sir GORELL BARNES, President, and Elder Brethren).

THE CRUSADER. (*a*)

Salvage—Services by ship's agents—Agreement between master and ship's agents—Inequitable agreement—Agreement set aside.

The plaintiffs acted as ship's agents at Colombo for the steamship C. *A few days after the* C. *left Colombo the mate of the* C. *returned to Colombo and presented a letter to the plaintiffs from the master of the* C. *stating that the* C. *was ashore on the Maldive Islands asking for a powerful tug, and saying that a salvage boat would be of assistance if procured on a "no cure no pay" basis. The letter also directed the plaintiffs to draw on the owners of the* C. *for their disbursements. The plaintiffs chartered the* G., *a tug belonging to the Government, at the rate of* 60*l. a day, and gave an undertaking to redeliver her in safety and keep her insured for* 15,000*l. The plaintiffs also sent a cable to the owners of the* C.—"*Your interests have our attention.*" *The* G. *left Colombo for the* C. *with a clerk of the plaintiffs on board. On arrival at the* C. *the master of the* C. *refused to use the tug, except on the basis of no cure no pay, and agreed with the plaintiff's clerk to pay that firm* 4000*l. if they succeeded in floating the* C. *and saw her safely into port if required, "no cure, no pay." The* G. *got the* C. *off, and the plaintiffs cabled the owners of the* C. *that the* C. *was salved and that a salvage agreement had been entered into for* 4000*l. At that time the owners, although they knew the terms on which the plaintiffs had engaged the tug, had not confirmed them. On hearing of the salvage agreement for* 4000*l. the owners repudiated it, and said they were ready to pay the plaintiffs their disbursements and a reasonable commission. In a salvage suit to recover* 4000*l. or such sum as should be just:*

Held, that the plaintiffs when they hired the tug were acting as agents for the owners of the C., *and even though they ratified the unauthorised act of their agent in making the agreement, it was of such an outrageous character that the court would, in the exercise of its discretion, set it aside as inequitable.*(*b*)

SALVAGE SUIT.

The plaintiffs were Clarke, Young, and Co.; the defendants were the owners of the steamship *Crusader*, her cargo, and freight.

The *Crusader*, a screw steamship of 4205 tons gross and 2744 tons net register, manned by a crew of thirty-three hands all told, while on a voyage from Java to Port Said for orders with a cargo of sugar was coaled by the plaintiffs at Colombo, and the plaintiffs had also done the ship's business. After leaving Colombo the *Crusader* about 9.15 p.m. on the 7th Aug. 1905, went ashore on Gofar Island in the Maldives. Soundings were taken which showed that the vessel had run on a coral reef and was lying in 16ft. of water forward, while her stern was in over 200 fathoms. She was leaking in No. 1 tank and in the port bilge, but there was no difficulty in keeping the water down with the donkey pump. Attempts were then made to back the vessel off by jettisoning cargo forward and filling the after tanks and working the engines astern, but the vessel remained fast.

On the 8th Aug. an anchor was run out from the port bow and dropped as far aft as possible, and at high water the anchor was hove upon by the winch, but the vessel still remained fast.

On the morning of the 9th Aug. the anchor carried away and was lost, and the vessel sagged round with her starboard side towards the reef and lay with a list to port. The chief officer was then sent to Mali Island to obtain a junk from the Sultan of the Maldive Islands in which to proceed to Colombo for a tug. The work of jettisoning the cargo was continued, and on the 11th Aug. the chief officer returned with a junk, and left the same day for Colombo with a letter from the master for Clarke, Young and Co.

The mate arrived in Colombo after nightfall on the 14th Aug., and on the 15th Aug. presented the master's letter to Clarke, Young and Co., which was in the following terms:

Dear Sirs,—This will introduce to you Mr. Milburn, chief mate of the Crusader. Kindly give him every assistance, and draw for disbursements on my owners. The Crusader ran ashore here the night of the 7th inst. I am jettisoning cargo forward, but as the reef is so steep, having under the stern of the steamer over 200 fathoms water and forward only 16ft., I can make no use of the anchors, having lost already stream anchor and new wire rope. I require a good powerful tug. The Sultan of the Maldive Islands has kindly promised me assistance as to labour, but that alone will not get the steamer off, as the current sets on the reef, and as we lighten so we drive further on. A salvage boat would be of assistance, on the principle of "no cure, no pay." I will probably be able to make better terms here than you can at Colombo with salvage boat when he sees the situation. So far she is only leaking slightly in forepeak and No. 1 tank. Please inform Lloyd's agents. My chief officer has telegram and letter for my owners, which please forward. Dispatch of tug is of the utmost importance, so do not delay. P.S.—Have you a dry dock or pontoon at Colombo that would take a steamer like the Crusader, 360ft. long, 48ft. beam, no keel, but has bilge clogs, one on each keel? Can cargo also be warehoused at a reasonable price during steamer's detention in dry dock? Please send me also Rs. 500 by chief mate to pay labourers for lightening and pumping at forepeak. If you have no dry dock, will steam direct to Bombay.

Clarke, Young and Co. forwarded the master's telegram to his owners, and also cabled themselves to the owners: "Your interests have our attention; will wire again;" and later, on the 15th Aug., they cabled: "A tug will proceed to her assistance to-night." In the meantime Clarke, Young and Co. had gone to the Ceylon Government and had hired the Goliath from the Government for about 60*l.* a day, and had given an undertaking to insure the tug during the hire for 15,000*l.*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

(*b*) This decision has since been affirmed by the Court of Appeal (March 15, 1907).—ED.

The tug left Colombo on the morning of the 16th Aug. with a representative of the plaintiffs' firm on board conveying a letter from Clarke, Young, and Co. to the master of the *Crusader* in the following terms:

We send you as requested 500 r.p c. by the chief mate. The tug we have chartered is the only one available, and is owned by the Ceylon Government. There is little chance here of assistance on the "no cure, no pay" principle. We have also wired your owners to-day, stating that their interests have our attention and that a tug is proceeding to your assistance.

On the 16th Aug. Clarke, Young, and Co. wrote to the owners of the *Crusader* telling them that:

The captain requested us to send him a good, powerful tug. We have accordingly chartered from the Ceylon Government the *Goliath* and dispatched her to the scene of the accident this morning soon after eight o'clock. She should reach the *Crusader* at daybreak on the 18th inst. Our representative, Mr. C. T. Young, left by the tug with letters of introduction to the Sultan of the Maldives and others in case of need. Mr. Young will consult with Captain Brown, and your interests will have our best attention. Lloyd's agents were immediately advised of the disaster. [They then referred to the dock accommodation and to the advance to the master, and concluded:] The cost of hiring tug, inclusive of coals, is 750 rupees a day or part of a day, and there are other charges, such as water and extra crew, which we estimate will bring the daily expense of the tug up to about 60*l.* sterling. Any damage to ropes has to be made good by hirers of the tug. We have also had to insure the tug for 15,000*l.* for fourteen days at 1 per cent. Agency fee, *i.e.*, commission on disbursements, has not been included in above figures.

The *Goliath* arrived alongside the *Crusader* on the morning of the 19th Aug. Mr. C. T. Young at once went on board the *Crusader* with the mate and explained to the master of the *Crusader* the terms on which the tug had been hired, but the latter refused to accept the services of the tug except on the basis of "no cure, no pay," as he feared the ship would not be got off, and entered into a salvage agreement with Mr. C. T. Young on the terms contained in the following letter:

S.S. *Crusader* aground off Gofar Island.—C. T. Young, Esq., representing Messrs. Clarke, Young, and Co., Colombo.—Dear Sir,—This is to certify that I as master of this ship and on behalf of my owners, the Eskside Steam Shipping Company Limited, Whitby, have this day agreed with you to pay Messrs. Clarke, Young, and Co. (on the no cure, no pay system) the sum of 4000*l.* (four thousand pounds sterling) if you succeed in floating the *Crusader* and see her safely into the nearest port if required. In the event of your doing so, payment to be made by draft on my owners. It is, of course, understood that should you not succeed in floating this steamer I am to pay you nothing.

Mr. Young then returned to the tug, told the crew that he had entered into a salvage agreement with the master of the *Crusader*, and that they should be specially rewarded if the tug was successful in getting the *Crusader* off. The *Goliath* made fast to the *Crusader* about noon on the 19th Aug. and towed for the rest of the day, but failed to get her off. During the day the hawser parted twice, and on one occasion fouled the *Crusader*'s propeller, which was only cleared after some difficulty.

Early on the morning of the 20th. Aug. the tug began to tow again, and at 3 p.m. the *Crusader*'s stern began to move and was got well round, but her forepart still remained fast. The hawser then parted, but was again made fast, and at 5 p.m. she was towed clear of the reef.

Mr. Young then went on board the *Crusader* and offered to accompany her in the tug to Bombay, but the master of the *Crusader* thought the risk was too great, and decided to take the vessel to Colombo under her own steam and dismissed the tug from further attendance. The *Goliath* accordingly returned to Colombo, reaching there about 3 p.m. on the 22nd Aug., the *Crusader* arriving about 6.30 p.m. on the same day.

On the 22nd Aug. Clarke, Young, and Co. sent the owners of the *Crusader* the following cable:

Tug floated *Crusader*. About half cargo jettisoned. Expected Colombo to-night. Salving agreement made for 4000*l.* Will wire again..

On the 23rd Aug. they sent a further cable:

We refer to our telegram of yesterday. Confirm by telegraph salvage agreement made for 4000*l.*

On the 27th Aug. the owners of the *Crusader* cabled to Clarke, Young, and Co.:

Wire explanation why salvage agreement was made by captain with Government tug when engagement was 60*l.* a day. Owners and underwriters decline confirm Retain possession of cargo. Keep the sound separate from that which is damaged.

And on the 1st Sept. they sent a further cable to Clarke, Young, and Co.:

Referring to your salvage claim 4000*l.*, we decline to recognise same, and can only confirm original arrangement made by you on our account with Government tug.

Until the cable of the 1st Sept. the owners of the *Crusader* had not confirmed the original arrangement made by Clarke, Young, and Co. for the hire of the tug.

On the 21st Nov. 1905 Clarke, Young, and Co. instituted proceedings for the recovery of salvage for the services rendered by the *Goliath* to the *Crusader*, alleging in their statement of claim that the *Crusader* and her cargo had been saved from total loss, and that they had been put to expense amounting to 697*l.* 1*s.* for the insurance and hire of the tug and Mr. Young's expenses, and claiming 4000*l.* under the agreement, or, alternatively, such an amount of salvage as to the court might seem just.

The defendants denied that the plaintiffs had rendered any salvage service, and alleged that they had always been ready and willing to pay the plaintiffs the amount of their disbursements, including the insurance premium and the amount paid for the hire of the tug and agency commission. They also alleged that the agreement was inequitable and should be set aside, and alternatively, while denying liability, brought into court the sum of 500*l.* as salvage, as well as 697*l.* 1*s.* for disbursements, and said that those sums were sufficient to satisfy the plaintiffs' claim in the action. The value of the *Crusader* in her damaged condition was 27,000*l.* and of her cargo 30,500*l.*, making in all 57,500*l.* The freight was exhausted by the expenses of the voyage.

Aspinall, K.C. and *Dunlop* for the plaintiffs.—The master of the *Crusader* first only asked the plaintiffs to engage a tug, but, when the tug arrived at the ship, he would only employ it on

the terms that the plaintiffs were responsible for the expenses of the tug, and entered into a no cure, no pay agreement. On those terms the tug made fast and the *Crusader* was got off. The master had authority to make such an arrangement, and, even if Young had no authority to enter into such an agreement, the plaintiffs have ratified and had a right to ratify his action. The plaintiffs by entering into this agreement waived their right to recover the hire of the tug. Four thousand pounds, considering the position of the ship, was not an unreasonable sum to pay for the services. Ships' agents have been allowed to claim as salvors:

The Kate B. Jones, 69 L. T. Rep. 167; 7 Asp. Mar. Law. Cas. 332; (1892) P. 366.

Laing, K.C. and *Dawson Miller* for the defendants.—The plaintiffs having acted on the master's letter, it became their duty, as agents, to do their best for the ship and get towage assistance on the most favourable terms they could. The plaintiffs cannot recover 4000*l.* or any sum in an action *in rem* for salvage; they were not volunteers; their claim is a personal one against the owners. The master of the *Crusader* had no authority to enter into any fresh agreement. The court should not give effect to this agreement as it is inequitable; the plaintiffs ran no risk in rendering the services; their only liability was the cost of insuring the tug. The defendants are ready and willing to pay the plaintiffs their disbursements together with the usual agency commission.

Dunlop in reply.

THE PRESIDENT.—The facts in this case are somewhat out of the ordinary run of salvage cases, and require some consideration in stating them. The claim is brought by Messrs. Clarke, Young, and Co. against the *Crusader*, her cargo, and freight, for a sum of 4000*l.* under an agreement, and alternatively for such an amount of salvage as may to the court seem just. The facts which it is necessary to state seem to be these. In August of last year the *Crusader*, while on a voyage, had been coaled at Colombo by the plaintiffs under a coaling contract, which had been made by their principals, and in addition they had done whatever ship's business required to be done at Colombo. I assume that they were repaid in the ordinary way by master's drafts for the amount of their disbursements. Then the vessel left and proceeded on her voyage, but, unfortunately, she ran ashore on Gofar Island, in the Maldives. The master of the vessel sent the chief officer to Colombo, which place he successfully reached. Accompanying him was a letter from the captain. While he was away the master appears to have made efforts to get the vessel off by jettisoning cargo, with the assistance of native labour. On the 15th Aug. 1905 the mate arrived at Colombo and saw the plaintiffs. The letter which he brought was in these terms:—"Dear Sirs,—This will introduce to you Mr. Milburn, chief mate of the *Crusader*. Kindly give him every assistance and draw for disbursements on my owners. The *Crusader* ran ashore here the night of the 7th inst. I am jettisoning cargo forward, but as the reef is so steep, having under the stern of the steamer over 200 fathoms water and forward only 16ft., I can make no use of the anchors, having lost already stream anchor and new wire rope. I require a good powerful tug. The Sultan of the Maldive Islands has kindly promised me assistance as to labour, but that alone will not get the steamer off as the current sets on the reef, and as we lighten so we drive further on. A salvage boat would be of assistance, on the principle of no cure no pay. I will probably be able to make better terms here than you can at Colombo with salvage boat when he sees the situation. So far she is only leaking slightly in fore peak and No. 1 tank. Please inform Lloyd's agents. My chief officer has telegram and letter for my owners, which please forward. Dispatch of tug is of the utmost importance, so do not delay." Then he asks about a dry dock or pontoon at Colombo, and says, "Send me also 500 rupees by chief mate to pay labourers for lightening and pumping at fore peak."

Thereupon the plaintiffs went to the Government at Colombo and hired the twin-screw tug *Goliath*, which belongs to the Ceylon Government, and which I understand is one of two tugs sent out by the Government to be of service to vessels in those waters and to do towage work. The bargain they came to is expressed in the terms of the tariff charges for the use of the tugs for extraordinary services, namely, "Hire of one tug per day of twenty-four hours or part of a day, inclusive of coal, 750 rupees. Other charges:—Water at the rate of 2.50 rupees per ton; extra men at the rate of 2 rupees per day each." There was also a provision that the vessel should be insured by the person hiring the vessel, and that all gear, ropes, &c., damaged, should be replaced at the expense of the hirer. So that when the plaintiffs hired that tug they hired her upon the terms of paying the Government moneys which amount, I understand, to 60*l.* per day, and they became personally responsible for that payment. The tug then proceeded to the vessel with a Mr. Young, who is a clerk in the plaintiffs' firm, on board. When they got to the *Crusader* the master of the *Crusader* seems to have felt difficulty about accepting the services of the tug without making some further bargain. Upon that point I shall have to say something.

The ultimate result was that on the 19th Aug. he gave this letter, which represents what was agreed between him and Mr. Young, the clerk of the plaintiffs: "This is to certify that I as master of this ship and on behalf of my owners, the Eskside Steam Shipping Company Limited, Whitby, have this day agreed with you to pay Messrs. Clarke, Young, and Co. (on the no cure, no pay system) the sum of 4000*l.* if you succeed in floating the *Crusader* and see her safely into the nearest port if required. In the event of your doing so payment to be made by draft on my owners. It is, of course, understood that should you not succeed in floating this steamer I am to pay you nothing." That is signed by the master. Thereupon the tug on the afternoon of the 19th and again on the afternoon of the 20th rendered towage services to the *Crusader*, and she came off the reef, and went under her own steam, as I understand, to Colombo. There the matter, so far as this question of salvage is concerned, ends.

Now, the point taken for the plaintiffs is that they are entitled to this sum of 4000*l.* The defen-

dants contend that the plaintiffs are not entitled to recover any salvage at all, neither the sum of 4000*l.* nor any sum, and that all they can do is to maintain a personal action against the owners of the ship for the amount of their disbursements, together with a commission upon such disbursements, because, they say, the plaintiffs were only acting as agents in the circumstances, and had no right in the circumstances to recover anything more than their out-of-pocket expenses, plus a commission. There are one or two letters and telegrams which bear upon these points more specifically. The first letter is one from Clarke, Young, and Co. to the master of the *Crusader*. I think it was taken out by Mr. Young, the clerk I have mentioned. In it they say: "We send you as requested 500 rupees by the chief mate. The tug we have chartered is the only one available, and is owned by the Ceylon Government. There is little chance here of assistance on the 'no cure, no pay' principle. We have also wired your owners to-day, stating that their interests have our attention and that a tug is proceeding to your assistance." On the same day they forwarded a telegram from the captain to his owners, which is referred to as having been sent, and they also telegraphed to the owners as follows: "Your interests have our attention, will wire again." On the same day they wired: "A tug will proceed to her assistance to-night." On the 16th they wrote a letter to the owners which contained these passages: "The captain requested us to send him a good powerful tug. We have accordingly chartered from the Ceylon Government the *Goliath* and dispatched her to the scene of the accident this morning soon after eight o'clock. She should reach the *Crusader* at daybreak on the 18th inst. Our representative, Mr. C. T. Young, left by the tug with letters of introduction to the Sultan of the Maldives and others in case of need. Mr. Young will consult with Captain Brown and your interests will have our best attention. Lloyd's agents were immediately advised of the disaster." Then they talk about the pontoon or dry dock, and of having sent 500 rupees to the captain. The postscript to the letter is as follows: "The cost of hiring tug inclusive of coals is 750 rupees a day or part of a day, and there are other charges such as water and extra crew, which we estimate will bring the daily expense of the tug up to about 60*l.* sterling. Any damage to ropes has to be made good by hirers of the tug. We have also to insure the tug for 15,000*l.* for fourteen days at 1 per cent. Agency fee—*i.e.*, commission on disbursements, has not been included in above figures." There is nothing else that I need refer to until I get to the 22nd Aug., when this telegram was sent from the plaintiffs to the defendants: "Tug floated *Crusader*. About half cargo jettisoned. Expected Colombo to-night. Salving agreement made for 4000*l.* Will wire again." On the next day a further telegram was sent saying: "We refer to our telegram of yesterday. Confirm by telegraph salvage agreement made for 4000*l.*" The owners and the Salvage Association in this country wired asking for an explanation. The telegram from the defendants, dated the 27th Aug., is as follows: "Wire explanation why salvage agreement was made by captain with Government tug when engagement was 60*l.* day. Owners and underwriters decline confirm. Retain possession cargo. Keep the sound separate from that which is damaged." A further telegram from the owners, sent on the 1st Sept., reads thus: "Referring to your salvage claim 4000*l.*, we decline to recognise same, and can only confirm original arrangement made by you on our account with Government tug."

I think that completes the documents it is necessary to refer to, with the exception, perhaps, of one letter from the master, to which I wish to draw attention later. It seems to me to result from that statement of the facts that the plaintiffs acted as agents for the owners in making the arrangements with the Government for the use of the tug *Goliath*. I think that the evidence which has been given in the depositions, and *viva voce*, makes it quite plain that that was the position of the plaintiffs, and the postscript letter commencing "the cost of hiring tug," and ending "agency fee, *i.e.* commission on disbursements has not been included in above figures," makes it perfectly plain. I do not think that the arguments that have been addressed to me have quarrelled with that view of the case at the outset. That being so, the position of the two parties was this, that the plaintiffs had made themselves responsible to the Government for the hire of the tug, and would have a right to recover whatever they paid to the Government from the owners of the ship, and in the ordinary course would, as indicated in the letters, have drawn from it and charged commission on the disbursements. I think that is also in accordance with the wishes of the master and the authority for the plaintiffs to act which they derived from him, contained in the letter of the 11th Aug. The authority to act upon that letter was accepted by the plaintiffs when they wrote to the master the letter of the 15th Aug. which I have referred to. That being the position, the liability of the owners of the ship seems to me to have become complete, and the bargain between the parties to have been definitely fixed. Of course that leaves me to consider what the position was when the tug arrived at the Maldive Islands, and when the alleged agreement sued upon was made.

At the moment I think it is clear from what I have stated that Mr. Young, the clerk, was going out as the representative of Messrs. Clarke, Young, and Co., the plaintiffs, to carry out the bargain which had already been made for the employment of this tug, and my opinion is that he had no authority whatever from his principals to alter that bargain so far as they were concerned; because if he did so in such a manner as it is contended he has done, he was placing them in a position of having no remedy whatever for the expenses they had already incurred against the owners of the ship, should the ship not be salved. That would not necessarily dispose of this point, however, because his principals could ratify that action of his if they chose, and say "although you may not have acted with proper authority from us to destroy our rights, for the liability we have incurred against the owners, we will ratify what you have done and now sue under the contract" So there is a difficulty in saying this case is disposed of simply on the ground that Mr. Young had no authority to make that bargain. I do not think that at

the time he made it he had any authority to act in the way he did.

I do not say for a moment that he was acting with any want of *bona fides*. He did the best he could in the situation. What was the situation? The master of the vessel would not accept the tug, apparently, when she got there on the footing on which she had been engaged, and what he says in one or two of his communications to his owners is this, for instance in a telegram of the 28th Aug.: "Your telegram received. All interests are cared for. . . . Confirm salvage agreement made with collieries' representative 4000*l.*, no cure, no pay. I insisted make agreement, considered best interests all concerned rather than allow tug work indefinitely possibly no results. I consider the demand very moderate considering risks." He practically maintains the same position in subsequent letters, but there is one which may perhaps be used as showing his more elaborate view of this matter: "I have very little to add why I made a salvage agreement. The honest truth is I never expected her to come off. The chief engineer and self knew a rock was working itself through above the margin plate in engine-room. . . . I offered Mr. Young 3000*l.* at first, but, as he pointed out to me that he should have to pay large bonuses to the two masters and first engineer in the tugboat and the risk his firm ran if he was not successful, it was then increased to 4000*l.*, and I firmly believe without a salvage agreement she would not have come off."

That is why Mr. Young made this salvage agreement. The master practically insisted upon it. The question then comes to be whether that can stand; in other words, whether the salvage claim put forward can be based upon it.

There is one principle which is well known in this court—salvage is a reward for services rendered not exactly on the basis of any contract, but as a remuneration on public grounds for services rendered to vessels or other property in distress. There are certain well-known principles which arise from that. Amongst them is the principle that the court will not enforce an agreement—or not give effect to it is the proper way to put it—and will not base its salvage award upon the basis of an agreement if the circumstances are such that it would not be just and equitable that it should do so. So it seems me that the principal matter to consider in this case is what is the duty of the court, and what are the rights of the parties, having regard to those principles. In this case I do not think that question presents any serious difficulty. In the first place, the position of an agent must not be left out of consideration. I held in one case that has been cited to me, *The Kate B. Jones* (*ubi sup.*), that an agent is not precluded from being a salvor, though his position affects to some extent the question of what his precise reward and rights are. I do not desire here to repeat anything I have said in that case. I do not think anybody questioned in the argument before me anything that that case laid down. The next matter to consider is that the vessel in this case was in a dangerous position, and it may be—I am not going into that question—that if an independent salvor had been procured, and he had proceeded out and rescued this vessel—it may be that the sum which was agreed upon would not have been thought excessive, though to my mind there is considerable doubt about that, having regard to what had been done with the vessel by the time the tug got there. That, however, is not the situation in this case. When the tug arrived she arrived under a binding bargain that her services were to be used for 60*l.*, or thereabouts, per day, and so if the master in this case had viewed the situation with anything like ordinary average intelligence he would have seen that he could use that tug for a day or two for a very small sum, 120*l.*, or 180*l.* for three days, and could thus have made certain whether by the efforts of the tug alone, as she lay there, having discharged some of her cargo, he could get her off. The view I take, and the view the Elder Brethren take, is that it was an absolutely outrageous bargain for the captain to attempt to make, and that he was acting in an extremely foolish and stupid way. I cannot follow the reasoning in his letters which led him to take that course, unless it was this, that he did not realise he was entitled to use that tug for 60*l.* per day as long as he chose. I cannot myself believe—because he is stated to be an intelligent man—that he thoroughly grasped or was adequately informed of the position which that placed him in, because it is so obvious that a trifling expense would have enabled him to see whether he was going to get the ship off or not, and he could have waited and then made his big bargain if he thought it necessary. That being so, even if the agent has had his act ratified, and acted quite straightforwardly in making the contract with the master, who was insisting upon it at the time, I do not think this court can allow the plaintiffs to ratify and adopt that act so as to give them a right to bring a salvage claim based upon it. To my mind their rights rest where their bargain originally was—namely, to get their disbursements from the owners of the vessel and charge them also a proper and reasonable commission on the disbursements for the work done. Is not that really the right—the meritorious—result in this case? What have the plaintiffs done except that which they undertook to do when they acted on the captain's message sent by the mate They have done nothing whatever, except make a bargain for a tug, and they were content when they made that bargain to incur a liability to pay for the tug, provided they got adequate remuneration in the shape of commission. In my opinion they are endeavouring to enforce a claim which in the circumstances the court will not allow them to maintain. My judgment must be for the defendants in this case, with costs, but costs will be subject to the defendants being willing that the plaintiffs should take out of court the sum of 697*l.* paid in for disbursements, and also subject to the defendants undertaking to pay the necessary agency commission, which I will fix at 5 per cent.

Solicitors for plaintiffs, *Pritchard* and *Sons*.
Solicitors for defendants, *Botterell* and *Roche*.

Nov. 27, 28, *and* 29, 1906.

(Before Sir GORELL BARNES, President, and Elder Brethren.)

THE ARAS (*a*)

Collision—Fog—Fog signal heard forward of beam —"Broadening"—"Position not ascertained" —"Navigate with caution"—Regulations for the Prevention of Collisions at Sea 1897, *art.* 16.

Where those in charge of a steamship going slow in a thick fog heard the whistle of another vessel fine on the bow and far away they stopped their engines. When they thought the whistles were broadening, and on their vessel losing steerage way, they went on at dead slow for about twenty minutes, during which time they alleged the whistles continued to broaden, at the end of which time the other ship came in sight and a collision occurred.

The court held them to blame because the indications as to the position of the other vessel were not such as to show to her master distinctly and unequivocally that the vessels would pass clear without risk of collision, and that they should have stopped from time to time, even at the risk of falling off from their course, as it is impossible to rely on the direction of sound in fog to indicate with any certainty the position of a vessel.

ACTION of damage.

The plaintiffs were the owners of the steamship *Oakmore*; the defendants and counter-claimants were the owners of the steamship *Aras*.

The case made by the plaintiffs was that shortly before 1.49 a.m. on the 23rd July 1906 the *Oakmore*, a steel screw steamship of 4547 tons gross and 2955 tons net register, 400ft. in length, manned by a crew of thirty-nine hands, was in the English Channel about 20 minutes S. by E. ¾ E of Portland Bill. The wind was light from the W.S.W., the tide was ebb of the force of about a knot, and the weather was foggy. The *Oakmore* was on a course of N. 86 degrees W. magnetic, proceeding at a speed of about two knots, the minimum speed at which she could be kept under control; her regulation lights were being duly exhibited and were burning brightly her whistle was being kept sounding in accordance with the regulations, and a good look-out was being kept on board her by her master and two officers on the bridge and two able seamen in the fore part of the vessel. In these circumstances a whistle was heard on the port bow, a long distance off; the engines were instantly stopped, and the bearing of the whistle was carefully ascertained by compass by the master and each of the officers on the bridge. When the whistle was found to be broadening on the bow, the engines were put dead slow ahead, the *Oakmore* having by this time almost come to a standstill, and thereafter the whistle of the approaching vessel was carefully followed and replied to. After an interval of about twenty minutes, when the whistle of the approaching vessel bore about four points on the port bow, the masthead and green lights of the vessel swinging to port appeared; the engines of the *Oakmore* were immediately put full speed astern, three short blasts were sounded, and her helm was put hard-a-port; but the *Aras* came on at considerable speed, and with her stem struck the port side of the *Oakmore* in the way of the foremast, doing much damage.

The plaintiffs charged the defendants with not keeping a good look-out; with proceeding at too great a speed; with not easing, stopping, or reversing their engines in due time; with neglecting to stop their engines and navigate with caution after hearing a fog signal forward of their beam; and with improperly starboarding.

The case made by the defendants and counter-claimants was that shortly before 1.30 a.m. on the 23rd July 1906 the *Aras*, a steel screw steamship of 3629 tons gross and 2338 tons net register, manned by a crew of thirty hands all told, was in the English Channel, in about latitude 50 degrees N. and longitude 2 degrees 56 minutes W., in the course of a voyage from Batoum to London with a cargo of petroleum. The weather was a dense fog, the wind was W.S.W., very light, and the tide was ebb of the force of about one and a half knots. The *Aras*, steering N.E. by E. ¾ E. magnetic, was making about two knots an hour through the water, with engines working dead slow. She carried the regulation two masthead lights, side lights, and a stern light, all being electric, duly exhibited and burning brightly; her whistle was being duly sounded a prolonged blast for fog at short intervals, in accordance with the regulations; and a good look-out was being kept on board of her. In these circumstances those on the *Aras* heard a long blast from the *Oakmore*, which appeared to bear about two points on the starboard bow, and to be at a considerable distance. The engines of the *Aras* were immediately stopped, and her whistle was sounded a prolonged blast, and that signal continued to be sounded at very short intervals until the *Aras* had lost her headway, when her whistle was sounded two prolonged blasts in rapid succession. Shortly afterwards the whistle of the *Oakmore* was again heard on the starboard bow and much nearer, and thereupon the engines of the *Aras* were put full speed astern and her whistle was sounded three short blasts, and directly afterwards the masthead and red lights of the *Oakmore* came into view, distant about a ship's length, and bearing rather more than a point on the starboard bow. As soon as the red light was seen, the helm of the *Aras* was put hard-a-port, but without any effect, and, though the *Oakmore* was loudly hailed, she came on at considerable speed, and with her port bow struck the stem of the *Aras* a heavy blow, causing her serious damage.

The defendants charged the plaintiffs with not keeping a good look-out; with going at an immoderate speed in the fog; with failing to stop their engines and navigate with caution after hearing the fog signal of the *Aras*; with neglecting to sound her whistle for fog, in accordance with the regulations; and with not easing, stopping, and reversing their engines in due time or at all before the collision; and counter-claimed for the damage they had sustained.

Aspinall, K.C. and *L. Noad* for the plaintiffs.

Pickford, K.C. and *D. Stephens* for the defendants.

Nov. 29.—THE PRESIDENT.—This is a case of a collision which took place on the 23rd July last, at a spot about which there has been some dispute, in the English Channel, between the steamships

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Oakmore and *Aras*. The time, according to one side, was 1.49 a.m., and according to the other 1.30 a.m. The *Oakmore* was bound from Antwerp to Boston with cargo, and was proceeding on a course of about N. 86 W. magnetic, at slow speed, because the weather was foggy. She was sounding her whistle, and those on board her were all at their proper stations. The *Aras* was on a voyage from Batoum to London with a cargo of petroleum, and was steering N.E. by E. ¾ E. easterly magnetic, also at slow speed because of the state of the weather. She also was sounding her whistle, and those on board her were at their proper stations. The case for the *Oakmore* is shortly this: That while proceeding in the way I have already stated they heard a long blast on the port bow; that it was reported by two look-outs, one forward and the other in the crow's nest; and that thereupon the engines were stopped. The master then stated that he took a bearing by compass of the sound, and made it out to be W. by S.—that is to say, a point and a quarter to a point and a half on his port bow. That is, of course, pure estimate, because it means that he took the direction in which he believed he had heard the whistle and endeavoured to make out where it was by compass. Then, according to his evidence, which substantially states the case for the plaintiffs, he kept the vessel stopped until her steerage way was lost, and during that time heard the whistle of the other vessel about three times, and it broadened out, and after he had lost steerage way and was falling off his course the whistle was bearing W.S.W. from him; that he put his engines ahead dead slow to get steerage way and bring the vessel back to her former course, and proceeded on for something like twenty minutes, during which time, although the whistle was heard getting closer, it was broadening on his port bow and not narrowing; and that when he saw the two masthead lights of the *Aras* 200 yards off they were bearing S.W. by W., while he was still on his course of N. 86 W. Then he stated that shortly afterwards he observed the *Aras* was rounding to port, as if way had just been given her, and that he put his engines full speed astern, gave three short blasts, and put his helm hard a-port, but the *Aras* struck him on the port side forward with her stem, with the result that both vessels were damaged. The case on the other side, stating it shortly and substantially from the master's evidence, is that while proceeding on the course I have mentioned, at one o'clock he stopped and took soundings and got 35 fathoms, small stones and sand; that at 1.10 he started the engines again dead slow ahead, giving a speed of two knots, and did not alter his course at all; that at 1.20 he heard a blast two points on his starboard bow—again that must, of course, be an estimate—that he telegraphed to stop and the engines were stopped, and the whistle blown for several minutes; that he looked over the side to see whether the way was stopped and then blew the "stopped" signal of two long blasts with a second's interval between, and that then he heard the whistle of the *Oakmore* closer to, and immediately rang the engines full speed astern and gave three short blasts, and when he saw, immediately afterwards, or practically at the same time, the masthead light of the *Oakmore*, he put the helm hard a-port, but without effect, the *Oakmore* being only a length off and a point and a half on the starboard bow when he also saw the red light. He further stated that he hailed the *Oakmore*, and he was himself going full speed astern, but the collision took place. The parts of contact are not substantially in dispute, but the plaintiffs say the angle of the blow was a right angle, or, if anything, slightly leading forward—Mr. Roscoe, the plaintiffs' surveyor, said it was a point leading forward—and the defendants say it was a two and a half to three point angle, but Mr. Lewis, their surveyor, says it is about a four point angle. That is the whole story as presented on the two sides. There is only one other matter to refer to. The place of the collision is not in agreement between the two sides, but both vessels were running by dead reckoning. The plaintiffs' vessel had run from the Goodwin Sands without making any fresh point of departure. That was a very long distance away. The defendants' vessel had made nothing for certain since the Burlings, which was a still greater distance away. So, although it is probable that the place is nearer what the plaintiffs say, because their point of departure is somewhat the nearer, still I do not know that it can with certainty be said that the exact spot is given by either side.

Now, the case presents some difficulties, but I do not think when it is carefully considered that those difficulties amount to very much. I think that the case for the plaintiffs depends substantially upon their establishing three points. The first is that the whistle of the defendants' vessel was broadening as the two vessels approached each other. The second is that it is impossible on the plaintiffs' story to make the collision occur unless the defendants' ship starboarded at the last from a position estimated to be four and a half points or thereabouts on the port bow of the *Oakmore*. The third, which is almost involved in the second, is that the *Aras* went at considerable speed at the close of the matter from the position which I have just stated, and estimated in regard to distance to be something like 200 yards away when seen. One has to consider whether those three points are made out. With regard to the latter two, it seems to me that they are not established. It is clear that if the vessels were in such a position that those on board the *Oakmore* could see, as they say they did, the *Aras* bearing S.W. from them at a distance of 200 yards or anything like it, they must make out that the defendants starboarded, and kept starboarding hard, too, without any really adequate reason for doing so; because in the position thus described it is almost obvious that the defendant vessel by a very slight port helm at that moment would have gone under the stern of the plaintiff vessel, and certainly would have no object whatever in coming at her at increased speed. With regard to one factor in the case which the plaintiffs rely upon as establishing what I think they have failed to establish—namely, the angle of the blow. I do not take the same view as was taken by the plaintiffs. I have said that they take the view, and endeavoured to prove, that the blow was at a right angle, or slightly leading forward. The defendants, on the other hand, say it was considerably less than a right angle. That is a point very much in dispute. Two very competent surveyors have been called on the respective sides, Mr. Roscoe on the

one and Mr. Lewis on the other, and they totally differ about it, and give their reasons, which are in complete conflict. When one has not seen the vessels it is very difficult to be certain which of them is right, but the view we take about it is that if there was reversing of the engines of the *Oakmore* only at the last moment she would probably have some speed still on her; that there was undoubtedly exceedingly little speed, if any, on the *Aras*; that the damage is more probably to be accounted for by the stem of the *Aras* being swept over to port by the contact which took place; and that the damage was done very much in the way the defendants contend for.

The result of that is that I cannot and do not accept the view that the defendant vessel starboarded and came at speed or increased speed just before the collision. Before leaving that point it is to be remembered that although the plaintiffs' witnesses spoke of a right-angle blow, yet the master of the plaintiff vessel admitted that the hard a-port helm and reversing had canted his head somewhat more to the northward, and the increase of the angle may be accounted for in that way. Upon this part of the case I think there was one witness who was an extremely good one, and that was a lad whose evidence was very much criticised by the plaintiffs. He was the helmsman, for the time being, of the defendant vessel—an apprentice named Jeffrey Bedford, sixteen years old—an extraordinarily smart boy, perhaps rather more than a boy. He had not been at sea long, but evidently he had come on so much as to be trusted with the wheel of a large vessel like this. He certainly impressed both me and the Elder Brethren by the way he gave his evidence, and in face of that evidence and against the probabilities I cannot accept the view that the defendant vessel starboarded. I think she kept her heading, and was practically stopped in the water at the time of this disaster. I think it follows that the defendants' story is practically true, that they were doing what they could to keep a proper look-out, that they stopped on the whistle being heard, and that they had practically run their way off when the vessel was seen, and that they then reversed their engines, but there was no time to avoid the collision. The only difficulty about their part of the case is that they did not hear more than two whistles, one at the commencement and one almost immediately before the collision, but it must not be overlooked that sound, as is quite notorious, is a very difficult thing to be accounted for in a fog, and the wind was W.S.W., which was from the defendants towards the plaintiffs, and therefore adverse to the defendants hearing so well as the plaintiffs. I feel no difficulty in accepting the story of the defendants, and I cannot find that they were to blame in any way in this collision.

The case against the plaintiffs requires careful consideration. It depends, so far as their navigation is concerned, upon the first point which I have said it was necessary for them to establish. It depends upon whether the account given in court of the whistles of the defendant vessel broadening continually from a point and a little more to four points or a little more on the port bow is correct. I think it almost follows from what I have already said about the bearing when the vessels were first seen that it cannot be correct. It is quite obvious that when this evidence was given a very strong attempt was made to make out this necessary feature of the plaintiffs' case. It is all very well to say that these sounds were gauged by compass with such certainty as those witnesses say, but that cannot possibly be accepted. One reason why I did not give my judgment yesterday was that I wished to see the two courses laid off with accuracy, in order to ascertain, knowing how the collision took place, whether that story could possibly be true. The Elder Brethren have been good enough to lay off for me the courses of the *Oakmore* and the *Aras*, and I have taken the position at which the plaintiffs state the whistle was first heard. It is almost obvious when the matter is thus laid out—I think it is quite obvious—that these two vessels must have kept almost upon the same bearing from first to last, approaching closer and closer, no doubt, but certainly not broadening. If there is any doubt about that, it ought to be resolved in the opposite direction—namely, in the direction of the conclusion that the *Aras* was getting narrower on the bows of the plaintiff vessel, rather than broader. That is made absolutely certain to demonstration by laying it off on the course and bearings of the vessels. That leads me to the definite conclusion that it is impossible there can have been this broadening spoken to by the plaintiffs' witnesses in this case.

I think the case then turns on a question of nautical skill, which is for the Elder Brethren to determine, because of the provisions of article 16. That article requires a steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, to stop her engines so far as the circumstances of the case admit, and then navigate with caution until danger of collision is over. In consequence of that rule I have asked the Elder Brethren this question: "When the *Oakmore* continued her course"—the explanation of that is that according to her evidence she stopped, and then, finding she was falling off, put her engines ahead again and brought herself on to her course and kept on for something like twenty minutes—"were the indications such as to show to her master, distinctly and unequivocally, that if both vessels continued to do what they appeared to be doing they would pass clear without risk of collision?" The answer is "No." Then the Elder Brethren were asked by me, "What ought to have been done in those circumstances on board the *Oakmore?*" and their view is that she ought not to have continued on in the way she was doing, with that big steamer coming closer and closer and doing what I have already said; but that she ought to have stopped, it may be only from time to time, even at the risk of falling off somewhat, because recollect there is a sound signal to be given if a vessel is absolutely stopped; that even if it would not have been advisable to keep continually stopped, by a touch ahead from time to time she could have been kept sufficiently on her course and under control to to have avoided going on for something like twenty minutes at slow speed. The only other matter to consider in connection with that—it is not necessary, really, when one has found the facts as I have done, but it is worth while saying something about it—is the possibility that a man in the position of the master of the *Oakmore* might have been mistaken in the view he took of

the bearing and progress of the vessel, and the consideration of what his position would be then. I think it is exactly the same, because it is so well known—so absolutely well known—that it is impossible to rely upon the direction of whistles in a fog, that I do not think any man is justified in relying with certainty upon what he hears when the whistle is fine on the bows like this was undoubtedly, and is not justified in thinking it is broadening unless he can make sure of it. That is the view I entertain very strongly, because if it is well established that the direction of sound in a fog is a matter of uncertainty, it is no use trying to make it a certainty by saying you looked at the compass. That being so, I am of opinion that the plaintiffs' vessel broke the provisions of article 16, and that if she had not continued her course in the way she did throughout those twenty minutes there would have been no collision. The *Oakmore* therefore must be held to blame for the accident that has happened.

Solicitors for the plaintiffs, *Rawle, Johnstone,* and *Co.*, for *Hill, Dickinson,* and *Co.*

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

Dec. 17 *and* 18, 1906.

(Before Sir GORELL BARNES, President, and Elder Brethren.)

THE KAISER WILHELM DER GROSSE (*a*)

Collision—Entrance to harbour—Crossing rule—Narrow channel—Good seamanship—Regulations for Preventing Collisions at Sea 1897—*Arts.* 19, 21, 22, 25, 27.

Two vessels, one entering and one leaving Cherbourg, met just outside the entrance of the harbour, which is about half a mile wide. The vessel entering the harbour had the green light of the vessel leaving the harbour on her port bow, and ported and slowed to enter the harbour well to her starboard side of the entrance. The vessel leaving the harbour starboarded, and endeavoured to cross ahead of the vessel entering.

Held, that good seamanship and local practice both demanded that vessels leaving and entering the harbour and navigating in the waters adjoining the entrance should keep to their starboard side of the channel and pass port to port.

Semble, *the waterway between the ends of the breakwaters at Cherbourg, together with so much of the adjacent water as is necessary for the navigation of the passage, is a "narrow channel" within the meaning of art.* 25.

ACTION of damage by collision.

The plaintiffs were the Royal Mail Steam Packet Company, the owners of the steamship *Orinoco.*

The defendants and counter-claimants were the North German Lloyd Steamship Company, the owners of the steamship *Kaiser Wilhelm der Grosse.*

The collision which gave rise to the action took place about 7.30 p.m. on the 21st Nov. 1906, at the entrance of Cherbourg Harbour, half a mile W.N.W. of Fort de l'Ouest. The weather at the time was dark and overcast, the wind was W.S.W., a strong breeze, and the tide was ebb.

The entrance of the harbour at which the two vessels met is formed by the ends of two breakwaters. The entrance runs about east and west, and is about half a mile broad. The breakwaters which form the entrance end in forts, Fort de l'Ouest being on the western end of the eastern breakwater, and Fort Chavagnac being on the eastern end of the western breakwater. Fort de l'Ouest is lighted; Fort Chavagnac is not.

The case made by the plaintiffs was that the *Orinoco,* a screw steamship of 4571 tons gross and 2451 tons net register, 410ft. long, whilst bound from Southampton to the West Indies, *viâ* Cherbourg and Vigo, with passengers and general cargo, and manned by a crew of 131 hands all told, was approaching the western entrance into the port of Cherbourg. The *Orinoco,* in charge of a duly licensed Cherbourg pilot, was steering about south magnetic, and, with engines working at full speed under reduced steam, was making about twelve knots. The regulation two masthead and side lights and a stern light were duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances the masthead lights of the *Kaiser Wilhelm der Grosse* were particularly noticed over the breakwater, about two miles distant, about one and a half to two and a half points on the port bow. The engines of the *Orinoco* were afterwards at 7.25 p.m. put half speed, to reduce her way before coming to the Fort Chavagnac breakwater. Shortly afterwards the *Orinoco* sounded one short blast, and ported the helm to keep well over on her starboard side of the passage. The *Kaiser Wilhelm der Grosse* sounded one short blast, and the *Orinoco* sounded a second short blast. At 7.28 p.m. the *Kaiser Wilhelm der Grosse,* whose green light came into view when she opened out the Fort de l'Ouest breakwater, instead of porting and keeping over to her starboard side of the entrance as she could and ought to have done, sounded two short blasts on her whistle. The engines of the *Orinoco* were at once put full speed astern and three short blasts were sounded on the whistle, and the helm was ordered to be steadied. The *Kaiser Wilhelm der Grosse* came on, attempting with her great speed to cross ahead of the *Orinoco,* but, after sounding three short blasts on her whistle, she struck the *Orinoco* a very heavy blow on the stem with her starboard bow a little forward of the foremast, doing great damage.

Those on the *Orinoco* charged those on the *Kaiser Wilhelm der Grosse* with not keeping a good look-out; with failing to keep clear of the *Orinoco;* with improperly attempting to cross ahead of the *Orinoco;* with failing to keep to the starboard side of the entrance; and with neglecting to ease, stop, or reverse her engines.

The case made by the defendants was that the *Kaiser Wilhelm der Grosse,* a steel twin-screw steamship 649ft. long, of 14,349 tons gross and 5521 tons net register, was proceeding through the roadstead at Cherbourg, in the course of a voyage from Bremerhaven, *viâ* Southampton and Cherbourg, to New York, with passengers, mails, and general cargo, and manned by a crew of about 500 hands all told. The *Kaiser Wilhelm der Grosse,* which had shortly before left her anchorage, was steering for the western entrance, keeping the Fort de l'Ouest light on her starboard bow, and was making about eight to ten knots

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

through the water. Her regulation two masthead lights, side lights, and fixed stern light, all electric, were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances those on the *Kaiser Wilhelm der Grosse* observed over the breakwater, about three miles off and about six points on the starboard bow, the two masthead lights of the *Orinoco*, steaming towards the harbour. The lights of the *Orinoco* were carefully watched, and the *Kaiser Wilhelm der Grosse*, gathering way under her engines, which were working at half speed, continued to make for the entrance, and, as she approached the Fort de l'Ouest light, her helm was ported in order to enable her to pass safely out of the entrance, and steadied on a course of N.W. ½ N. magnetic. Directly afterwards her engines were set full speed ahead and her whistles were sounded two short blasts to the *Orinoco*, which was still broad on the starboard bow, with her masthead lights nearly in line. After a short interval, as there was no reply from the *Orinoco*, this signal was repeated, and immediately afterwards the masthead lights of the *Orinoco* were observed to be opening, indicating that she was porting, and at the same time her whistle was heard to be sounded one short blast. The engines of the *Kaiser Wilhelm der Grosse* were instantly put full speed astern and her whistle was sounded three short blasts, but, notwithstanding these manœuvres, the *Orinoco* came on at great speed, showing her masthead lights and red light, and with her stem struck the starboard bow of the *Kaiser Wilhelm der Grosse* a violent blow, doing her very heavy damage, killing four passengers and injuring others. Just before the collision the *Orinoco* sounded three short blasts on her whistle.

Those on the *Kaiser Wilhelm der Grosse* charged those on the *Orinoco* with keeping a bad look-out; with improperly porting; with neglecting to keep her course; with neglecting to wait outside the harbour until the *Kaiser Wilhelm der Grosse* had passed out; and with failing to ease or stop and reverse their engines; and counter-claimed for the damage they had sustained.

The following are the Collision Regulations which were referred to during the course of the case:

19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed.

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.

25. In narrow channels every steam vessel 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 vessel.

27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

Aspinall, K.C. and *Dunlop* for the plaintiffs.—The evidence of the pilot on the *Orinoco* shows that the practice is for vessels coming into the harbour not to wait for vessels coming out, but to pass port to port. The crossing rule does not apply; but, even if it did, the outgoing vessel ought to avoid crossing ahead of the incoming vessel, and so would have to port to pass under her stern. Art. 25, which directs each vessel to keep to the starboard side of the fairway, applies to this case:

The Knaresboro, *Shipping Gazette*, Nov. 10, 1900.

Somewhat similar facts were proved in that case, and the court inclined to the view that the crossing rule did not apply, and that the narrow-channel rule did. Good seamanship and a due regard for the dangers of navigation demanded that the vessels should pass each other port to port.

Pickford, K.C. and *H. C. S. Dumas* (*D. Stephens* with them) for the defendants.—The plaintiffs now admit that the defendants' vessel did not sound one short blast as alleged in the pleadings, but sounded two short blasts twice, and the porting on the *Orinoco* was the only thing which prevented the defendants' vessel from successfully crossing ahead of her. Art. 25 does not apply to such a case as this. Good seamanship in a place such as this requires the incoming vessel to wait until the outgoing vessel has got clear. It would have been bad seamanship on the part of the *Kaiser Wilhelm der Grosse* to port and attempt to go out port to port, for she would have then crossed the course of the *Orinoco* twice. The *Orinoco* starboarded when approaching the entrance, and, if she had not at the last moment ported, she would have passed clear under the stern of the *Kaiser Wilhelm der Grosse*. The *Orinoco* should have followed art. 21 and kept her course, for those on board saw the green light on the plaintiffs' ship, and must have realised she was crossing ahead; to port was therefore the worst thing that could be done,

Aspinall, K.C. in reply.—It does not follow that because a green light is seen on the port hand the crossing rule applies; that depends to some extent on the locality. Before the rule applies, there must be opportunity to comply with it, and time to appreciate the situation:

The Theodore H. Rand, 56 L. T. Rep. 343; 6 Asp. Mar. Law Cas. 122; 12 App. Cas. 247.

Even if this is not a narrow channel, the observations in *The Knaresboro* (*ubi sup.*) apply, for the adjacent water is to be considered part of the narrow channel for the purposes of the rule, just as some of the open water outside the pierheads at the mouth of the Tyne is within the ambit of rule 20 of the By-laws for Preventing Collisions in the Tyne:

The John O'Scott, 76 L. T. Rep. 222; 8 Asp. Mar. Law Cas. 235; (1897) P. 64.

THE PRESIDENT.—This is a case of collision which took place on the 21st Nov. 1906 near the entrance to Cherbourg, between the steamship *Orinoco* and the steamship *Kaiser Wilhelm der Grosse*. The *Orinoco*, with her bowsprit, figure-head, and stem, came into contact with the starboard bow of the *Kaiser Wilhelm der Grosse*, and considerable damage was done to both vessels. I think, though we have heard no evidence about it, there was some loss of life. The *Orinoco* is a screw steamer of 4571 tons gross, belonging to

the Royal Mail Steam Packet Company, and was bound from Southampton to the West Indies, *viâ* Cherbourg and Vigo, with passengers, general cargo, and a crew of 131 hands all told She was approaching, in the course of that voyage, the entrance called the west entrance to the harbour at Cherbourg. The *Kaiser Wilhelm der Grosse* is a twin-screw steamship, belonging to the port of Bremen, 649ft. long, and 14,349 tons gross register. She was proceeding from Bremerhaven, *viâ* Southampton and Cherbourg, to New York, with passengers, mails, general cargo, and a crew of 500 hands all told. She had put into Cherbourg in the course of that voyage, and was proceeding out again. She had passed the *Orinoco* in the course of the afternoon as she went towards Cherbourg, and the *Orinoco* was coming into Cherbourg with the same sort of object—namely, to get passengers and go out again. Now, the case presented on the part of the *Orinoco* is that she had been approaching the port originally on a course of south by west; that she had a French pilot on board, who had been taken on at Southampton to pilot her into Cherbourg; that at seven o'clock the course was altered to south magnetic; that that course was kept until nearly the time when the collision took place; and that at 7.25 p.m. her engines were put at, half speed, to reduce her way in going in between the two breakwaters. On her port hand as she went in would be the Fort de l'Ouest breakwater, and on her starboard hand Fort Chavagnac breakwater. Now, the case near the time of the collision is to this effect: that as the *Orinoco* was approaching the entrance the masthead lights of the *Kaiser Wilhelm der Grosse* were particularly noticed over the breakwater. That would be because the *Kaiser Wilhelm der Grosse* had been at anchor a little to the eastward of the western line of anchorage inside the harbour of Cherbourg, and the *Kaiser Wilhelm der Grosse* would have to come out in a westerly and northerly direction to get to the entrance. At 7 25 p.m. the engines of the *Orinoco*, it is said, were put at half speed, a short blast was sounded on her whistle, and her helm was ported to keep well over to the starboard side of the passage. I understand, however, from the evidence, that at first she was heading so as to pass more or less towards the middle of the passage, and that was because the breakwater on the starboard hand has no light on it, and as she got near to it and could make out the end of the breakwater it would be possible to see where it was, and therefore she could, and did, keep a little more to the westward, so as to give an open passage, as far as possible, on the port hand. Then the case of the plaintiffs proceeds to aver that the *Kaiser Wilhelm der Grosse* sounded one short blast and the *Orinoco* sounded a second short blast; that at 7.28 p.m. the *Kaiser Wilhelm der Grosse*, whose green light came into view when she opened out the Fort de l'Ouest breakwater, instead of porting and keeping over to her starboard side of the passage, and, of course, passing the *Orinoco* port side to port side, sounded two short blasts on the whistle; that the engines of the *Orinoco* were thereupon put full speed astern, and three short blasts were sounded on the whistle, and the helm was ordered to be steadied; but the *Kaiser Wilhelm der Grosse* came on, attempting with her great speed to cross ahead of the *Orinoco*, and the collision happened.

The case on the other side is that the *Kaiser Wilhelm der Grosse*, which had left the anchorage to which I have referred, was steering to the western entrance, keeping the light of the Fort de l'Ouest on her starboard bow, and making about eight to ten knots through the water; that the two masthead lights of the *Orinoco* were seen about six points on the starboard bow over the breakwater, about three miles away; that when the *Kaiser Wilhelm der Grosse* gathered way her engines were put to half speed as she approached the entrance, and then, she having been up to that time on a W.N.W. course, her helm was ported to enable her to pass safely out of the entrance, and steadied on a course of N.W. ½ N.; that directly afterwards her engines were set full speed ahead and her whistle sounded two short blasts, and, as no reply was received from the *Orinoco*, this signal was repeated; that immediately afterwards the masthead lights of the *Orinoco* were observed to be opening, indicating that she was porting, and at the same time her whistle was heard to be sounded a short blast; and that thereupon the engines of the *Kaiser Wilhelm der Grosse* were put full speed astern and her whistle was sounded three short blasts, but still the collision happened.

That is the outline of the story told on the two sides. Broadly speaking, it comes to this: that the plaintiffs say the defendants' vessel ought to have ported or waited and passed them port to port, either by slowing, if necessary, or porting enough to do so, and that she did not do so, but tried to cross ahead of the *Orinoco*; whereas the defendants' case is that they had the *Orinoco* broad on the starboard hand all the time, and they were in a position to go right across her bows without any difficulty at all if she had not ported. That is the broad issue between the parties. There is a small matter to dispose of first. There is no charge in the pleadings of the defendants that the lights of the plaintiffs' ship were in any way not in accordance with the regulations, but in the course of the evidence for the defendants it was suggested that there was some obstruction of the port light of the *Orinoco* which prevented its being properly seen by another vessel when nearly ahead, and that that may have accounted for the defendants' witnesses not noticing the light, as they say they did not, though the real reason they gave was that they were paying more attention to the masthead lights than to the side lights. The master of the *Orinoco*, however, said there was no obstruction, and I do not see any reason, after hearing his evidence, for differing from him. I do not think there is anything in that point at all. The next point I wish to refer to is that the place of the collision is agreed, and appears to have been at five cables, half a mile W.N.W. of Fort de l'Ouest. Therefore, if one glances at the chart, one sees it is well over to the west side of the entrance, somewhere about N.N.E. of the end of Fort Chavagnac, and very much nearer to it than to Fort de l'Ouest.

The first thing to consider in this case is what rule of navigation is to be observed by these two vessels going in and out of this place. The plaintiffs contend that the proper and seamanlike navigation of the locality is for each vessel to keep on her starboard hand and pass the other vessel port to port. Also they

contend that art. 25, the narrow-channel rule, applies. The evidence, so far as there is any evidence of practice in this matter, is given by the pilot of the *Orinoco*, a man named Alphonse Esnol, who is licensed for Cherbourg. He says the usual course in coming out of Cherbourg is to keep to the right; that there is no special rule, but vessels always keep to the right, and those which enter do the same thing—that is, keep to their right. There is no other evidence differing from that statement of practice, but it seems to me that I ought to consider this case, it may be, partly by the practice and partly also by the view which the Elder Brethren take of what would be good seamanship in such a case as this. Their view is most distinctly that the proper rule of seamanship to follow is in accordance with the rule or practices which I have referred to, entirely independently of whether art. 25 applies in strictness. So I do not know that it is necessary in this case to express a definite view about the application of art. 25, but I must say that my own inclination is to think, in accordance with what I said in *The Knaresboro* (*Shipping Gazette*, Nov. 10, 1900), that the rule ought to be taken as applicable to the passage between these two piers and so much of the water adjoining as was necessary for the negotiation of the channel at that spot. So it seems to me at the outset that the broad contention made by the plaintiffs is right, and that vessels ought to pass, and expect to pass, port to port.

Another rule which has been touched upon is the crossing rule, but I think, having regard to the locality and the difficulties there are in applying that rule, the probability is that it is not applicable, and that the court has to consider the case in the light of good seamanship, guided by the principle of art. 25, and possibly by the application of that article. The question, therefore, is whether there was in this case any difficulty in either vessel following this course, and the court is of opinion that there was no difficulty whatever. Of course, if the *Kaiser Wilhelm der Grosse* were to come at seventeen or eighteen knots on a W.N.W. course up to the end of the breakwater, and then try to get round by porting, she would find natural difficulty in following out that practice or rule; but there is no difficulty whatever, so long as you know there is a vessel porting or entering, in either waiting a little while or else slowing down so as to be able to come round under a port helm, and thus comply with what I think ought to have been done. Those observations really dispose of the case, but there are one or two matters which are to be noticed in regard to the evidence. I say that view, if right, disposes of the case, because, on the ordinary outline of the two stories, the *Kaiser Wilhelm der Grosse* did not follow that rule or that practice at all, and the other vessel did, subject to one or two minor points. There are, however, one or two other matters which I think I ought to refer to, and they are with regard to the position in which these two vessels were approaching each other. Now, the witnesses from the *Kaiser Wilhelm der Grosse* really seek to make out that from the first the *Orinoco* was in such a position as to have them nearly ahead of her. That appears from the statement that, when the *Kaiser Wilhelm der Grosse* left her anchorage on a W.N.W. course, she had the other vessel six points on her starboard bow; so also from the statement that, when she got clear of the breakwater and was on a N.W. course, the *Orinoco* was still on her starboard bow. I think, when the chart is looked at and the direction in which the vessels were going is considered, that cannot be correct, because the *Kaiser Wilhelm der Grosse* was steering from the anchorage within the western line of the anchorage, and the *Orinoco* was heading, and there is no reason for doubting it, for about the middle of the entrance between the piers. I therefore feel difficulty in seeing how it is then possible for the *Orinoco* to have had the *Kaiser Wilhelm der Grosse* ahead of her. Then, again, if the defendants' speed is taken as stated by their witnesses, and the speed of the plaintiffs' ship is taken, and the broad outline of their action is taken together, it is difficult to see how the contention of the defendants can be maintained. All this leads to the conclusion that the plaintiffs' ship did not, even on the defendants' own version of the facts, have the defendants' ship ahead of her, but that she really had the *Kaiser Wilhelm der Grosse* more or less on her port bow, as the master of the *Orinoco* says was the case. Then, and this is an important matter to notice, even if the bearings, distances, and speeds given by the defendants are treated as approximately correct, it almost certainly seems to follow, from the fact that after allowing for the porting of two points by the *Kaiser Wilhelm der Grosse*, the bearing of the other vessel did not, according to the defendants' evidence, change, that the vessels would meet at a certain point, and there was undoubtedly danger of collision from the very outset. The result of these features of the case is that I accept the view of the position of the vessels presented by the master of the plaintiffs' ship. I think that the distances and bearings have been inaccurately estimated and considered by the defendants' witnesses, and, if there is any real, substantial accuracy in what they say, it is almost impossible to make the collision occur, because the defendants' vessel would then have been in a position to go right across and clear away from the *Orinoco*, and it would be impossible for the *Orinoco* to catch her. The real truth of this collision is that the *Kaiser Wilhelm der Grosse* was going at a high speed, expecting, but erroneously expecting, to pass ahead of the *Orinoco*, and failed to do so.

That she had considerable speed on at the time of the collision is, I think, perfectly clear from the damage done to her, and the length which that damage extended on her bows, and also from the entry in the engineer's log. On this point, while referring to the damage, the view which I take after consulting the Elder Brethren is that the damage was done by a blow at an angle of about six points, and that therefore only involves an amount of porting on the part of the *Orinoco* of about two points, part of which may be accounted for by the reversed action of her engines. The only matters left to consider are points made against the plaintiffs by counsel for the defendants. First he says the *Orinoco* improperly ported her helm, and secondly he says she did not stop and reverse her engines as soon as she ought to have done. With regard to the porting there were certain

comments made in connection with the whistles which these vessels exchanged. I think there is possibly some confusion about them, but one thing I am satisfied about, and that is that the whistling described in the evidence took place in a very short period of time, and the conclusion to which I have come on the facts is that probably the plaintiffs whistled first. At the same time I do not think it is established that the defendants ever gave a single short blast, such as is alleged in the statement of claim as having been given by the *Kaiser Wilhelm der Grosse* between the two short single-blast signals given by the *Orinoco*. The only other matter connected with this is that the pilot said he gave an order to port, and the master said that, knowing the vessel better, he gave an order to hard-a-port, because he was not going very fast and thought it would be necessary to get the amount of porting required. The result is, having regard to what I have already said about the practice and the rule of navigation, it was in the circumstances quite justifiable for the plaintiffs' vessel to port her helm at that time; and I have already pointed out that the amount of alteration produced does not seem to exceed two points. I think in the circumstances of the case, and the Elder Brethren agree with me, that the plaintiffs' vessel was justified in porting as she did in the reasonable and proper expectation that the *Kaiser Wilhelm der Grosse* would follow the practice and come out port side to port side. That only leaves the question of the stopping and reversing. There, again, we have to deal with what those on the *Orinoco* could reasonably expect the other ship to do, and it is obvious they acted in accordance with their expectation by sounding a port-helm signal. It was not until it was made reasonably clear to them that the *Kaiser Wilhelm der Grosse* was determined to cross the bows of the *Orinoco* that it was necessary for them to think she would do otherwise than come out port to port; and, as soon as they had an opportunity of realising she was not going to do so, I think their engines were reversed and put full speed astern. I think that disposes of the only two points made against the plaintiffs, and I only wish to refer to two more matters. The defendants' master said that if he had ported he would have created greater difficulty, because he would have had to cross the track of the other vessel twice—that is to say, gone right away over to the starboard bow and then come back again. I am afraid that is not the view the court takes. That is only consistent with keeping up his speed. If he had come round slowly he would never have crossed the course of the plaintiffs' vessel. The other point is this; I am not expressing an opinion whether the crossing rule does apply to this case at all, but, if it were held to apply, it would clearly make the defendants in the wrong; but I am not, however, at all satisfied at present that, having regard to the locality and the practice of the port and art. 25, it would necessarily follow even then that the plaintiffs could be held to blame for porting and reducing their speed in the circumstances. There is one other remark which the Elder Brethren wish me to make in this case, which is of some public interest. It is that this collision demonstrates, very forcibly, the great advantage in what I believe are correctly termed schooner bows, because this steamer the *Orinoco*, struck the *Kaiser Wilhelm der Grosse* first with her bowsprit, then with her figure-head, and then with the overhang of the upper part of her stem, and yet the German vessel did not get a cut right down to the water's edge, which is the case where vessels have straight stems. It is a matter which strikes the Elder Brethren, because, but for the *Orinoco's* schooner bows, this collision might possibly have been of a much more disastrous character. In my opinion the plaintiffs have not been shown to have committed any error or fault in this case, and the defendants must be held alone to blame.

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

Solicitors for the defendants, *Clarkson, Greenwell, and Co.*

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Jan. 29, 30, *and Feb.* 27, 1907.

(Present: The Right Hons. Lords MACNAGHTEN and DAVEY (*a*), Sir J. GORELL BARNES, and Sir ARTHUR WILSON, with Nautical Assessors.)

OWNERS OF THE ALBANO *v.* ALLAN LINE STEAMSHIP COMPANY. (*b*)

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Collision—Crossing ships—Special circumstances—Canadian Regulations for Preventing Collisions at Sea, arts. 19 *and* 27.

The facts that two steamers upon crossing courses are approaching a well-known pilot station in order to take on board a pilot, and that the one which has the other on her starboard hand has almost brought herself to a standstill, are not such "special circumstances" within art. 27 *as to take the case out of art.* 19 *of the regulations.*

Where a ship is bound under the regulations to keep her course and speed with regard to another vessel which has to keep out of the way some latitude must be allowed to the master in determining when he ought to take action to avoid an imminent collision.

Judgment of the court below reversed.

APPEAL brought from a judgment of the Supreme Court of Canada, dated the 5th March 1906, in favour of the respondents affirming the judgment of the Exchequer Court of Canada, dated the 3rd Oct. 1905, by which it was found that the steamship *Albano*, belonging to the appellants, was alone to blame for a collision with the steamship *Parisian* belonging to the respondents, which occurred off Halifax, Nova Scotia, on the 25th March 1905.

The action was brought on the 25th March 1905 by the respondents against the steamship *Albano*, and on the same day a cross action was instituted by the appellants against the steamship *Parisian* in respect of the same collision.

(*a*) Lord Davey was present during the argument, but died before their Lordships gave judgment.

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

The actions were tried on the 13th April before McDonald, J., sitting as local judge in Admiralty, and assisted by Commander Tinling as assessor.

The case made on behalf of the owners of the *Parisian* was as follows:—The *Parisian* was a screw steamship of 3385 tons net register, and 440ft. in length, belonging to the Allan Line Steamship Company Limited, and, whilst bound from Liverpool with passengers and general cargo, was proceeding towards Halifax Harbour on the afternoon of the 25th March 1905 to pick up a pilot and proceed under his charge into Halifax. The weather was fine and clear, the sea calm, the wind southerly and very light, and there was no perceptible tide. Shortly before 4.40 p.m. the *Parisian* was steering N.W. ¾ N. magnetic, and, with engines working at full speed, was making about fourteen knots. She was coming in along the western shore in the ordinary and usual way to the pilot station and was flying flags for a pilot. A gook look-out was being kept on board of her. At about 4.40 p.m. those on board of her saw the pilot cutter at the pilot station, just outside the entrance to the harbour. The engines were accordingly rung "stand by" at 4.52, at 4.57 they were reduced to half speed, and 4.58 they were slowed, and at 4.59 they were stopped and remained stopped until 5.6, and the helm was ported a little to bring the *Parisian's* head more on to the pilot cutter. After the engines were stopped the *Parisian* quickly lost headway and a row boat accordingly left the cutter with a pilot on board for the *Parisian* and was rowed to her. The *Parisian* was then lying practically stopped in the water with her head about N. by W. magnetic. When the row boat came along the starboard side of the *Parisian* a rope was thrown to her, and the pilot, at about 5.6, was just about to step on to the ladder, which had been put over side for him, to come on board.

Whilst the *Parisian* was thus engaged the steamship *Albano*, after mistaking her course for Halifax Harbour and running too far to the eastward on a north by easterly course, had turned round and was approaching the harbour on a westerly and southerly course. Those on board the *Parisian* first saw the smoke from the funnel of *Albano* close to the N.E. land, and at 4.45 made out her hull about five and three-quarter miles distant and more to the westward. The *Albano* afterwards approached on the starboard side of the *Parisian* with the *Parisian* and the pilot cutter and the row boat in full view. At about 5 6 p.m., after sounding three short blasts on her whistle, she came on at a high rate of speed, heading for the starboard side of the *Parisian* about amidships, and making a collision unavoidable. The *Parisian*, to avoid being struck in the engine-room, promptly put her engines full speed ahead, and about half a minute later was struck by the stem of the *Albano* a very heavy blow on the starboard side aft. The vessels met at about a right angle, and the *Parisian* was cut into so deeply that to avoid sinking in deep water she had to be run into Halifax Harbour, where she immediately sank.

The case made on behalf of the owners of the *Albano* was that the *Albano*, a screw steamship of 2423 tons net register, whilst on a voyage from Hamburg to Halifax, was, about twenty minutes before the collision, standing across from the eastward on a course of W.S.W. ¾ W. magnetic towards the pilot station at the entrance to Halifax Harbour, and with engines working at full speed was making about nine knots. The weather was fine and clear, the wind a moderate southerly breeze, and the tide was flood setting towards the harbour at less than half a knot per hour.

In these circumstances those on board the *Albano* saw the *Parisian* coming up from the south seven or eight miles distant, and about six points on the port bow. The course was afterwards altered to W. ¼ S. for the pilot cutter, and as the *Albano* approached it the engines were rung "stand by" and afterwards reduced to half speed and slow. When the *Albano* was distant about five lengths from the *Parisian* immediate danger of collision first appeared to those on board the *Albano*, and she at once stopped and reversed her engines full speed, and at the same instant sounded three short blasts of her whistle. The rudder was kept amidships and she kept her course with diminishing momentum. The engines worked full speed astern for two minutes before and up to the time of collision, and the *Albano* at the time of the collision was almost dead in the water, and the starboard side of the *Parisian* came in contact with the stem of the *Albano*.

The charges made against the *Albano* were (*inter alia*) that (*a*) the *Albano* improperly failed in the circumstances to keep out of the way of the *Parisian*, or to take any proper measures, or in proper time to do so. (*b*) The *Albano* ought to have stopped her way before coming up to the vicinity of the pilot's row boat and waited until after the pilot on board the row boat for the *Parisian* had been taken on board the *Parisian* and the *Parisian* had gone clear. (*c*) As those on board the *Albano* saw, or ought to have seen, that the *Parisian* was lying stopped, or nearly stopped, at the usual pilot ground for the purpose of taking on board her pilot, the action of the *Albano* in proceeding at the speed she did, and not altering her course, and not reversing her engines until too late to avoid the collision, was a neglect of the ordinary precaution of keeping out of the way required under such circumstances by the ordinary practice of seamen and the special circumstances of the case. (*d*) The *Albano* improperly approached the pilot ground at a rate of speed which was in the circumstances excessive. (*e*) The *Albano* improperly failed to put her engines full speed astern in time to avoid the collision. (*f*) The *Albano* failed or delayed to put her engines full speed astern after sounding three short blasts. (*g*) The *Albano* improperly failed to put her helm to starboard or improperly kept it amidships. (*h*) Those in charge of the *Albano* improperly failed to indicate by whistle signals the course they intended to take. (*i*) Those in charge of the *Albano* neglected to observe arts. 24, 27, 28, and 29 of the Rules for the Navigation of Canadian Waters or the corresponding articles of the Regulations for Preventing Collisions at Sea.

The charges made against the *Parisian* were that (*a*) the *Parisian* improperly failed to comply with art. 19 of the Regulations for Preventing Collisions at Sea and to keep out of the way of the *Albano*. (*b*) The *Parisian* took no proper measures to prevent the collision, nor did she take any measures in time to avoid the *Albano*. (*c*) The *Parisian* improperly failed to indi-

cate to the *Albano* by whistle signal what she was going to do. (*d*) The *Parisian* improperly kept her course until the collision. (*e*) The *Parisian* did not take prompt action to avoid a collision when there was immediate danger of collision, or when the collision was imminent. (*f*) The *Parisian* improperly put her engines full speed ahead immediately before the collision. (*g*) The *Parisian* violated arts. 15, sub-sects. (*b*) and (*c*), 19, 21, 22, 23, 27, and 29 of the Regulations for Preventing Collisions at Sea.

On the 3rd Oct. 1905 MacDonald, J. gave judgment in favour of the owners of the *Parisian*, finding the *Albano* alone to blame for the collision.

Commander Tinling, who sat with the learned judge as assessor to assist him on questions of seamanship, made a report in writing to the judge in which he arrived at a different conclusion, which the learned judge after a careful consideration of the reasons on which it was founded said that he was unable on the evidence to adopt.

The view which the assessor took was that both vessels were to blame, the *Parisian* for a breach of art. 19 of the Regulations for Preventing Collisions at Sea, which in his opinion applied to her, and the *Albano* for approaching too close to the *Parisian* before reversing her engines, and for not passing under the *Parisian's* stern by putting her helm hard-a-starboard instead of keeping it amidships.

Art. 19 of the Regulations for Preventing Collisions at Sea provides:

> When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

From this judgment the owners of the *Albano* gave notice of appeal on the 9th Oct. 1905.

The appeal was heard on the 20th, 21st, 22nd, and 23rd Feb. 1906 by the Supreme Court of Canada, composed of Davies, Sedgewick, Girouard, Maclennan, and Idington, JJ., sitting without nautical assessors.

Judgment was delivered on the 5th March 1906 (Idington, J. dissenting), affirming the judgment of the court below that the *Albano* was alone to blame for the collision, and dismissing the appeal with costs.

Pickford, K.C., *Butler Aspinall*, K.C. and *A. Pritchard* appeared for the appellants.

Sir *R. Finlay*, K.C., *F. Laing*, K.C. and *C. Robertson Dunlop* for the respondents.

The following cases were referred to in the course of the arguments:

The Broomfield, 10 Asp. Mar. Law Cas. 194; 94 L. T. Rep. 109;
Cayzer, Irvine, and Co. v. *Carron Company*, 5 Asp. Mar. Law Cas. 204; 52 L. T. Rep. 361; 9 App. Cas. 873;
The Monte Rosa, 7 Asp. Mar. Law Cas. 326; 68 L. T. Rep. 299; (1893) P. 23;
The Sanspareil, 9 Asp. Mar. Law Cas. 78; 82 L. T. Rep. 606; (1900) P. 267;
The Helvetia, 3 Asp. Mar. Cas. N. S. 43n.;
The Ada and the Sappho, 1 Asp. Mar. Law Cas. 475; 2 Asp. Mar. Law Cas. 4; 27 L. T. Rep. 718; affirmed on appeal, 28 L. T. Rep. 825;
The Pekin, 8 Asp. Mar. Law Cas. 367; 77 L. T. Rep. 443; (1897) A. C. 532.

Pickford, K.C. was heard in reply.

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

Feb. 27. — Their Lordships' judgment was delivered by

Sir J. GORELL BARNES.—These appeals arise out of an action brought by the Allan Line Steamship Company Limited (respondents), the owners of the steamship *Parisian*, against the steamship *Albano* and her freight (appellants), and a cross-action brought by the owners of the steamship *Albano*, against the steamship *Parisian* and her freight. The action and cross-action were brought in respect of a collision which took place between the *Parisian* and the *Albano* off the entrance to Halifax Harbour, Nova Scotia, about five o'clock in the afternoon of the 25th March 1905, in which both vessels were seriously damaged. The action and cross-action were tried together on the 13th, 14th, 17th, and 24th April 1905, before the Hon. James MacDonald, ex-Chief Justice of Nova Scotia sitting as local judge in Admiralty, Exchequer Court of Canada, Nova Scotia Admiralty District, assisted by Commander Tinling, R.N., as assessor, and judgment was reserved and delivered on the 3rd Oct. 1905. The learned judge held that the *Albano* was alone to blame for the collision, and by decrees dated the 3rd Oct. he pronounced in favour of the claim of the Allan Line Steamship Company Limited, and condemned the ship *Albano* and her freight and the bail for the ship *Albano* and her freight in the amount to be found due and in costs, and ordered that an account should be taken, and referred the same to the registrar (assisted by merchants) to report the amount due, and he dismissed the cross-action with costs, and condemned the plaintiff in that action in costs. The appellant appealed to the Supreme Court of Canada, and the appeals were heard on the 20th, 21st, 22nd, and 23rd Feb. 1906, by the Supreme Court of Canada, composed of Sedgewick, Girouard, Davies, Idington, and Maclennan, JJ., sitting without nautical assessors, and judgment was delivered on the 5th March 1906, Idington, J. dissenting, affirming the judgments of the court below. Both appeals were dismissed with costs. The facts which gave rise to the action are not substantially in dispute so far as regards the main features of the case, and may be stated briefly as follows: [His Lordship went through the facts as set out above, and continued as follows:] From this statement of the facts it appears that the two vessels were approaching each other on courses which converged at the point where the collision took place, that they were always in motion up to that point, that the collision took place at about right angles, and that the point at which the collision took place was about the spot at which each of these vessels expected to pick up her pilot. Had the *Parisian* picked up her pilot without accident she would have proceeded on the course on which she was up the harbour, whereas if the *Albano* had picked up her pilot, it would have been necessary for her, after passing the spot where the collision took place, to have rounded up under her port helm and gone up the harbour, but she would not in the course of her navigation have altered her course until she had picked up her pilot at or about the spot where the collision took place. The main ques-

tion, then, to be considered in the case is whether the regulations in force in the waters where the collision took place ought to have been followed by these two vessels respectively in order to avoid danger of colliding. Now the collision took place in Canadian waters, and the "Act respecting the Navigation of Canadian Waters," passed in 1886 (Revised Statutes, c. 79), contained regulations for preventing collisions in Canadian waters. Sect. 5 provided that:

If, in any case of collision, it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any of the rules prescribed by this Act, the vessel or raft by which such rules have been violated shall be deemed to be in fault; unless it can be shown to the satisfaction of the court that the circumstances of the case rendered a departure from the said rules necessary.

Sect. 9 provided that:

Whenever foreign ships are within Canadian waters the rules for preventing collisions prescribed by this Act, and all provisions of this Act relating to such rules, or otherwise relating to collisions, shall apply to such foreign ships; and in any case arising in any court of justice in Canada concerning matters happening within Canadian waters foreign ships shall, so far as regards such rules and provisions, be treated as if they were British or Canadian ships.

By sect. 14 of the Act provision was made that in case of the alteration of the Imperial regulations the Governor in Council might from time to time make corresponding changes as respects Canadian waters in the regulations contained in the Act or any that might be substituted for them, and by an Order in Council of the 9th Feb. 1897, under the provisions of the said 14th section, rules and regulations which are in conformity with the regulations approved by Order of Her late Majesty in Council on the 27th Nov. 1896 were substituted for the regulations contained in the said Act of 1886. The regulations which it is material to consider in the present case are arts. 19, 21, 22, 23, and 27 of the Canadian Regulations. These articles are as follows:

Art. 19. When two steam vessels are crossing so as to involve risk of collision the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way the other shall keep her course and speed.

Note.—When in consequence of thick weather or other causes such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

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 or reverse.

Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

The appellants contended that the *Parisian* and *Albano* were vessels which were crossing so as to involve risk of collision and that it was the duty of the *Parisian*, having the *Albano* on her own starboard side, to keep out of her way. The contention on the part of the respondents was that the vessels were not vessels crossing so as to involve risk of collision, that the articles were not applicable to the case, that the *Parisian* had become practically a stationary vessel at the time when the *Albano* was approaching close to her, and that the *Albano* ought to have acted for the *Parisian* and to have avoided her by taking the proper action for that purpose. The report of the assessor, Commander Tinling, who assisted at the trial, was to the effect that in his view the *Parisian* had the duty, under art. 19, of keeping out of the way of the *Albano*, and that she had failed to perform that duty through a bad look-out and want of action taken on her part, and thereby caused the collision. He further reported that the action of the captain of the *Albano* through an error or judgment in allowing his vessel to approach so close to the *Parisian* as to involve a collision, was much to be censured. The learned judge who tried the case held that the decision of the case did not turn upon any question of seamanship alone, but that it turned upon the construction of rules as familiar to lawyers as sailors, and he expressed himself as follows: "Entertaining a strong opinion as to the construction of these rules in the light of the evidence on which my judgment must be founded, it is my duty, with the greatest deference to Commander Tinling, to assert that opinion, which I do the more readily as my opinion, if erroneous, can readily be corrected. I am of opinion that on this evidence the *Albano* should alone be held to be in fault and that there should be judgment accordingly." Their Lordships are not able to gather from this judgment the precise views entertained by the learned judge as to applicability of the rules in question. In the Supreme Court of Canada the judgment of Davies, J. concludes as follows: "In the case before us, however, the *Parisian* had clearly first reached the pilotage grounds, had slowed down till she was practically motionless without steerage way, was, it may be said, in the very act of taking aboard the pilot who had come alongside of her from the pilot cutter in a row boat, when the risk of collision first arose, and although so lying that the *Albano* was on her starboard side, was not, in my humble judgment, from these circumstances—all of which must be held to have been present to the eye and mind of the *Albano's* captain—a crossing ship within the rule." Idington, J., the dissenting judge, held that the vessels were crossing vessels involving risk of collision, and that art. 19 applied, that the *Parisian* ought to have taken steps to keep out of the way which should have been taken some time before she was stopped and considered in relation to the purpose of stopping, and a proper place therefore selected. But he expressed a doubt as to whether or not the captain of the *Albano* ought not to have had more regard to art. 27, and if blameable for not doing so, his vessel might have to share the loss, but he stated that in his judgment the *Parisian's* officers had not regarded either rule until too late, and were guilty of negligence that caused the accident.

The broad question, therefore, to consider on these appeals is whether or not the vessels were, as they approached towards the spot where the collision took place, vessels crossing so as to

involve risk of collision. If they were, the *Parisian* must be held to blame under arts. 19, 22, and 23, and the only question would then be whether the *Albano* ought also to be held to blame for not having acted sooner than she did very shortly before the collision. The case of *The Ada and the Sappho*, which was heard before Sir Robert Phillimore in 1872, and on appeal by the Privy Council in 1873 (27 L. T. Rep. 718; 1 Asp. Mar. Law Cas. 475; 28 L. T. Rep. 825; 2 Asp. Mar. Law Cas. N. S. 4), raised a question somewhat similar to that involved in the present case. In that case the two vessels were bound for Hull, the *Ada* coming from the south-east and the *Sappho* from the north-east, and both vessels were approaching the pilot cutter lying at anchor to take up their pilots, the place of the collision being at the mouth of the Humber. Sir Robert Phillimore held that the vessels were to be treated as crossing vessels under art. 14 of the Regulations for Preventing Collisions at Sea which then existed, and corresponded with art. 19 of the present regulations, and that the fact of approaching a well-known pilot station was not such a special circumstance as to take the case out of the operation of the rules, and that the *Ada* having the *Sappho* on her starboard side was bound to keep out of the way. This judgment was affirmed on appeal, and Sir J. W. Colvile in delivering the judgment of the board said: "Their Lordships think it desirable to consider whether the vessels were crossing vessels within the meaning of the 14th article, and consequent thereon, if the assumption which seems to have been the *ratio decidendi* in the court below was correct. Their Lordships are of opinion that it was correct. It appears that both vessels, the one coming from the northward, the other from the southward, and both bound to Kingston-upon-Hull, were under the necessity of proceeding to the same point where the pilot vessel was moored. It appears to their Lordships on the evidence that when first sighted the *Ada* had the other vessel on her starboard bow, and therefore, if they were crossing vessels, it was her duty to keep out of the way of the *Sappho*. Now, their Lordships think that they were crossing vessels within the meaning of the rule, because both were of necessity directing their courses to one point. That point would be the point of intersection of the two courses if prolonged." His Lordship proceeded to say that the learned judge was right, and held that the *Ada* had failed in the duty imposed upon her by the rule, and that there were no special circumstances taking her out of the operation of the rule. There were other questions in the case as to whether the *Sappho* was to blame for not complying with the then existing art. 16, which are not material upon the simple question as to whether the crossing rule applied in the present case. It is true that in that case the *Sappho* seems to have been the vessel nearer to the pilot boat than the *Ada*, and that the senior pilot had ordered that the *Sappho* should be the first vessel to which the pilot should be sent, whereas in the present case the pilot boat was proceeding first from the pilot cutter to the *Parisian*, and the *Parisian* was first upon the spot where the collision took place, though it can only be said that the *Parisian* had reached that spot almost at the same time, though slightly before, the *Albano*. But this difference between the two cases does not seem to their Lordships to be material upon the mere question of construction of the articles applicable to this class of case. The late Lord St. Helier, in delivering the judgment of this board in the case of *The Pekin* (8 Asp. Mar. Law Cas. 367; 77 L. T. Rep. 443; (1897) A. C. 532), though dealing with a collision in a river, used language which may be regarded as not inappropriate to this case. He is reported thus: "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 the moment." It does not appear to their Lordships possible to regard the situation in the present case from the point of view for which the respondents contend, viz., that, being on the spot first and with little motion left, they are entitled to treat their vessel as a vessel to which the rules are inapplicable, and for which the other vessel should give way. The consideration of the situation must be carried further back to the time when these vessels were approaching the spot where the collision took place, and would, if they continued doing what each of them respectively was doing, arrive at that spot so as to involve risk of collision. It is the omission by the majority of the judges of the court below so to consider the matter that gives rise to the principal divergence between their opinion and that entertained by their Lordships in this case, for in the passage above quoted from the judgment of Davies, J. it is to be observed that he speaks of the risk of collision as first arising when the pilot boat was close to the *Parisian*, whereas, when what each vessel was doing for some time before this is taken into consideration, it seems reasonably certain that they were approaching each other on crossing courses so as to involve the very risk which resulted in an actual collision. They were, in fact, converging on a spot on courses and at speeds which would probably bring them to that spot so as to present a danger of collision when they reached it, which each of them would do in the course of her navigation, and their Lordships are of opinion that in these circumstances the vessels were vessels crossing so as to involve risk of collision, and that arts. 19, 22, and 23 were applicable. It follows, therefore, that it was the duty of the *Parisian* to have kept out of the way of the *Albano*. The reason for her not doing so is clearly, as already pointed out, that those engaged in her navigation, who ought to have attended to the look-out, appear to have been paying no attention to the *Albano*, probably because their attention was riveted on the pilot cutter and pilot boat. It was urged, however, by the respondents' counsel that, even if the *Albano* had been properly observed, the *Parisian* would not have been navigated differently, and they prayed in aid the provisions of art. 27; but if the duty were *primâ facie* on the *Parisian* to keep out of the way, this article could only be of assist-

ance to the *Parisian* if it could be shown by the respondents that there were special circumstances which rendered a departure from art. 19 necessary in order to avoid immediate danger. No such circumstances could be shown in this case, for if the *Albano* had been properly noticed there would have been no reason for the *Parisian* to continue on her course and place herself across the course of the *Albano* at the critical time, and no difficulty in completely taking off the way of the *Parisian* by the reversing of her engines some time before she was allowed to approach the line of the course of the *Albano*. Again, it might be said that, if on their courses and speeds the two vessels would not have arrived at or near the place of collision at or about the same time, and if the *Parisian* had arrived at and was lying motionless at the place of collision some considerable time before the approach of the *Albano*, the circumstances might be such as to make the rule inapplicable, for then it might perhaps be said that the vessels could not be regarded as moving to a spot at the same time, and never could reasonably be regarded as crossing so as to involve risk of collision. But such a case which the respondents attempted, but failed, to make out, so that it is not necessary to express an opinion upon it, is far removed from the actual facts of the present case where the two vessels, doing what each of them did, were approaching so as to cross each other, or at any rate would probably be in motion and cross each other at or about the same time and place.

The question, however, remains for consideration whether, the *Parisian* being to blame, the *Albano* was not to blame also. She was bound to comply with art. 21, and to keep her course and speed until she found herself so close to the *Parisian* that the collision could not be avoided by the action of the latter vessel alone, and upon this view the master of the *Albano* acted, for he said in his evidence, "I had to keep my course and he had to keep out of the way. I did not think that he would do it to oblige me, but I expected him to go according to the rules of the road. That is what I expected," and further on he said that he thought that the *Parisian* had taken off steam to slow down for a pilot and also to let him pass. It must always be a matter of some difficulty for the master of a vessel which has to keep her course and speed with regard to another vessel which has to keep out of her way, to determine when the time has arrived for him to take action, for if he act too soon he may disconcert any action which the other vessel may be about to take to avoid his vessel, and might be blamed for so doing, and yet the time may come at which he must take action. Therefore he must keep his course and speed up to some point, and then act, but the precise point must necessarily be difficult to determine, and some little latitude has to be allowed to the master in determining this. [His Lordship said that under the circumstances of the case it did not appear that the master of the *Albano* was to blame for not slowing and reversing his engines sooner, and continued:] In conclusion, it is to be observed that the regulations are the outcome of long experience and of conferences held by representatives of the maritime nations, and, if firmly acted on and applied, are more likely to obviate the doubts and difficulties by which those navigating vessels may be assailed—for instance, in cases similar to the present case, which may not infrequently arise where vessels are making for the entrance of a port at the same time—than if the actions of those in charge are to be guided by rough estimates of courses and speeds to determine which vessel is slightly ahead of the other, and considered afterwards by the light of conflicting evidence as to whether these estimates were right or wrong. Their Lordships will therefore humbly advise His Majesty to set aside both these judgments or decrees of the Supreme Court and of the local judge in Admiralty, there being cross-suits in the case, to declare in both suits that the *Parisian* was alone to blame for the collision, to dismiss the action against the *Albano* and her freight, with costs, in the court below, to pronounce in favour of the plaintiffs' claim in the cross action against the *Parisian* and her freight, and to condemn the *Parisian* and her freight, and the bail therefor, in the amount to be found due in the usual way by reference and in the plaintiffs' (appellants') costs in the courts below. The respondents must pay the costs of the appeals.

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

Supreme Court of Judicature

COURT OF APPEAL.

Tuesday, Nov. 27, 1906.

(Before COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.)

BEDE STEAMSHIP COMPANY *v.* RIVER WEAR COMMISSIONERS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Harbour—Liability of harbour commissioners—Advertisement as to depth of water—Accommodation for ships—Ingress and egress—Warranty of accessibility.

A body of harbour commissioners, who had statutory rights and duties in connection with a harbour, put an advertisement of the harbour in a shipping publication, and therein stated the depth of water on the sill of a dock in the harbour at high water of ordinary spring and neap tides.

The owners of a ship, relying on this advertisement, sent their ship into the dock, but when loaded the ship was unable for some days to get out of the harbour because of the danger in rough weather arising from the accumulation of silt at the entrance to the harbour.

In an action by the shipowners against the harbour commissioners for damages for detention of the ship, it was proved that the commissioners had not used reasonable care to dredge away the accumulation of silt so as to allow egress to ships which had entered the harbour and docks on their invitation:

Held, therefore, that the commissioners were liable in damages.

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

Quære *as to the nature of the warranty of accessibility to and from the dock which may be implied from such an advertisement.*

Williams *v.* Swansea Harbour Trustees (14 *C. B. N. S.* 845) *discussed.*

APPEAL by the defendants from the judgment of Jelf, J. at the trial of the action.

The plaintiffs were the owners of the steamship *City*, and the defendants were, by virtue of divers statutes, the harbour authority and in occupation and control of the port and harbour of Sunderland, including the Hudson Docks and the approaches thereto.

The action was brought to recover damages for four days' detention of the ship in the harbour.

By the statement of claim it was alleged that the defendants were entitled to receive port and dock dues in respect of vessels navigating and using the port and docks, and it became and was their duty to cleanse and maintain the same, and do all things necessary for the purpose of carrying on and maintaining the free navigation of the port and docks, and for the purpose of rendering the port and docks and the approaches thereto safe and commodious.

In or about the month of March 1904 the plaintiffs' steamship *City* was, for reward paid to the defendants, admitted into the Hudson Docks, and was there loaded, until the said steamship was on the 24th March 1904, at or about 4 a.m., ready to leave the said docks, loaded to a draught of 21ft. 11in. forward and 21ft. 10in. aft.

The defendants did not perform the duties above set out, and did not take due or reasonable care about the performance of the same, but suffered the approaches to the said docks, particularly at the pier entrance, to become so silted, or so obstructed by sand or other material, that the said steamship was unable to proceed out of dock or to pass out of the said pier entrance when loaded as aforesaid, and was detained until the 28th March 1904.

Further, the defendants knew, or ought to have known, that the entrance and the approaches to the docks were in the said condition, and that they were not in a fit or proper state to allow vessels of the draught of the *City* to pass out, but the defendants did not take due care or reasonable care to remedy the said condition or to put the entrance or approaches into a fit or proper state to allow vessels to pass out as aforesaid.

Further, or in the alternative in the circumstances hereinbefore set out, there was a warranty on the part of the defendants that the entrance and the approaches to the docks were in a fit and and proper state to allow the *City* to pass out, and that there was at all material times a sufficient depth of water at the entrance, and at the approaches to the docks, for the purpose.

The condition of the entrance and of the approaches to the docks and the insufficient depth of water referred to above, as existing between the 24th and 28th March, constituted a breach of the defendants' warranty.

At the trial it appeared that the defendants had had an advertisement put in the Shipping World Year Book 1904, which gave particulars as to the convenience of the harbour, and in which it was stated that the depth of water on the sill of the Hudson Dock South was at high water of ordinary spring tides 25ft. 6in., and at high water of ordinary neap tides 22ft., and that the plaintiff sent the *City* into the Hudson Docks relying upon what they had read in this advertisement.

On the 24th March 1904, when the *City* was ready to go to sea, there was at high water a depth of only 21ft. 6in. on the bar which was formed by the accumulation of silt between the two pier heads which formed the mouth of the harbour. Even if the depth of water on this bar had been nominally the same as on the sill of the dock, yet, owing to the state of the weather at the time and the variation of depth between the waves, the ship could not have got out to sea.

JELF, J.—This is an action brought by a firm of shipowners against the River Wear Commissioners to recover damages for the detention of the steamship *City*, belonging to the plaintiffs, such detention, as they allege, having been caused by the default of the defendants. The question of damages, if any should arise, was agreed at the beginning of the case to be decided by some other tribunal, and the question of liability was left to me to decide without the assistance of a jury. Now, the plaintiffs put their case in two ways. First they say, "You have contracted with us and warranted to us that the bar of the south outlet of the Sunderland Docks was not less than a certain depth; you led us by that means to bring our ship into your dock to load her in your dock, and we found that we could not get her out of the dock without the loss of four days, from the 24th March 1904 to the 28th March 1904, because with the depth which there was on the bar it would have been dangerous to attempt to go out."

Now, the way in which the plaintiffs seek to make out this contract and this breach of warranty is this. They say: "Before we entered into the first charter, which we followed afterwards by other charters, including that which had reference to the ship on the present occasion, we had in our possession a book called the Shipping World Year Book, edited in 1903, and in that year book we saw an advertisement put forward by the River Wear Commissioners, in which we found that in the Hudson Dock South the depth of water on the sill at the gate at high water at ordinary neap tides was 22ft., and, upon the faith of that, we took our ship in and brought about the trouble which has caused damage to us." Now there is no doubt, if the depth of water on the sill of that gate had not been 22ft., there would have been a warranty and a breach of that warranty. If dockowners advertise to the shipping world that they will have a certain depth of water in the dock, and if shipowners act upon the faith of that advertisement and send their ships into dock and then find that they have not got the depth of water which they have been told they would have, it is clear upon authority and upon principle that they are entitled to say that the dockowners have broken their warranty. Now, there has been no breach of warranty in this case by the defendants in the sense of their having given a less depth of water at the sill of the dock than 22ft., because undoubtedly there was that amount of water there. The sill has been unmoved, and when the plaintiffs' vessel entered the dock there was a depth of 22ft. at high water ordinary

neap tides. It is said that the statement that a ship could come into the defendants' dock and get out of it with a depth of 22ft. on the sill gate implied that the ship could also get out of the harbour altogether and into the open sea, and implied a warranty that there was at least such depth of water at the bar as was advertised to be on the sill. Speaking for myself, I should have said that that was an inference which shipowners would be fairly entitled to draw, and therefore there would be an implied warranty which they were entitled to expect to be honoured. But the matter does not rest there. In the case of *Williams* v. *Swansea Harbour Trustees* (14 C. B. N. S. 845), decided in 1863 by a court presided over by Erle, C.J., the exact question was decided in principle. In that case the defendants had put forward a statement that the depth of water on the sill at the dock gates varied from 26ft. and 23ft. at spring tides to 15ft. at the lowest neaps. Erle, C.J. in delivering judgment said: "Where the representation has reference to the depth of water at the entrance of a dock, the depth of water on the sill is of no importance unless the depth of the whole of the channel of approach approximates to that on the sill. I am of opinion that the notice amounts to a representation to all the world that there is available access to the dock gates of the depth mentioned, or at all events approximating thereto." Now, the words "or at all events approximating thereto" were apparently introduced into the judgment because it had been suggested that everybody would consider it to be more important to have an absolute knowledge of what the exact depth of water was when the bottom was a hard substance like the sill of a dock than to know the exact depth of water on the bar where the bottom was sandy; and evidence was called in that case which has not been called in this, to the effect that that would make a difference to any ordinary person's understanding. Therefore, as the court found in that case that there was a very great difference between the depth of water on the sill and the depth of water on the bar, it became unnecessary to say that they would omit the words as to the approximation of the depth of water, and decide that there must be at least as much depth on the bar as on the sill. But I read the words of the judgment as amounting to that, unless there are some special circumstances to lead to the possibility of their meaning less. It is quite unnecessary to decide that, because there was nothing in that case at all approximating to the depth of the sill. What Erle, C.J. says is this: "I retain the opinion which I expressed at the trial—viz., that it amounted to an offer to the public of a certain amount of accommodation in the new dock, and professed to hold out that the depth of water on the dock sill at spring tides was not less than 23ft.; and that I construe to amount to a warranty that ships wishing to use the dock would find an accessible entrance thereto of that depth, and that their contract was broken if that was not so."

I consider that a direct authority for me in support of the view which I certainly should have been inclined to take myself if I had no authority to assist me, that there was a warranty in this case that the depth of the water over the bar was at least 22ft., which is the ordinary neap tide high water advertised as being on the sill, and I should have been inclined to think that it might have been inferred that there was something more over the bar than over the sill, because ordinary people would know that there would not be anything like the amount of swell or wave on the sill that there would be over the bar. If there were only exactly the same depth of water over the bar as on the sill of the dock, you might be thrown out of your calculations if you acted with close nicety upon the figures. If there were the slightest swell which would take the ship up and down, the actual depth of water on the bar at the moment when the ship was crossing it might be less than 22ft., and might be not enough to enable the ship which had got safely over the 22ft. of water on the sill to get out into the open sea. In the present case it is not necessary to decide that the warranty extended so far as that, because it is admitted that during the whole of the four days from the 24th to the 28th March the depth of water over the bar was 6in. less than the depth of water over the sill.

That, I consider, would have been sufficient to have decided this case upon the question of warranty; if that is the warranty, the warranty has been broken. The vessel was prevented by that breach of warranty from going out, and therefore all the consequences follow. I am satisfied that the plaintiffs did act upon the defendants' advertisement to the extent of a warranty, and that the warranty has been broken.

But the case does not rest there, because the plaintiffs put their case also in another way. They say that these docks were made originally by another company, that that company's undertaking was taken over in the year 1859 by the defendants, so that it became part of the defendants' undertaking, and that by the Acts which have been referred to there were made applicable to the defendants' whole undertaking, including the new part which was brought in to it in that way—that is to say, including the part where the Hudson Docks were made and the south outlet—provisions which originally had been applied only to the other parts—*i.e.*, the northern part of the docks—and thus the defendants came under the obligations cast upon the commissioners by sect. 39 of 11 Geo. 4, c. xlix., which provides that "it shall be lawful for the said commissioners and they are hereby required from time to time to deepen, cleanse, and scour the said river Wear within the limits of this Act, and to cleanse, deepen, and enlarge the channel of the said river Wear to the mouth thereof, and to widen, contract, or lessen the mouth or entrance thereof, and to maintain and repair the present piers, and to build such other piers or to alter the present or any other piers to be built, and also to build any quay or jetty and to make such other works within the limits of this Act as shall be necessary for promoting and preserving the navigation of the said river, and for that purpose to remove any rocks, sand, or rubbish, or other matter which shall obstruct the navigation of the said river, port, and haven, or the improvement thereof, and to lay the same behind such piers, quays, or jetty as shall be necessary for effecting the purposes of this Act, or upon any land which may be purchased by the said commissioners under the powers of this Act, and also to remove all trees, stones, gravel, sand, or other obstructions whatsoever which may any way impede the

navigation of the said river, port, and haven within the limits of this Act, or the improvement or use of the said river, port, and haven as aforesaid."

I cannot call the navigation of the river a thing which ceases when you come to the most important part of the river—namely, the door out into the open sea. It seems to me that the navigation of the river essentially implies the mode of getting from the river into the open sea. Therefore I think there is an obligation cast on these gentlemen to do all that they are reasonably capable of doing to carry out the purpose of the Act, and, amongst other things, to keep this channel at its proper depth and size. That duty seems to me to be emphasised by the fact that a channel having exactly the same depth of water as the sill would not, for the reason I have already given, be of much use, except at times when the sea is perfectly smooth; and, moreover, the witnesses for the defendants agree that what they aim at is a difference of 2ft. 6in. in favour of the channel over the bar. That is what they aim at, and not only do they aim at that, but in this publication of 1896, called The Port of Sunderland, which they give to anybody who asks for information as to the port, there is, I think, at this moment a statement to the effect that the channel of the entrance and outlet of the docks has a depth of about 28ft. at high water of ordinary spring tides. That is 24ft. 6in., if I remember rightly, at high water neap tides, and 24ft. 6in. is 2ft. 6in. deeper than the channel which is mentioned and guaranteed in the guarantee which I have already called attention to. Therefore I think the defendants' duty is to do all that is reasonably possible to keep the navigation in the channel at all times about that depth—*i.e.*, somewhere about the depth of 24ft. 6in. over the bar at high water neap tides, and 2ft. 6in. greater than the depth at the sill. If that is so, the question arises whether they have done all that they reasonably ought to do in order to carry out that duty. It is said by Mr. Tindal Atkinson that they have all the appliances that were necessary. Now, although the defendants had got the *Sandrail*, which seems to have been able to do more in bad weather than the other dredgers, yet they had let the *Sandrail* for the whole of this winter preceding March of 1904. They might have reasonably thought it very likely that the *Sandrail* would not be wanted, but at the same time they put it out of their power during that time to use it if they wanted it.

What did they have to deal with? They had to deal, according to their statements, with a place where the currents and winds and tides and seas were perpetually changing the amount of the bank at the bar. Nobody can glance at any of the papers I have here with regard to the soundings without seeing how extraordinarily they change. In 1903 there is a change of actually 3ft. in the course of one month, and if the defendants had any idea that they might have difficulties in keeping the depth of water on the bank to 2ft. 6in. more than on the sill, it seems to me that, if they had not the *Sandrail*, they ought to have had the best instrument that could reasonably be devised for the purpose of dealing with the matter even in somewhat rough weather. But unfortunately the *Sandrail* had passed out of their keeping, and they had no other means of dealing with the difficulty. I think that that is one of the things that should be taken into account. Now, what happened to the other dredgers? One of them was not available because it was under repair. One would have thought that the defendants might have had the repairs done during the winter months when they could not dredge or or were not likely to be dredging; but the misfortune is that they have it under repair during the end of the month of February and the beginning of March. Another was up the river. They say they could have got it down quickly, that it was really just on the spot. But just at the most critical time, between the 19th and 24th March, the dredger was let out to Sir John Jackson for doing work in some other place. It is true that it was let out only by the day, and the defendants might have taken it away from that work, but they had tied their hands to a certain extent, and instead of having it ready to deal with any emergency that might arise they had more or less hampered themselves with the contract with Sir John Jackson. Then what happened? On the 15th Feb. it turned out that there were 9in. or 10in. less than the depth of 24ft. 6in. at high water mark at neap tides. They knew that that was an important thing, as is shown by the minute of the 23rd Feb. in which the engineer brought the matter to the notice of the commissioners as being a matter which required attention, and orders were given that it should be attended to as soon as possible. Now, I am satisfied that no really serious attempt was made to watch that bank to see what was going on until the first opportunity when the weather permitted them to go out and dredge it down. What did they do? On the 23rd Feb. what were they doing in the way of sounding? I am not aware that there is any magic in monthly soundings. If they found that the depth at high water was less than 28ft. at spring tides or 24ft. 6in. at neap tides, I do not know why they should limit themselves to monthly soundings. One would have thought they would have been more and on the look-out so as to take the earliest opportunity of dredging the bank down. But they took soundings once a month and left out the periods when large alterations took place, as is shown, between Sept. and Oct. 1903, when an accretion of 3ft. took place at that critical point. Then comes the period from the 19th to the 24th March.

Now, my view is, that in Feb. 1904 the defendants knew of the accumulation of sand on the bar, in consequence of which there was no longer a margin of 2ft. 6in. in favour of the bar over the dock sill. On the 19th March in the morning soundings were taken, and it was found not only that the margin of 2ft. 6in. had disappeared, but that there was another 6in. of sand on the top. The soundings were taken to the dock master's office, but there was no dock master there. No provision had been made that these soundings should be taken to his house, so no further step was taken and nothing was known about it, except by a subordinate official, until the Monday morning. Would not anybody have thought that every effort conceivable would have been made then to deal with this very critical state of things? What did the defendants do? I have taken into account

the desire of the defendants not to disturb the arrangement which they had made with Sir John Jackson for letting out the dredger to him, and one of the answers given by one of the engineers was: "I did not think the weather was such as to call upon me to take away this dredger from another job." But reading between the lines I think that is an indication of a great want of appreciation of the crisis which had arisen, and this want of appreciation, coupled with all the other matters, the very unfrequent soundings, and the absence of dredgers ready to be on the spot at a moment's notice, is evidence, I think, that they were not taking all the reasonable care which they should have taken.

But I go further than that. Although a vast deal has been made of the question of the weather, and the difficulty of dredging with this dredger on any of this work, I have come to the conclusion on the whole, after taking into account what has been said on both sides and these records which have been taken at different times, to find, as a fact, that the weather was not such that the small amount of dredging required to allow this ship to have gone out free could not have been done. I think that the difficulties with regard to the dredger have been very considerably exaggerated, and I more or less arrive at that conclusion by what has been said by both sides about the *Sandrail*. I think that the *Sandrail* could have done a considerable amount more than has been thought by the witnesses on the side of the defendants to have been possible. I think also that the dredgers could have done more, and that they could have worked for several days even with the weather that existed before the 19th March. I cannot help thinking that if on the 19th March the defendants had had in their hands the records of the soundings which showed the increase of the danger which had been known to exist since the 23rd Feb., they might have got men to work on the Sunday, as they do in cases of emergency, and even if they did not work on the Sunday, I think they had ample time on the Monday and Tuesday for them to have got up an amount of sand which would have got rid of this danger.

Therefore, I think that on this second ground also the duty existed on the part of the commissioners to take reasonable care to keep the channel down to a reasonable depth, and I think that, in accordance with the view they themselves take of the matter, a depth of water on the bar 2ft. 6in. greater than the depth on the sill should have been provided. I think they did not provide that, because they took more or less the chance that the thing was likely to happen, or that something which was equally urgent was going on, and therefore they let the dredgers remain with those other people on the other job. I think if they had realised, what we all realise now, the urgency of the matter they would have done it, and I think they were unreasonable in their conduct in not attending to it.

I think not only has this warranty been broken as regards these particular plaintiffs, but I think these commissioners have failed in their duty with regard to keeping the entrance clear, and that the plaintiffs have suffered the loss they did because of the breach of warranty or the breach of duty, whichever it was, and under either head I think they are entitled to come forward and say that they claim judgment. Therefore I give judgment for the plaintiff with costs, the amount of damage to be hereafter ascertained.

Judgment for the plaintiffs.

The defendants appealed.

Tindal Atkinson, K.C. and *Scott-Fox*, K.C. (*Simey* with them) for the defendants.

J. A. Hamilton, K.C. and *Manisty*, K.C. (*Adair Roche* with them) for the plaintiffs.

The following cases were cited:

Parnaby v. *Lancaster Canal Company*, 11 A. & E. 223;

Mersey Docks and Harbour Board Trustees v. *Gibbs*, 2 Mar. Law Cas. O. S. 353 (1866); 14 L. T. Rep. 677; L. Rep. 1 H. L. 93;

Reg. v. *Williams*, 51 L. T. Rep. 546; 9 App. Cas. 418;

Williams v. *Swansea Harbour Trustees*, 14 C. B. N. S. 845;

Thompson v. *North-Eastern Railway Company*, 1 Mar. Law Cas. O. S. 207; 3 L. T. Rep. 618; 6 L. T. Rep. 127; 2 B. & S. 106, 119.

Collins, M.R.—This is an appeal from the decision of Jelf, J. without a jury, in a case tried at Durham. The action is brought by shipowners against the proprietors of the port of Sunderland, the River Wear Commissioners, for damages for four days' detention of their ship through the inability of the ship, which had been invited by the defendants into one of their docks in the river Wear, to get out into the open sea, by reason of an obstruction in the channel leading from the mouth of the river to the sea. The case has been most ably argued before us, and, in the result, I have come to the conclusion that I can really add nothing to the admirable judgment of Jelf, J. It is only in deference to the very able arguments which have been addressed to us by the defendants' counsel that I think it necessary to put my conclusion in my own words, for the closer I have studied the judgment of Jelf, J. the more complete it appears to me to be in every form. Now, a great deal has been done, and very properly done, by the appellants' counsel to try and put this case as one of warranty only, but although warranty does enter in the case, it seems to me, both from the way in which it was tried by Jelf, J. and from his conclusions of fact, that the question of warranty occupies a wholly subordinate position in this case. To begin with, the plaintiffs did not put warranty in the forefront of their case. Their claim is very briefly and clearly put in their statement of claim, and I will read a few paragraphs from it. "The defendants are and were at all material times, by virtue of the various statutes in that behalf, the harbour authority for and are in the occupation and control of the port and harbour of Sunderland, including the Hudson Docks and the approaches thereto. The defendants are and were entitled to receive port and dock dues in respect of vessels navigating and using the said port or docks, and it became and was their duty properly to cleanse and maintain the same and to do all things necessary for the purpose of carrying on, maintaining, and repairing the free navigation of the said port and docks, and for the purpose of rendering the said port and docks and the approaches thereto safe and commodious. In or about the month of March 1904 the plaintiff's said steamship *City* was for reward

paid to the defendants admitted into the Hudson Docks and was there loaded until the said steamship was, on the 24th March 1904, at or about 4 a.m., ready to leave the said docks, loaded to a draught of 21ft. 11in. forward, and 21ft. 10in. aft. The defendants did not perform the duties set out in par. 3"—which I have just read—"and did not take due and reasonable care about the performance of the same, but suffered the approaches to the said docks, particularly at the pier entrance, to become so silted or so obstructed by sand or other material that the said steamship was unable to proceed out of dock or to pass out of the said pier entrance when loaded as aforesaid, and was detained until the 28th March 1904."

That is one clear statement of a cause of action. Now comes an alternative. "Further, the defendants knew or ought to have known that the said entrance and the approaches to the said docks were in the said condition, and that they were not in a fit and proper state to allow vessels of the draught of the *City* to pass out, but the defendants did not take due or reasonable care to remedy the said condition or to put the said entrance or approaches into a fit or proper state to allow vessels to pass out as aforesaid." Those causes of action are stated without any reference to a question of warranty.

Then, as a third alternative, comes the question of warranty, which has formed the chief subject of the learned counsel's observations who addressed us for the appellants. Now, in order to clear the ground upon the first causes of action I will read a passage from the well-known judgment of Blackburn, J., who delivered the joint opinion of all the judges who heard the argument, in answer to the questions put by the House of Lords in *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (2 Mar. Law Cas. O. S. 353 (1866); 14 L. T. Rep. 677, at p. 678; L. Rep. 1 H. L. 93, at p. 104). He said: "The Court of Exchequer Chamber, in both cases, decided that this difference did not affect the question; that so long as the dock was kept open for the public, the duty to take reasonable care that the dock and its entrance were in such a state that those who navigate it may do so without danger, was equally cast on the persons having the receipt of the tolls and the possession and management of the dock whether the tolls were received for a beneficial or a fiduciary purpose. If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care, or neglect to take care, except through its servants; and (assuming it was the duty of these trustees to take reasonable care that the dock was in a fit state), it seems clear that if they by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit. And, after hearing the very able arguments at your Lordships' bar, we are of opinion that the judgment of the Court of Exchequer Chamber was correct."

Now, there can be no doubt that the commissioners are under a statutory duty inside of this bar. I will go back to the original statute of 1830, sect. 39, which says: "And be it further enacted that it shall be lawful for the said commissioners, and they are hereby required from time to time to deepen, cleanse, and scour the said river Wear within the limits of this Act, and to cleanse, deepen, and enlarge the channel of the said river Wear to the mouth thereof, and to widen, contract, or lessen the mouth or entrance thereof, and to maintain and repair the present piers, and to build such other piers, or to alter the present or any other piers to be built, and also to build any quay or jetty, and to make such other works within the limits of this Act as shall be necessary for promoting and preserving the navigation of the said river, and for that purpose to remove any rocks, sands, or rubbish, or other matter which shall obstruct the navigation of the said river, port, and haven, or the improvement thereof"; and then come the general words, "and also to do all other works, matters, and things which shall be necessary or proper for the rendering of the said port and haven safe and commodious, and for the improvement of the navigation of the said river and the use thereof as aforesaid, and for executing the other purposes of this Act." That is the original Act which underlies the whole position, although they had later Acts. No doubt their works have been enlarged, and the particular part of their undertaking we are concerned with in this case is one which has been recently accomplished. They have, in addition to the mouth of the river itself, which is the subject-matter which is dealt with in the Act I have just referred to, opened out another passage into the sea south of the main entrance by the mouth of the river, and it is that entrance which is called the south entrance, which is one which comes into discussion in this case. They made that entrance by building out two walls, one running from north-west to south-east, and the other running from south-west to north-east. The one on the northern side projecting further out than the other, and thereby opening an orifice between the two which opened towards the sea. Through that orifice created by these two converging walls the vessel enters, and having entered and got through, it finds itself on the way towards a series of docks which have been built, and to which they invite the owners of ships. There can be no doubt that the object which these docks are publicly asserted to serve is the natural object which, to all people conversant with these matters, docks are meant to serve. They are not places for people to put their ships in simply for amusement, or to let them lie up; they are places for the convenience of loading and unloading ships, and ships do not load and unload for pastime. That is a condition precedent or subsequent to the commencement or conclusion of a voyage. Therefore, unless a ship can get into a dock it is no use advertising that it has the appliances in the dock, or an abundance of those appliances, or particulars with regard to the width and depth of the dock. All these things have an ulterior purpose, the ulterior purpose of loading a ship, or the ulterior purpose if it is loaded, of unloading it. In an advertisement published in the Shipping Year Book every year by the River Wear Commissioness they give particulars of the South Docks—and it is the South Docks that we are concerned with in this case—"The water area; width of gateway; depth of water on sills." I need not read those particulars; and then they go on, "Sunderland, at the mouth of the river Wear, is the chief seaport

of the county of Durham. It is one of the greatest coal ports of the kingdom, the annual shipments reaching upwards of 4,500,000 tons. The River Wear Commissioners are the conservators of the port, which includes the river Wear to Biddick Ford, a distance of nine miles from the mouth, and they are also the owners of the South Docks, which extend from the harbour entrance southwards for a length of one mile. Extensive protecting piers are now being constructed, which will form in all weathers and at all times of the tide a harbour of refuge for the largest class of vessels. The South Docks, comprising the Hudson Dock, north and south "—it is the South Hudson Docks we are concerned with in this case—" and Hendon Dock are furnished with the latest appliances for quick loading and discharge of vessels. The warehouses, timber yards, &c., on the Dock Estate are directly connected with the North-Eastern Railway."

That all obviously points to the attractions of this harbour for vessels coming in from the sea and going out to the sea; and it is certainly a representation not only as to the facilities that meet a person when he gets into it, but also a representation as to the accessibility of those docks to people coming in from the sea or desirous of going out to sea from the docks. Now, in this case the particular vessel here was sent in ballast to Sunderland for the purpose of taking a cargo there and proceeding with that cargo upon a voyage, and before the ship was sent its owners had seen the advertisement which I have just read and had gathered from it an indication, which appeared on the face of it, as to the facilities and conveniences of the port to which they were invited to go. Among those particulars, one they would particularly notice would be the depth of water given in detail as to each of the docks in this volume; and you find with respect to the Hudson Dock South, the one which they actually used, that the height of the water at ordinary spring tide is put at 25ft. 6in.; and the height of water at ordinary neap tides at 22ft. in the dock. Therefore, in loading their vessels in ballast for the pu rpose of going into that dock, the plaintiffs would have regard to the indicated height of water on the dock sill, and likewise, in loading the vessel when she had got into the dock, they would necessarily have regard to the height of water on the dock sill enabling the vessel to get out when loaded to a certain depth. In this case the plaintiffs loaded their vessel up to its full capacity, having regard to the depth of water on the dock sill, and it is not suggested that the cargo which they put in was more than adequate to enable it to pass over the dock sill at the height described in the particulars I have just read. Now, when the vessel came to be ready to start, I think it was on the 24th March, it was found that though they might have got over the dock sill with safety, they could not get out of the harbour by reason of the fact that there was not sufficient water at what has been called the bar, but which I think is an incorrect description. There was not sufficient water at the entrance to the harbour where these walls converge and form the orifice I have described to enable a vessel drawing her amount of water to get over the sill clear out to the sea.

Now, it is quite clear obviously, as a matter of common sense, although we have had a long and subtle discussion about it, that when you speak of the water with regard to the draught of a vessel, that must mean water of a depth which will be sufficient to enable the vessel to float without going on to the ground in so doing. It is quite obvious if you have in still water just enough to float a vessel, that depth is not sufficient if the water is agitated; so that you have, according to the conditions of the weather, to have the clear depth of the minimum number of feet indicated on the dock sill. Therefore, a vessel which will pass over a dock sill at the height described here would not be able to pass out of the orifice of the harbour if the clear water is not always at a minimum of 22ft. high on the dock sill. When you get that water at the orifice agitated, of course that means it is sometimes higher and sometimes lower, and therefore when it is lower there is not a clear depth of the minimum number of feet which this vessel would require, and that was the case when this vessel wanted to go out. It was ascertained that the water, on what has been called the bar at the orifice, would not be deep enough if the receding waves left a hollow; there was not a clear space of 22ft. of water for this vessel to go out, and she could not go out without going aground on the bar. Under those circumstances she was detained for four days, and it is in respect of those four days that the plaintiffs bring this action.

Now, was it or was it not the duty of the harbour authorities, the defendants here, to take all reasonable care to secure that there should be a reasonable access and means of egress for vessels loaded up to the capacity which the dock sill would admit of? Was there or was there not upon them an obligation to take reasonable care that that entrance should be at all times accessible, and possible for vessels seeking to come in or go out? If there was that duty upon them, then the question would be, Was there evidence here such as would justify the learned judge in finding that they had not adequately discharged it? It seems to me there can be no manner of doubt that there was. The docks are held out to the public as places where vessels can safely load and unload; they are invited to come in through the only means of access—namely, this orifice which I have described, and they are invited to come in with the object of loading. Underlying all that is an implication that they can load with safety and get out with safety. It seems to me, apart from the question of warranty, which I have not discussed, there is this obligation accepted by the defendants to give accommodation to ships, inviting them to avail themselves of it, which has been followed by members of the public availing themselves of the facilities there.

Now, what were their duties with respect to this obstruction which was found to exist at the bar? It seems to me that they were bound to take all reasonable care to secure the safe egress of a vessel from the dock into which they had invited her. That became a question of evidence: whether or not in the circumstances they did take all reasonable care. The learned judge, having heard elaborately the evidence—I think it extended over two or three days—has come to a reasonable conclusion, after examining it most critically, that they did not take all

reasonable care, and he points to two or three instances which he treats as obvious neglect of their duty. I have very carefully followed the clear and able argument addressed to us by counsel on both sides in this case, and it seems to me there was abundant evidence—in fact, on the evidence I should have drawn the same conclusion myself—that the harbour authority did not take reasonable care to inform themselves as to the condition of the bar, and to take all such steps as were reasonably possible to make it safe. The evidence as to that I do not propose to go through in detail, because it was elaborately examined by the learned judge, who had the responsible witnesses before him; but I will summarise it shortly, to show that I follow the trend of his reasoning. Now, if the state of this bar had been such that it was liable to fluctuation in the depth of water by reason of the shifting of the silt according as the wind and weather varied, the harbour authority, having had a long period of observation, ought to have been thoroughly alive to the fact that this bed of the harbour near the orifice was liable to fluctuation in depth, and that put upon them the duty of very close inspection so as to inform themselves from time to time what the condition of the mouth of the harbour was. Their system was to have monthly soundings. There is no absolute safety in sounding once a month; the soundings must be such as may be reasonable to keep them informed as to the condition of the sill in the harbour, so that they might take all necessary steps to secure an adequate entrance. As a matter of fact, their system appears to have been monthly soundings, followed, or they ought to have been followed, by dredging. The last occasion on which they actually dredged the site of this orifice, where they were aware there was a tendency to silt, before the 24th March was in the preceding January, and the result of their operations was very satisfactory, as it gave results at the end showing an ample margin of depth at the bar as compared with the dock sill. Now a word upon that.

There has been a good deal of discussion here, and a suggestion which is capable of misleading one if one does not address one's mind closely to it, as to the relative depth of water on what has been called the bar and on the dock sill. The real difference between the two is simply this: on a dock sill the water is perfectly quiet, not agitated by wind at all. Therefore you have a level, uniform surface to deal with. When you get out to the bar you are getting to a point where the wind and currents naturally operate, and you do not get the same uniform surface. Therefore to say you have 22ft. at the bar is not the same thing as to say you have 22ft. at the dock sill, because 22ft. at the bar is a variable quantity. It may be 22ft. sometimes, but it may be a great deal less when the wave passes on one side and leaves a hollow behind it. Therefore what we are really aiming at is the actual available depth, and to make the actual available depth, so that there shall be 22ft. of clear water at the bar, you must have a greater maximum at the bar so as to admit of the minimum that would not be less than 22ft. when the waves recede. The actual depth of available water ought to be the same in both cases, and to say you have satisfied your obligation to give an available depth of 22ft. at the bar when you have only the same measure of depth at the bar as you have on the sill is to say what you have not; 22ft. at the bar is not the same as 22ft. on the dock sill, because 22ft. on the sill is a uniform depth. If in truth and in fact the 22ft. available depth had been given at the bar there would have been no trouble in this case; and to say that the authorities have satisfied their obligation because they show only 6in. less at the bar than on the dock sill is to say, when you sift it, that which does not agree with the fact when you come to this, that some 2ft. 6in. more water is required at the bar to give you the minimum on the dock sill.

So, really, it is more a dispute about words than about things. You have, in order to give a safe passage out of that dock, to secure that there shall be water of the minimum depth of 22ft., or whatever it may be, which would enable a ship to pass over the dock sill. When you give it that you give it a safe access; if you give it anything less you do not give it a safe access. Now, I will deal with what they did with regard to the dredging. They had dredged to give themselves a margin apparently of 3ft. or 4ft. more at the bar than there was on the dock sill. That was in January. Then the next time they found anything with regard to the condition of the bed was about the 15th Feb., and they then found something which ought to have alarmed them, as Mr. Hamilton put it. They found a very formidable alteration in the bed inside the harbour near the mouth. They had lost the whole of their margin, and even if they had water enough to pass a vessel in as it stood it certainly called for inquiry and called for action, because a memorandum was sent as soon as the depths were ascertained by soundings to the harbour authority calling attention to the necessity of immediate action. Now, no action was taken, none whatever, as to soundings or dredging from that time until you get to the 19th March, which is a few days before a very critical period in this case; and on the 19th March they did perform the operation of sounding again, and sounding then they found a state of things which really in point of fact showed that the harbour was not in a condition to admit or let out a vessel of the draught of the plaintiffs' vessel. They had lost all their margin and something more beside. The depth of the bar was disclosed to be less than it was on the sill. Under those circumstances they had in the first instance from, I think, the 15th Feb. up to the 19th March, during which they might have done some dredging if the weather permitted it, and they had more information on the 19th March; and then they had from the 19th to the 24th March, the date on which the vessel was ready to go out, during which time they might have done some dredging again if weather permitted. That raises a question of fact — whether during each of these intervals from the 15th Feb. to the 19th March, and again between the 19th March and the 24th March, the condition of the weather was such as to permit of their carrying on the operation of dredging, and if it was such as to enable them to do it, why did they not do it?

There was, no doubt, some conflict of evidence upon this matter, but Jelf, J. saw the witnesses and examined all the evidence critically and came to the clear conclusion on the evidence, and I entirely agree with him, that there were several

opportunities between the 15th Feb., when there was a state of things which should have put them upon inquiry, and the 19th March during which there was no condition of wind and tide which would have debarred them, had they had their appliances ready, from performing dredging operations. Then again when they got the information derived from the soundings on the 19th March there was again a four days' interval between that and the 24th, when the ship was ready to go; and during that time again Jelf, J. was of opinion if they had had appliances on the spot and used reasonable and proper diligence in the matter they would have informed themselves earlier of the condition of the bed and mitigated it by dredging. As a matter of fact they allowed the interval between the 19th, which I think was a Saturday, and the following Monday morning before appreciating the information derived from the soundings of the 19th. The intervening Sunday was a *dies non* and there was nobody there to utilise the information which was sent in to them on the Saturday, and nothing was done, and the learned judge was of opinion something ought to have been done. They could have used their appliances but for the fact of having two dredgers away which would otherwise have been available. They had lent one out on contract for money elsewhere, and they had lent another to a contractor who was doing work under a contract with them. That latter one was at call by the terms of the contract; he took it only from day to day, and they could resume possession of it if they thought fit. As to how long it would take to get to work having regard to picking up the moorings and so on there was a great conflict of evidence, but the opinion of Jelf, J. was, having regard to what they knew about the condition of this harbour and its liability to silt in certain weather, that they ought to have had these dredgers or one of them at hand, so that it would be available at the shortest notice, and if they had had it at hand and utilised it, it would have been quite possible in the interval between the 15th Feb. and the 19th March, and again between the 19th March and the 24th March, to have made the channel safe for this vessel to pass out.

Upon this part of the case it seems to me there was abundant evidence to justify Jelf, J. in coming to the conclusion which he has, and, as I have said, I should not have hesitated, having seen the witnesses, in arriving at the same conclusion—upon all these facts there was an abundance of evidence in favour of his view.

Now I come to the question which has been put in the forefront by Mr. Tindal Atkinson as though it was the only claim of the plaintiffs in this case—namely, that part of it which rests on a warranty. He chooses, with admirable skill, as he always does as an advocate, to put in the forefront that which the plaintiff had thrown in as a sort of make-weight; he put that in the forefront to show that they had not a case which would hold water. This is the claim on the warranty as put in the statement of claim: "Further or in the alternative in the circumstances hereinbefore set out there was a warranty on the part of the defendants that the said entrance and the approaches to the said docks were in a fit and proper state to allow the *City*" —that is the name of the vessel—"to pass out, and that there was at all material times a sufficient depth of water at the said entrance and at the approaches to the said docks for the said purpose." That is the nature of the warranty which they set out—namely, a warranty on the part of the defendants that the said entrance and the approaches to the docks were in a fit and proper state to allow the *City* to pass out. That is a very simple statement which one would have thought not capable of much criticism, because it is a very reasonable one. If you invite a vessel to come into your dock you impliedly warrant that there are means for her to come into the dock, and, if she comes in, that there are means for her to get out of the dock. The learned counsel fixed upon one word in the judgment which was cited as affecting the judgment. That is the case of *Williams* v. *Swansea Harbour Trustees* (14 C. B. N. S. 845), which is a decision of the Court of Common Pleas. The case was tried before Erle, C.J. with a jury, and in the Court of Common Pleas he afterwards delivered a judgment, in which the other judges concurred, discharging a rule for a new trial. I will read the headnote: "The trustees of a dock, being about to open a new one under the authority of Parliament, issued a notice addressed to shipowners, merchants, and others, describing the accommodation which their new dock would afford to shipping, and containing a statement that 'the depth of water *on the dock sill* was 26ft. and 23ft. at the highest spring tides and 15ft. at the lowest neaps.' Held, that this amounted to a warranty that there was an available depth of water *in the entrance channel* approximating that mentioned in the notice; and that the trustees were responsible to the owners of a ship, who, trusting to the representation contained in the notice, entered the dock to load, and were delayed and put to expense in consequence of the insufficiency of water in the channel to enable her to complete her loading in the dock." That case bears a very great resemblance to the one before us, because it is the case of a vessel coming to the dock for the purpose of loading, and not being able to get out by reason of an obstruction not on the dock sill, but outside the dock.

In that particular case, as pointed out by Mr. Tindal Atkinson, the particular obstruction was just outside the dock sill; it was not 200 or 300 yards off as it was in this case we are now dealing with—namely, at the entrance to the harbour itself; and he fastens on the word "approximating" mentioned in that, and says that, as the water on the bar was only 6in. less than 22ft. in depth, it cannot be said that the available depth of water did not approximate the depth of 22ft. That is one point he made upon it.

Another point he made is this: He said: "Supposing I had given the 6in. you would have been in no better position, assuming I had 22ft. at the bar instead of 21ft. 6in.; you could not have got out, and, therefore, your damages are nominal." First of all with regard to that word "approximating," which has been so much relied upon as affecting the discussion. That seems to me capable of an explanation, an explanation which fitted the facts of that case, and which Mr. Hamilton gave in the course of his argument. He pointed out that in the entrance to a dock

there may be loose silt, through which a vessel can come with comparative ease. At the same time if you measure the height of the water strictly, if you measure it from the surface of that silt, you may show a depth outside the dock not quite the full depth of the water measured on the sill, and therefore to say there was an absolute warranty that the water outside the dock would be exactly the same depth as the water on the dock sill might be to put it too high, and that the real warranty was a warranty of accessibility which could be fulfilled, even if there were a less depth outside, provided it was caused only by such obstruction as silt, which would not really interfere with the accessibility, although technically you meant to say there was a little less outside than in. That is why the word "approximating" is brought in there. The explanation is that what it is dealing with is not the exact corresponding measurement of depth outside and in, but the possibility of accessibility—that is the point of the case. A statement made for people to act upon as to depth of water on the sill carries with it an implication that it is accessible for vessels loaded up to the standard indicated, and it is only by treating that as the precise depth that you get the difficulty raised by the fact that they had only 6in. less at the bar. I have pointed out that 6in. less at the bar is not in any sense an approximation to the full 22ft. on the sill, because where you have the water agitated you have a totally different proposition. You have to get your minimum assured depth at the bar up to the level of the sill. You do not get that where you have fluctuating water which is either 6in. more or 6in. less—you do not get your irreducible minimum at the bar up to the minimum on the dock sill.

Now, to imply a warranty from all the circumstances of the case, as shown by the passage read from the judgment of Lord Bowen, you have to ascertain what was present to the minds of the parties when they entered into the transaction. It is easy in the one case to infer an absolute warranty when a person is undertaking that which is entirely within his means of observation and means of control. It is more difficult to import an absolute contractual obligation where you are dealing with something as to which he has not every moment of the day absolute means of knowledge or certainty of control, and where the conditions at the entrance of a harbour are such that at some states of the weather it is not possible physically to inform himself of the exact condition of things you would not infer such a warranty as that.

But whatever standard of warranty is taken in this case, I wish to point out that the evidence is abundant that there was a failure on the part of the defendants to perform their obligation. The particular spot where the difficulty arose here is not, as suggested by Mr. Tindal Atkinson, outside the harbour; it is just inside these walls, and it seems to me very probable—I believe there is no express evidence about it in the case—that the condition of this so-called bar, which certainly was not a bar of a river, was brought about by the shifting currents and winds, brought about by the introduction of those artificial elements into the condition which obtained in the space bounded by these two walls running out to sea and inclosing the harbour. It was not a bar in the proper sense. It was the shifting sand and silt inside brought about by the action of the tide and the currents, and inside the harbour unquestionably it was within the sphere of their statutory obligation, and it is not denied that they had the means of dealing with it. Assuming the obligation of dealing with it in the circumstances of this case, they did not perform their obligation up to a reasonable standard according to the findings of the learned judge, and therefore in this case there has been a falling off on the part of the defendants to which the detention of this vessel was attributable. Therefore it seems to me the judgment of the learned judge was absolutely right.

Cozens-Hardy, L.J.—I am of the same opinion. The Master of the Rolls has said, and I entirely agree, that it was difficult to add anything to the judgment of Jelf, J. If that was difficult, I find it impossible to add anything to the judgment of the Master of the Rolls. I had intended to state in my own words the reasons which influenced me in holding that this appeal should be dismissed, but I now think I should be best doing my duty by saying that for the reasons assigned by the Master of the Rolls I think the appeal fails.

Farwell, L.J.—I am of the same opinion. Perhaps, after what my brother, Cozens-Hardy, L.J., has said, it is really rash for me to add anything; but as I have attempted to formulate two propositions of law in this case, I will venture to state them. It is admitted that the docks and the access thereto are part of the undertaking of the commissioners in respect of which they had statutory duties. Now, a corporation authorised by statute to maintain and keep open a dock and to charge a toll for its use is under an obligation at common law to take reasonable care to keep the access thereto so far as such access is vested in them or under their control free from obstacle, so that the public may use it without danger, whether such tolls are taken for the private benefit of the corporation or in performing a public duty bringing in a profit to the corporation. The authorities for that proposition are *Mersey Docks and Harbour Board Trustees* v. *Gibbs*, already referred to by the Master of the Rolls, and *The Bearn* (10 Asp. Mar. Law Cas. 208; 94 L. T. Rep. 265; (1906) P. 48). The principle has also been extended to the executive government in New Zealand in *Reg.* v. *Williams* (51 L. T. Rep. 546; (1884) 9 App. Cas. 418), and the case is stronger when, as in the Act of 1830, the commissioners are not merely empowered, but, as in the case of *Parnaby* v. *Lancaster Canal Company* (11 A. & E. 223), are required, amongst other things, to remove all obstructions that may in any way impede navigation or use of the port or haven, nor is it any answer to say, as has been argued here, that the defendants were not idle, but were employing their resources in other parts of the undertaking. Blackburn, J. dealt with that argument in *Mersey Docks and Harbour Board Trustees* v. *Gibbs* (*ubi sup.*). At 14 L. T. Rep. 679; L. Rep. 1 H. L. 107 he said: "It is obvious that a shipowner who pays dock rates for the use of the dock, or the owner of goods who pays warehouse rates for the use of a warehouse and the services of the warehouse

men, is, as far as he is concerned, exactly in the same position, however the rates may be appropriated. He pays the rates for the dock accommodation, or for warehouse accommodation and services, and he is entitled to expect that reasonable care should be taken that he shall not be exposed to danger in using the accommodation for which he has paid."

Whatever may be the difficulty of formulating any rule as to the depth of water that may be required by ships desiring to enter a dock, I think it follows, as a necessary corollary to the rule stated above, there is a further obligation to take reasonable care to keep the approaches to the dock clear to a depth sufficient to allow every vessel received into the dock to leave again with a full load under normal conditions of wind and weather. It is necessary for this purpose to dredge a channel through the so-called bar at the pier heads and to keep the channel clear. That is a finding of fact of the learned judge in the present case with which I entirely agree. In the present case Jelf, J. has found as a fact that such reasonable care was not taken. The Master of the Rolls has shown why he agrees, and I can only say I entirely agree with his conclusions and those of the learned judge. So much for the first cause of action.

The second cause of action on warranty arose in this way. The warranty originally pleaded was contained in a book of 1896. The pleadings are to be taken as amended by pleading the warranty contained in the advertisement of 1904, and the learned judge accepted the evidence of the plaintiffs that they contracted on the faith of that statement. If a dock-owner for his own profit invites shipowners to bring their ships into docks on a statement that there is a minimum depth of water on the sill in the dock he thereby impliedly warrants that there is access in normal conditions of weather to and from his dock to the open sea for ships loaded as full as is reasonably proper, having regard to the depth of the water alleged by the defendants to exist in such docks. The depth of the channel by which such access is gained must vary according to circumstances. The case of *Williams* v. *Swansea Harbour Trustees* (*ubi sup.*), to which the Master of the Rolls has referred, turned, of course, on the declaration alleged in that case of a specified depth of 26ft. and 23ft. at the highest spring tides and 15ft. at the lowest neaps. But, in my opinion, the court there evidently intended to form the sensible proposition that what was warranted was access, not a particular depth, which might vary more or less, varying to the lowest so as not to give access, which would be an absurdity. There is one passage in the report of the judgment of Erle, C.J. which looks at first sight as though he was referring to the specific depth mentioned there, and I venture to suggest that two or three words have dropped out of that sentence. The passage is this: "That I construe to amount to a warranty that ships wishing to use the dock would find an accessible entrance thereto of that depth, and that their contract was broken if that was not so." I should prefer to read: "Would find an accessible entrance thereto for ships requiring dock accommodation of that depth," which would make that proposition, in my opinion, perfectly intelligible. The gist of the warranty is, to my mind, the possibility of access, not any specified depth. It may be approximating, but only so far as the smaller depth is concerned with the possibility of ingress or egress. We were pressed with the argument of hardship on the owner, but in a case of implied contract, as Lord Bowen said in the case of *The Moorcock* (6 Asp. Mar. Law Cas. 357, 373 (1889); 60 L. T. Rep. 654; 14 P. Div. 64): "In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended, at all events, by both parties, who are business men." You have on the one side the dockowner, who can, if he pleases to do so, limit his liability by stating, "I will not warrant this depth; I will only say this is the depth on the sill, and I will make no warranty as to your being able to get in"—he can protect himself if he desires. On the other hand, you have the shipowner who, seeing the statement without any qualification, comes to the harbour, and is it to be expected if he gets in that he would stay there indefinitely, or until they clear the channel for him, or, if he is outside, that he would stand off, or possibly anchor his vessel off the shore, until he can get in? Treating Lord Bowen's view as the test, it appears to me the warranty is what would reasonably be expected, and one which the dockowners would not, I venture to think, withdraw, because it would possibly injure the use of their port. So far as regards the particular case, I think it is material, as Mr. Hamilton has pointed out, that there never has been a sudden silting up which would render it unreasonable for the dockowners to warrant this at all times and in all circumstances; there has never been any time until within the last twelve months, so far as the evidence goes during the fifty years or so that the dock has been opened, in keeping this dock open in the way in which it should be kept open. I therefore agree that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: for the plaintiffs, *Botterell* and *Roche*; for the defendants, *Maude* and *Tunnicliffe*, for *Simey* and *Iliff*, Sunderland.

Dec. 14, 15, *and* 21, 1906.

(Before COLLINS, M.R., COZENS-HARDY and FARWELL, L.JJ.).

CAINE AND OTHERS *v.* PALACE STEAM SHIPPING COMPANY. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Seaman — Wages — Contract to serve on commercial voyage—Ship carrying contraband of war—Ultimate destination communicated to seamen in course of voyage—Refusal of seamen to proceed with voyage—Conviction—Estoppel—Claim for wages and maintenance—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *s.* 134.

Seamen who knew that war had been declared between Russia and Japan signed on for a voyage not exceeding three years in the defendants' ship to Hong Kong and (or) any ports

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

within certain limits which included Japan, the voyage to end in the United Kingdom or Continent of Europe.

The ship was loaded with a cargo of coal, and this fact and the fact that coal had been declared by Russia to be contraband of war were known to the seamen.

The ship arrived at Hong Kong, and there the seamen were informed that she was to proceed to a certain Japanese port which was within the limits mentioned in their contract of service.

The seamen refused to proceed to the Japanese port, and, being put ashore at Hong Kong by the master of the ship, were convicted there of an offence under sect. 225 of the Merchant Shipping Act 1894 and imprisoned. From Hong Kong they were afterwards sent home as distressed seamen.

The seamen sued the shipowners for wages from the time they were put ashore at Hong Kong and for damages.

Held, that, the agreement being only to serve on a commercial or mercantile voyage, involving the risks incident to such a voyage, the seamen were justified in refusing to run the further risks which would have been entailed by their proceeding with the ship to the Japanese port, and that, under sect. 134 of the Merchant Shipping Act 1894, they were entitled to wages up to the date of the judgment of this court.

Held, also, that the seamen were not estopped by their conviction at Hong Kong from contending, as against the defendants, that their conduct at Hong Kong was lawful.

Held, also, that the seamen could not, in the circumstances, recover general damages.

APPEAL by the defendants and cross-appeal by the plaintiffs from the judgment of Lawrance, J. at the trial of the action without a jury.

The plaintiffs had served on board the defendants' steamship *Franklyn*, and brought this action to recover wages and damages under the following circumstances:—

In 1904 war was declared between Russia and Japan, and in March of that year notices were published in the *London Gazette* that the Russian Government had declared neutral vessels liable to confiscation if carrying contraband of war to a Japanese port, and had declared coal to be contraband of war.

On the 5th Dec. 1904 the plaintiffs agreed at Cardiff to serve as seamen on the *Franklyn* on a voyage, not exceeding three years in duration, to any ports within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence *viâ* Barry to Hong Kong, and (or) any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe, within home trade limits, as might be required by the master.

The ship was loaded with a cargo of coal and then proceeded to Hong Kong.

At Hong Kong the plaintiffs were informed that the ship would proceed to Sasebo, a naval base in Japan, and a port within the above-mentioned limits. Thereupon they refused to proceed further in the ship. The master put them ashore, and they were convicted by the magistrate under sect. 225 of the Merchant Shipping Act 1894 of having conspired to impede the progress of the voyage, and were sentenced to seventy 'days' imprisonment. The magistrates also put a "D" on their discharge papers.

On the 1st May 1905 they were released from prison, and were afterwards sent back to England as distressed seamen.

At the trial of the action without a jury Lawrance, J. held that the plaintiffs were entitled to recover wages and maintenance from their conviction at Hong Kong down to the time of their arrival in England.

The defendants appealed, and there was also a cross-appeal by the plaintiffs on the ground that they were entitled to wages and maintenance down to the time that the court gave judgment in their favour, and to damages for what had occurred in the matter of their conviction at Hong Kong.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

> 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) . . . (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.

Dec. 14 and 15.— J. A. Hamilton, K.C. and *Dawson Miller* for the defendants.—The agreement made by the plaintiffs to serve on this voyage was in accordance with the requirements of sect. 114 of the Merchant Shipping Act 1894. There is nothing in the articles which justified their refusal to proceed from Hong Kong to Sasebo. They knew that the ship was to carry contraband of war before they signed on. They could not refuse to go to a port within the region of war which was within the geographical limits within which they had contracted to go. This is not a case where the seamen were required to do something illegal by the law of England, such as to commit a breach of the Foreign Enlistment Act:

> *Burton* v. *Pinkerton*, 2 Mar. Law Cas. O. S. 494, 547 (1867); 17 L. T. Rep. 15; L. Rep. 2 Ex. 340;
> *O'Neill* v. *Armstrong, Mitchell, and Co.*, 8 Asp. Mar. Law Cas. 8, 63 (1895); 73 L. T. Rep. 178; (1895) 2 Q. B. 418.

Such cases as those are distinguishable. According to English law it is a perfectly lawful adventure to carry contraband goods to a belligerent:

> *Ex parte Chavasse; Re Grazebrook*, 2 Mar. Law Cas. O. S. 197 (1865); 12 L. T. Rep. 249; 4 De G. J. & S. 655; 11 Jur. N. S. 400.

The seamen contracted to run what risk there was in such an adventure:

> *The Neutralitet*, 3 Chr. Rob. 294.

There is no evidence here of any exceptional peril that was not known to exist when the articles were signed, except that the plaintiffs did not know that Sasebo was the port to which the ship was to go. There is no evidence that there was at any time any danger from the Russian fleet. There is nothing but the plaintiffs' own apprehensions. Seamen engaging for a commercial

voyage cannot complain if the voyage turns out more risky than they expected. The existence of a state of war between two belligerents gives the belligerents a right of searching a neutral vessel, and of compelling the ship to go to a port for inquiry. If that is done *bonâ fide*, that gives no right of complaint against anyone. This is not a case of a change in the nature of the voyage. The plaintiffs knew when signing on that the ship was to carry contraband of war, and would be liable to seizure by the belligerents. It is distinguishable from a case in which war was declared after the crew had entered into their agreement, and where they did not know that the ship was carrying contraband of war:

Austin Friars Steam Shipping Company v. *Strack*, 10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315.

In two recent cases somewhat similar to this the Divisional Court held that the seaman was entitled to recover wages, but we submit that those cases were wrong and should be overruled:

Lloyd v. *Sheen*, 10 Asp. Mar. Law Cas. 75 (1905); 93 L. T. Rep. 174;
Sibery v. *Connelly*, 10 Asp. Mar. Law Cas. 221 (1905); (1907) 330; 94 L. T. Rep. 198.

The conviction of the plaintiffs at Hong Kong concludes them from saying that the voyage was not terminated by their own wrong.

S. T. Evans, K.C. and *A. Neilson* (*Morgan Morgan* with them) for the plaintiffs.—The plaintiffs were justified in refusing at Hong Kong to proceed to Sasebo. The increased risks of going to Sasebo constituted a change in the voyage which entitled them to act as they did. Several neutral ships were sunk by Russians, and it is idle to say that there was no additional risk in going to a port which was not only in Japan, but was an important naval base. The cases cited on behalf of the defendants are all in the plaintiffs' favour. As to the cross-appeal, if the plaintiffs are entitled to wages, they are entitled, under sect. 134 (c) of the Merchant Shipping Act 1894, to wages up to "final settlement"—*i. e.*, up to the date of the judgment of the court. Lawrance, J. was wrong in giving them wages only up to their arrival in England. The conviction does not estop the plaintiffs from setting up their claim in this action, because the proceedings are not between the same parties:

Castrique v. *Imrie*, 3 Mar. Law Cas. O. S. 454 (1870); 23 L. T. Rep. 48; L. Rep. 4 H. L. 414;
Gibson v. *M'Carty*, cas. temp. Hardwicke, 311;
Petrie v. *Nuttall*, 1856, 11 Ex. 569;
Justice v. *Gosling*, 1852, 12 C. B. 39.

J. A. Hamilton, K.C. replied. *Cur. adv. vult.*

Dec. 21, 1906.—Collins, M.R.—I have had an opportunity of reading the judgments of my learned brethren in this case, and I entirely agree with them.

Cozens-Hardy, L.J. read the following judgment:—The respondents on this appeal are seamen who agreed in writing to serve on a vessel on a voyage of not exceeding three years' duration to any ports within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, *viâ* Barry, and (or) any other port within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe as might be required by the master. At the date of the agreement, which was signed at Cardiff by the respondents, war had been declared between Russia and Japan. The cargo with which the vessel was loaded was a cargo of coals. To the knowledge of the seamen coals were, according to the statements of both belligerents, contraband. The seamen did not know that the ultimate destination of the ship, by arrangement with the owners, was Japan. They first learned this at Hong Kong, and when told by the master, who had not heard it himself till then, that the vessel was going to Sasebo, which is a naval base in Japan, they declined to proceed further on the voyage. They were taken before the local marine superintendent, who acts as port magistrate, and were sentenced to prison for ten weeks. They were finally sent back from Hong Kong as distressed seamen to this country, and they brought this action claiming wages until final settlement, and also general damages.

The main question on the appeal is whether the seamen were bound to proceed with the contraband cargo to Sasebo, a place within the limits stated in the agreement. It is not alleged that there is any illegality in a contract to carry contraband to a belligerent port. But it appears from documents published in the *London Gazette* of the 18th March 1904, a date prior to the agreement, that the Russian Government declared neutral vessels liable to confiscation if carrying contraband of war to an enemy's port. It is not in my opinion necessary to consider whether, according to international law as generally understood, the contraband cargo alone ought to be confiscated, or whether the vessel itself could also be confiscated. It is sufficient to say that the Russian Government asserted, and were prepared to enforce, the latter view. Now, it has been held that a similar agreement signed before the outbreak of war did not bind a seaman to continue after the outbreak of war a voyage in terms falling within the language of the agreement, but involving the risk of capture and detention, if not of loss of life: (*Burton* v. *Pinkerton*, *ubi sup.*; *O'Neill* v. *Armstrong, Mitchell, and Co.*, *ubi sup.*). This conclusion was reached partly on the ground that the war was a new element not in the contemplation of either party when the agreement was signed, but mainly, I think, on the ground that, as matter of construction, the agreement was to serve only on a commercial or mercantile voyage involving perils of the sea, including piratical attacks, but not involving the special and peculiar risks of capture by a belligerent fleet. This latter ground seems to be equally sound although the agreement may be signed after and with notice of the outbreak of war.

The sailors in the present case knew that coal was contraband, but they did not know, until they were informed at Hong Kong, that the coal was to be taken to Japan. If they had been told that the coal was intended, not for Japan, but for a Russian port then blockaded by the Japanese, and that they were required to run the blockade, I think they would have been entitled to say that the bargain made at Cardiff did not as matter of construction extend to such an adventure. And although the danger of carrying a cargo of contraband goods from Hong Kong to Japan was

less than the danger of running a blockade, it seems to me that the same priniciple applies. The voyage from Hong Kong ceased to be an ordinary commercial voyage, such as alone was contemplated by the agreement. The sailors ought to have been told what was the destination of the cargo, which was an ordinary commercial cargo, before they signed on. They might and probably would have demanded and obtained higher wages for the increased risk. In my opinion they were acting within their rights in refusing to proceed beyond Hong Kong. This is the view taken by the Divisional Court in *Sibery* v. *Connelly* (*ubi sup.*)—a case which cannot be distinguished from the present case. It was argued that the proceedings at Hong Kong, which resulted in a sentence of imprisonment for ten weeks, operated as an estoppel and precluded the sailors from now contending that their conduct at Hong Kong was lawful. But it was pointed out that there could be no estoppel, the criminal proceedings at Hong Kong not being between the same parties as the present civil proceedings in this country, and the contention was abandoned by Mr. Hamilton in his reply. It follows that, in my opinion, Lawrance, J. was right in holding that the sailors were entitled to wages, in which term I include an allowance for maintenance. He gave wages only down to the date when the sailors arrived in England. The cross-appeal claims wages to a later date, and I think the sailors are entitled to wages up to the date of the order of this court. There has not been any such "final settlement" as is required by sect. 134 of the Merchant Shipping Act 1894, and I can see no sufficient reason for stopping at any date short of the judgment of this court.

The cross-appeal also claims general damages. In substance these damages are based upon what took place at Hong Kong. But it is not competent for us to hold that the imprisonment was unlawful, or that any case of malicious prosecution can be established. If I may say so, I regret that we cannot award damages for their sufferings at Hong Kong. It is said, however, that the letter "D." which was put upon their discharge papers at Hong Kong by the magistrate who thus recorded the master's report has seriously prejudiced them and rendered it difficult to procure fresh employment. But it was in the discretion of the master under sect. 240 (4) and sect. 129 of the Merchant Shipping Act 1894 either to give or to refuse to give what is equivalent to a character to a discharged seaman. By writing "D." he stated that he declined, and, in the absence of malice, I do not think any claim for damages can be based on the master's refusal to give a character. Our attention was directed to many sections of the Merchant Shipping Act 1894, in addition to the three to which I have referred. But I do not consider it necessary to allude to them, except to say that the statutory requirements contained in sects. 113 and 114 with respect to agreements with seamen (which I assume to have been observed in the present case) do not seem to me to have any bearing upon the true construction and effect of this agreement. In other words, they do not prevent the seamen from asserting that they contracted only for an ordinary mercantile voyage. The result is that, in my opinion, the appeal should be dismissed with costs, and the cross-appeal should be allowed with costs, but only to the extent I have indicated. The figures were apparently agreed in the court below, and I presume there will be no difficulty in agreeing to them now.

FARWELL, L.J. read the following judgment:—The defendants' appeal depends for its success or failure on the true construction of the contract of the 5th Dec. 1904 between the shipowners and the seamen, and, as that contract is in common form, the case is of considerable importance. At the date on which the contract was executed war between Russia and Japan had been raging for several months, and H.M. Secretary of State for Foreign Affairs had, in March 1904, given public notice in the *Gazette*—first, that the Emperor of Russia regarded coal as contraband of war; and, secondly, that ships carrying contraband of war to Japanese ports would be seized and condemned. Under these circumstances the seamen (whom I assume to have been aware that coal was contraband of war) signed on for a voyage of not exceeding three years' duration to any ports or places within 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, and (or) any other ports within the said degrees of latitude—which amount in effect to the whole Eastern hemisphere, and therefore include the whole seat of war and the ports there of the two belligerent Powers—and to end at such port in the United Kingdom or the Continent of Europe (within home trade limits) as might be required by the master.

The question is whether on arriving at Hong Kong the men could lawfully refuse to proceed with their cargo of coal to Sasebo, a Japanese port. In my opinion this must depend upon the construction of the contract. No new circumstances had arisen which could justify them in refusing to carry out their bargain if they had in fact made it—for example, if the port of destination had been stated in the contract to be Sasebo, I can see no ground on which the men could have refused to go there; for it is well settled that the carrying of contraband in time of war between two belligerents, both of whom are at peace with this country, is legitimate trading, although the trader runs the risk of capture and of the condemnation of the contraband stores, and in many (if not all) cases of his ship also. In *Ex parte Chavasse; Re Grazebrook* (*ubi sup.*) Lord Westbury, L.C. said: "The belligerent Power certainly acquires certain rights which are given to it by international law. One of these is the right to arrest and capture when found on the sea, the high road of nations, any munitions of war which are destined, and in the act of being transported in a neutral ship, to its enemy. This right which the laws of war give to a belligerent for his protection does not involve as a consequence that the act of the neutral subject in so transporting munitions of war to a belligerent country is either a personal offence against the belligerent captor, or an act which gives him any ground of complaint either against the neutral trader personally or against the Government of which he is a subject. The title of the belligerent is limited entirely to the right of seizing and condemning as lawful prize the contraband articles. He has no right to inflict any punishment on the neutral trader, or to make his act a ground of representation or complaint against the neutral State of which he is a subject.

In fact, the act of the neutral trader in transporting munitions of war to the belligerent country is quite lawful, and the act of the other belligerent in seizing and appropriating the contraband articles is equally lawful. These conflicting rights are co-existent, and the right of the one party does not render the act of the other party wrongful or illegal. There is, however, much incorrectness of expression in some writers on the subject, who, in consequence of this right of the belligerent to seize *in transitu* munitions of war whilst being conveyed by a neutral to his enemy, speak of the act of transport by the neutral as unlawful and prohibited commerce. But this commerce, which was perfectly lawful for the neutral with either belligerent party before the war, is not made by the war unlawful or capable of being prohibited by both or either of the belligerents, and all that international law does is to subject the neutral merchant who transports the contraband of war to the risk of having his ship and cargo captured and condemned by the belligerent Power for whose enemy the contraband is destined. That the act of the neutral merchant is in itself innocent is plain from the circumstance that the belligerent captor cannot visit it with any penal consequence beyond the judicial condemnation of the ship and cargo, nor can he make it the subject of complaint." See also *The Helen* (2 Mar. Law Cas. O. S. 293 (1865); 13 L. T. Rep. 305; L. Rep. 1 A. & E. 1); Manual of Prize Law by Lushington and Holland, sects. 44 to 48; Wheaton on International Law, 4th edit., p. 678; and Hall's International Law, 4th edit., p. 693; 5th edit., p. 667. But these risks, and especially the risk of condemnation of the ship, which necessarily would put an end to the contract of service on board her, with the corresponding advantage of being conveyed home to the United Kingdom or Europe within home trade limits, are, in my opinion, altogether outside the ordinary perils of shipwreck, pirates, and the like, which seamen necessarily undertake—such perils are the usual perils of peaceful commerce—the peril of capture by ships of war and loss of ship is an unusual and additional peril arising out of a state of war between States friendly to our country—a peril, too, which in this case might entail great hardships on the seamen, as was the case in *Austin Friars Steam Shipping Company* v. *Strack* (*ubi sup.*), where the men had to get home across Siberia.

Further, the appellants' argument is pressed to this extent, and does in my opinion logically lead to this, that the seamen would be bound to attempt to run the blockade of a closely invested harbour, and to incur all the dangers of wounds and death incident to such an adventure. In this case we have to construe a contract to sail in the first instance to a named neutral port many miles from the scene of war, followed by general words embracing ports within an area wide enough to include the ports of the belligerent Powers, but wide enough also to give ample scope for successful voyages elsewhere. If war had broken out between this country and Russia before the contract was entered into, I apprehend that the court would have had no difficulty in construing the contract so as to restrict the generality of the words by excluding Russian ports in order to give effect to the paramount intent of the parties—namely, to engage in lawful trading. It is the same principle, although its application is not so obviously necessary, that leads the court to construe the general words so as to limit them by the paramount intention to engage for a peaceful voyage with ordinary commercial risks only — *verba intentioni servire debent.* So, too, if the contract had been made before the war and had been to sail to Sasebo, it might well have been construed as subject to an implied condition that the seamen should not be called upon to undertake anything more than the ordinary risks of commercial adventurers. This is, in my opinion, the ground of the decision in *Burton* v. *Pinkerton* (*ubi sup.*), where Kelly, C.B. said that "the contract with the plaintiff was to employ him for twelve months on board this vessel, free from any other perils than such as were incident to a voyage for ordinary commercial purposes" — the contract being for a voyage to Rio or any port or ports over a very large area and containing no express exceptions of any sort. *O'Neill* v *Armstrong, Mitchell, and Co.* (*ubi sup.*) was a stronger case, because the ship was a warship belonging to Japan, and war was declared by Japan against China during the voyage for which the plaintiff had signed on. The plaintiff was held justified in leaving the ship at Aden, and was held entitled to his whole wages because, as Smith, L.J. put it, "by the conversion of the voyage by the Japanese Government from one with the risks incident to peace to a voyage with those incident to war, the peace adventure had become frustrated and put an end to."

The principle to which I have referred above is applicable to all contracts, but in the present case there is the additional circumstance that the contract is one between shipowners and seamen—a class of men whom for nearly two centuries the courts and the Legislature have felt the necessity of protecting. Lord Stowell, in *The Minerva* (1 Hagg. Adm. 347) in 1825, describes them as "a set of men, generally ignorant and illiterate, notoriously and proverbially reckless and improvident, ill-provided with the means of obtaining useful information, and almost ready to sign any instrument that may be proposed to them, and on all accounts requiring protection, even against themselves"; and an Act was passed in 1729 (2 Geo. 2, c. 36) enforcing the execution of written contracts and requiring to be stated as two necessary particulars the extent of the voyage and the rate of wages during its continuance—an enactment which has now expanded into sect. 114 of the Merchant Shipping Act 1894. Lord Stowell in *The Minerva* (*ubi sup*) had to deal with a contract under the Act of Geo. 2 containing the words "from London to New South Wales and India or elsewhere, and to return to a port in Europe," and he held that the words "or elsewhere" must receive a reasonable construction conformable to the necessities of commerce; and he treats as quite outside the contract a voyage "to New Zealand, where not a man ventures to land for fear of being made a meal's meat of by the cannibal inhabitants, as they are represented to be"; and he says that the contract must receive "such a limitation as will not by any means privilege these wild and eccentric rambles which the captain has thought proper to take

upon a voyage rather of experiment and discovery than of commerce." In *The George Home* (1 Hagg. Adm. 370) Lord Stowell says: "The mariners' contract describes the voyage for which they undertake 'to be from the port of London to Batavia, to any ports and places, the East India seas or elsewhere, and until her final arrival at any port or ports in Europe.' This is certainly a most sweeping description of the ports of unlivery, for it comprehends every port situated between the southern and northern extremities of Europe. It would apply with equal truth to Corfu and Archangel; it could not in either case be charged as a misrepresentation. But, though a true description in that sense, and therefore not liable to a charge of absolute deception, yet it by no means answers the beneficial purposes for which the law makes the demand in favour of the mariner, that the voyage for which he contracts shall be made known to him. The beneficial purposes for which the law makes such a requisition in his favour are, that he may know as exactly as can be described for what probable space of time he surrenders himself, his services, his interest, his domestic comforts, his health, and personal convenience. These and other considerations are to influence his decision. With respect to the disposal of himself, he has a right to be informed as far as competent accuracy can be applied to the subject; and it is unnecessary to add that a description, which extends over one entire quarter of the globe, without any more particular limitation, though geographically true, affords nothing that can be considered as bearing the shape or colour of such accuracy."

These observations appear to me to apply to a case like the present. If the shipowner require the seaman to run risks to life and limb, and to health and comfort, greater than those necessarily incident to the usual life of seamen engaged in peaceful commerce, he must state it clearly in the contract, for the court will not deduce it from ambiguous or general words. The contract in the present case fails to do this, and I am of opinion that on its true construction it did not oblige the seamen to sail with coal to Sasebo. Reference was made to sect. 114 of the Merchant Shipping Act 1894, but this does not assist the appellants; assuming that they have complied with it, there is nothing in it to relieve them from the duty of stating explicitly in the contracts any extraordinary risks that they expect the seamen to run. The section is a reproduction of part of sect. 149 of the Act of 1854 and sect. 7 of the Act of 1873. The Act of 1854 was in force when *Burton* v. *Pinkerton* (*ubi sup.*) was decided, and it was not suggested that sect. 149 of that Act expressed the whole extent of the shipowner's duty, and I can see nothing in the words added to the present Act from the Act of 1873 which would have that effect.

Another point was raised by the appellants in the court below—namely, that the conviction of the men by the magistrate at Hong Kong estopped them from raising their present contention; but this was properly given up by counsel for the appellants in this court. It is well settled that a conviction is no estoppel in a civil action: (*Castrique* v. *Imrie*, *ubi sup.*; *Petrie* v. *Nuttall*, *ubi sup.*; and Taylor on Evidence, sect. 1693). Estoppels must be mutual, but the litigation here is between shipowners and seamen; in the criminal proceedings in Hong Kong it was between the King and the prisoners. I am therefore of opinion that the defendants' appeal fails, and must be dismissed with costs.

The plaintiffs have a cross-appeal for their wages and maintenance up to final settlement within sect. 134 (*c*) of the Merchant Shipping Act 1894, and for damages for the hardships and indignities suffered by them in Hong Kong, and for the loss of character entailed by the refusal of the master to give any opinion on the conduct, character, and qualification of the seamen under sect. 129. The claim for damages for malicious prosecution was abandoned in the court below. Lawrance, J. gave the seamen wages and maintenance up to the date of their return to England only, and I am unable to find any reason for this. The Act of 1894 provides by sect. 134 (*c*) that, "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." Lawrance, J. has held, and we agree with him, that the non-payment of the seamen's wages is due to the wrongful act of the master in putting them ashore at Hong Kong and leaving them there. The fact that they were imprisoned immediately after they were put on shore, and therefore could not serve on board, is immaterial, because it happened after the captain had wrongfully determined the contract of service. The seamen did not carry out their real contract of service because the captain would not let them, not because they were imprisoned; and we are therefore in no way hampered by the fact of their imprisonment. If the captain had put the men ashore on an island inhabited by savages, he could not set up in defence to a claim under this section the fact that the savages had enslaved the men, and therefore they could not work for him. The result is that there never has been any settlement within sect. 134 down to the present time, and the seamen are entitled to the admitted daily sums down to to-day. I cannot, however, see that they are entitled to any further sum for damages. They admit that they can get none for malicious prosecution because the conviction stands, and the indignities and hardships were incident to such imprisonment, and were the acts of the local police and the prison authorities. I have had some doubt as to the certificate and its being indorsed "D.," but I understand that all parties are willing that this shall be rectified so far as is possible, and that no money claim is now pressed in respect of this. The cross-appeal should therefore be allowed to the extent of giving wages and maintenance up to to-day, and the defendants to the action should pay the costs of the appeal and cross-appeal.

Appeal dismissed and cross-appeal partly allowed.

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

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

Friday, Feb. 1, 1907.

(Before Sir GORELL BARNES, P., FARWELL and BUCKLEY, L.JJ.)

HUTTON *v.* RAS STEAM SHIPPING COMPANY LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Naval court—Seamen—Offences against discipline—Complaint to naval court against seaman—Powers of naval court—Jurisdiction to dismiss from ship—Finality of order of court—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 225, 480-486.

Upon a complaint made to a naval court duly convened in pursuance of sect. 480 *of the Merchant Shipping Act* 1894 *by the master of a British ship under sect.* 225 *of that Act for offences against discipline, the naval court is not restricted in its punishments to those prescribed by sect.* 225, *but may inflict the punishments prescribed by sect.* 483, *sub-sect.* 1, *and may therefore order the seaman to be discharged from his ship and his wages to be forfeited, as provided by that sub-section.*

The plaintiff shipped as a seaman on the defendants' ship at Barry under articles for a voyage for three years for Port Arthur and (or) any ports within certain limits, which included Japan, and back to a final port of discharge in the United Kingdom. Whilst at a port in Japan, which was then at war with Russia, the plaintiff and others of the crew objected to continue the voyage, on the ground that the vessel was carrying contraband of war. They refused to work until an arrangement was made under which they would be indemnified in the event of capture.

Upon the complaint of the master of the ship they were summoned before a naval court under sect. 225 *of the Merchant Shipping Act* 1894 *upon the charges that they had been guilty of continued wilful disobedience to lawful commands, and of continued wilful neglect of duty, and that court, after hearing the evidence, found them guilty of the charges and ordered that they should be discharged from the ship and their wages forfeited.*

In an action for wages and damages for the dismissal from the ship:

Held, that the naval court had power to inflict the punishment of dismissal from the ship and forfeiture of wages under sect. 483, *sub-sect.* 1, *of the Act; that there was no substantial evidence before the naval court that the vessel was carrying contraband of war; that the order was not made without jurisdiction, and was therefore, under sect.* 483, *sub-sect.* 2, *conclusive of the rights of the parties; and therefore the plaintiff could not maintain the action.*

*Decision of Lord Alverstone, C.J. (*10 *Asp. Mar. Law Cas.* 243 (1905); 94 *L. T. Rep.* 645) *affirmed.*

APPEAL from a decision of Lord Alverstone, C.J. in an action brought by the plaintiff, who was formerly employed as a donkeyman on board the steamer *Ras Bera*, to recover 29*l.* 1*s.* wages alleged to be due to him in respect of his employment on board that steamer.

The plaintiff shipped at Barry under articles for a voyage for three years for Port Arthur *viâ* Barry and (or) any ports within certain limits, which included Japan, and back to a final port of discharge in the United Kingdom. The vessel loaded a cargo of coals at Barry and arrived at Port Arthur on the 18th Jan. 1904, during the siege, and the coals were there discharged. The vessel was at Port Arthur during a portion of the bombardment. She got away from Port Arthur on the 11th Feb. and went in ballast to Moji, a port on the west coast of Japan, whence she proceeded to Hong Kong. At Hong Kong the *Ras Bera* was chartered by the Nippon Yusen Kaisha, the R.M.S.S. Company of Japan, on a voyage to carry cargo and passengers to all parts of the world except British North America and Magellan, including Japanese ports. The charter provided that the steamer should fly at the mainmast head during her stay in port any private signal or home flag of the charterers It was also provided by clause 26 of the charter-party that the charterers should not employ the steamer in the carrying of troops and contraband of war. Under this charter she was to proceed to Moji and from Moji to Yokohama. The manifests for the two voyages before her arrival at Yokohama were put in, and it was alleged by the plaintiff that the steamer carried on these two voyages, among other things, rails and other railway material. By Russian proclamations published in the *London Gazette* of the 1st and 22nd March materials for the construction of railways were declared by Russia to be contraband of war. Upon the arrival at Yokohama the plaintiff and others of the crew objected to continuing the voyage on the ground that the vessel was carrying contraband of war, and declined to work until some arrangement was made that in the event of capture they would be indemnified and their wives and families compensated and cared for.

While the question was under discussion the plaintiff and the others who objected declined to do any work, but except in respect of such refusal it was not alleged that they refused to discharge their duty. On the complaint of the master, the seamen in question were summoned before a naval court. The summons recited that the complaint was that they were guilty of continual wilful disobedience to lawful commands and continual wilful neglect of duty and of general insubordination subversive of discipline and prejudicial to the owners' interests, and continued: "And whereas the offence of which you are accused as aforesaid is that of continued wilful disobedience to lawful commands and continued wilful neglect of duty, an offence against sect. 225 of the Merchant Shipping Act 1894 which is punishable on summary conviction." The naval court was held under sects. 480 to 485 of the Merchant Shipping Act 1894, and, after hearing the evidence of the plaintiff, the master, and other witnesses, decided that the plaintiff and others were guilty of continual neglect of duty without good and sufficient cause. The judgment further stated that the sailors' plea that the carrying of contraband vitiated the agreement was without force, the voyage remaining an ordinary commercial venture, any risk or responsibility that might be incurred being borne by the ship. The court further discharged the plaintiff and the other seamen from the steamship *Ras Bera* and forfeited their wages.

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

Evidence was given before the Lord Chief Justice by the plaintiff that at Yokohama the vessel was both taking in and discharging railway materials, and his Lordship was of opinion upon the evidence that this was the case. Upon the other hand, evidence was also given by the plaintiff that military stores were being shipped and men in uniforms carried as passengers; but upon the evidence his Lordship did not find either that the vessel was fitted for carrying troops or members of the Japanese navy, or that any were so carried, and he also thought that there was no substantial evidence before the court that the vessel was carrying contraband of war.

His Lordship held that the naval court had jurisdiction to make the order, and under sect. 483, sub-sect. 2, of the Merchant Shipping Act 1894 it was conclusive of the rights of the parties, and dismissed the action.

The plaintiff appealed.

The Merchant Shipping Act 1894 provides:

225 (1). If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows, that is to say . . . (c) If he is guilty of continued wilful disobedience to lawful commands or continued wilful neglect of duty, he shall be liable to imprisonment for a period not exceeding twelve weeks, and also, at the discretion of the court, to forfeit, for every twenty-four hours' continuance of disobedience or neglect, either a sum not exceeding six days' pay or any expenses properly incurred in hiring a substitute.

Sects. 480 to 486 deal with "Naval courts on the high seas and abroad."

Sect. 480. A court (in this Act called a naval court) may be summoned by any officer in command of any of Her Majesty's ships on any foreign station, or, in the absence of such an officer, by any consular officer, in the following cases—that is to say: (i.) Whenever a complaint which appears to that officer to require immediate investigation is made to him by the master of any British ship, or by a certificated mate, or by any one or more of the seamen belonging to any such ship. (ii.) Whenever the interest of the owner of any British ship or of the cargo thereof appears to that officer to require it.

Sect. 481 (1). A naval court shall consist of not more than five and not less than three members. . . .

Sect. 482. A naval court shall hear the complaint or other matter brought before them under this Act . . . and shall do so in such manner as to give every person against whom any complaint or charge is made an opportunity of making a defence. (2) A naval court may for the purpose of the hearing and investigation administer an oath, summon parties and witnesses, and compel their attendance and the production of documents.

Sect. 483 (1). Every naval court may, after hearing and investigating the case, exercise the following powers—that is to say . . . (c) The court may discharge a seaman from his ship. (d) The court may order the wages of a seaman so discharged or any part of those wages to be forfeited, and may direct the same either to be retained by way of compensation to the owner, or to be paid into the Exchequer, in the same manner as fines under this Act. (f) The court may direct that all or any of the costs incurred by the master or owner of any ship in procuring the imprisonment of any seaman or apprentice in a foreign port, or in his maintenance whilst so imprisoned, shall be paid out of and deducted from the wages of that seaman or apprentice, whether then or subsequently earned. (h) The court may punish any master of a ship or any of the crew of a ship respecting whose conduct a complaint is brought before them for any offence against this Act which, when committed by the said master or member of the crew, is punishable on summary conviction, and shall for that purpose have the same powers as a court of summary jurisdiction would have if the case were tried in the United Kingdom. (k) The court may order the costs of the proceedings before them, or any part of those costs, to be paid by any of the parties thereto . . . and any costs . . . so ordered to be paid shall be paid by that person accordingly, and may be recovered in the same manner in which the wages of seamen are recoverable, or may, if the case admits, be deducted from the wages due to that person. (2) All orders made by a naval court under the powers hereby given to it shall in any subsequent legal proceedings be conclusive as to the rights of the parties.

Danckwerts, K.C., *Llewelyn Williams*, and *M. Morgan* for the appellant.—The summons was issued under sect. 225, and the only punishment which the court had power to award was that provided by that section, which does not include dismissal from the ship and forfeiture of wages. The powers of the court under sects. 480 to 486 did not apply:

Sibery v. *Connelly*, 10 Asp. Mar. Law Cas. 221 (1905); 94 L. T. Rep. 198;
Caine v. *Palace Steam Shipping Company*, 96 L. T. Rep. 410; (1907) 1 K. B. 670.

Batten, K.C. and *Bailhache* for the respondents.—There is no cause of action here, because the plaintiff was discharged and his wages forfeited by the order of the naval court. It was a judicial act by that court, and it had jurisdiction to make the order under sects. 480 to 486. Although the summons was issued under sect. 225, the court had all the powers given by sects. 480 to 483. The plaintiff was discharged by the naval court, not by the master. Under sub-sect. 2 of sect. 483 the plaintiff is estopped from making this claim.

Sir Gorell Barnes, P.—My opinion of this case is that in substance the Lord Chief Justice was quite right. The plaintiff and others being discharged from the ship, afterwards, at a later period, bring their action against the shipowners claiming for wages up to the time of the decision, or for damages for breach of contract of service. The substantial answer set up by the defendants in their statement of defence is the judgment of the naval court, and that the plaintiff was discharged and his wages forfeited accordingly. The answer made in the reply to that plea is really in the nature of a demurrer. A statement of the facts and the position in which the action is brought leads to a consideration of the main question in the case, because this question is not the same as that raised in *Sibery* v. *Connelly* (*ubi sup.*) or in *Caine* v. *Palace Steam Shipping Company Limited* (*ubi sup.*).

The point to be determined is what is the effect of this decision of the naval court at Yokohama. That must turn, I think, upon the procedure adopted and the powers which the court had. Sect. 225 of the Merchant Shipping Act 1894 gives this power. It provides: "If a seaman lawfully engaged or an apprentice to the sea service commits any of the following offences, in this Act referred to as offences against discipline, he shall be liable to be punished summarily as follows." Then there are several cases put; but sub-sect. 1 (c) is the one in point. [His Lordship read it.] Now, sects. 480 to 486 inclusive deal with the con-

stitution of the naval court which dealt with this matter. As I understand, the point made here on behalf of the appellant is that the summons was issued for an offence within sub-sect. 1 (*c*) of sect. 225, and for that only, and that the naval court had no power except to inflict the punishment contemplated by that sub-section, and had no power whatever to discharge the man from the ship and put an end to the service upon which he was engaged. It must be observed that sect. 225 deals with the case of summary conviction and with those matters which can be brought before the magistrate or court which is referred to in sect. 711 of the Act, or the case of a magistrate having the ordinary powers which a summary jurisdiction court has. This court in the present case was constituted under sect. 480, and it is necessary to see what powers that court had. [His Lordship then read sect. 480 and sub-sects. 1 and 2.] Sub-sect. 3 is not applicable in the present case, as it refers to cases of wreck, abandonment, and loss. Sect. 481 deals with the constitution of the court, and provides that it shall consist of not more than five and not less than three members. Sect 482, the marginal note of which is "Functions of Naval Courts," provides: [His Lordship then read that section.] Now, we must turn to sect. 483 to see what power the court has when any complaint is made before it, and how it may deal with it. It is contended on behalf of the appellant that the only power the court had on the summons before it was to punish the seaman under sub-sect. 1 (*c*) of sect. 225.

The contention on the other side is that upon a complaint which was made, even though that complaint was confined by a summons to answer for an offence under sub-sect. 1 (*c*) of sect. 225, the court had all the powers mentioned in sect. 483, if it chose to exercise them in that particular case. That section is as follows: "Every naval court may, after hearing and investigating the case, exercise the following powers." I do not need to read them all, but those particularly applicable to the present case are sect. 1, sub-sects. (*c*), (*d*), (*f*), (*h*), (*k*), and sub-sect. 2. [His Lordship then read them.] The question is whether the court in this case had all those powers on the summons which was before it, so far as it chose to exercise them, or whether it was confined to punishing this man as contemplated by sub-sect. (*h*).

There appears to be the very strongest ground for holding that the court on a matter brought before it, even in the way of a complaint under sect. 225, sub-sect. 1 (*c*), would have, on that offence being proved before it, power to deal with the case in such a way as to apply the powers, so far as it thought right and so far as they were applicable and suitable to the case, which are contained in the sub-sections of sect. 483. It seems to me that there are strong reasons for so holding. In the first instance it must be remembered that these matters are, speaking generally, being dealt with in a foreign port or on the high seas; the heading to the section is "Naval Courts on the High Seas and Abroad." The Legislature is dealing with cases that are brought in such courts, where it may not be that the only thing required to be done is simply to punish the men, or fine them, or forfeit their wages; there may be other things in a British ship upon which these men are that it is necessary should be dealt with by the court in order to free the ship and get rid of the difficulties which the complaint has given rise to. Therefore it seems to me reasonable at the outset to look for a clause such as we find in sect. 483, giving more power when a complaint of this character is made than that of merely punishing; and, further, that view is fortified by the way these sections are arranged and expressed. First of all, sect. 480 starts, "Whenever a complaint is made"; then sect. 482 states, "A court shall hear the complaint," and then, after having heard and investigated the case, it is directed that the court may exercise any of the powers mentioned. Why should exercise of those powers be limited in this case to the particular offence which is referred to in sub-sect. (*h*)? I cannot find anything in the wording to these sections to impose such a limit upon the powers of the court.

There is this further point which Mr Danckwerts made, that it would not be reasonably fair to allow the men to be punished, except in the manner contemplated by sect. 225, sub-sect. 1 (*c*), because they would not have adequate notice of what was alleged against them. I do not think that there is any substance in that point, even if the summons were confined expressly to the offence charged in sub-sect. 1 (*c*) of sect. 225. The men know perfectly well what is the point; the naval court hears all they have to say, because it has to take care that it is done in their presence, and they would see that no injustice would be done even if the summons were strictly confined to an offence under sect. 225, sub-sect. 1 (*c*), because the matter would be thoroughly investigated by the court, and they would only be punished or dealt with in a way which the naval court had jurisdiction to direct, either by discharging them from the ship or otherwise, in addition to any penalty. This point has no merits in this case, because the summons shows that it was not in terms confined only to the particular offence charged, but related to their conduct, although they may have had some excuse for their conduct on the ground that they thought there was contraband of war on board, but in the summons their conduct was stated to be prejudicial to the interests of the owners. So there was a general application which might be dealt with if the court thought fit under their general powers.

The only other point to consider is what is the effect of sub-sect. 2 of sect. 483. It is said it cannot bind the present parties, but it seems to me that it must have that effect, because between whom are the subsequent legal proceedings there referred to? They can only be between the owners on the one side and the seamen on the other, or it may be between the master and his owners, or between the master and the seamen. Is it not right to read that section, if one is satisfied that the order was duly made (which I think I have already shown to be the case), that the order duly made should in subsequent legal proceedings be conclusive as to the rights of the parties? The wording is curious; it is not "between the parties to the particular proceedings"; it does not use the words "between the parties," but "be conclusive as to the rights of the parties." At any rate, the seamen were parties to these proceedings, and it seems to me

that when that section is fairly considered it means if once the matter is disposed of by the naval court, so long as it has power to dispose of it, that puts an end to the matter, no matter who is concerned in the legal proceedings such as I have contemplated, the master, owners, or seamen. If that is the right view, then the order of the naval court in this case put an end to the matter; it was that which discharged the seamen, and not any act of the owners themselves, because the court had jurisdiction to do what they did and their jurisdiction was exercised. It seems to me, whether the conclusion of the court was right or wrong at law does not matter, that the proceedings were binding upon them by virtue of the sub-section to which I have referred, and therefore that the action cannot be maintained. I understand that to be the view expressed by the Lord Chief Justice, and with that view I agree. Therefore, in my opinion, this appeal fails.

FARWELL, L.J.—I agree. This fasciculus of clauses as to the holding of naval courts creates a special tribunal, specially constituted, of not less than three persons, for the purpose of dealing with emergencies arising in foreign ports or on the high seas. This particular court has functions and powers given to it which the President has read, and which I will not go through again. Put shortly, my view is this: Sect. 483 specifies a number of powers which that court may exercise, including the power of forfeiting wages and imprisonment, which are given to a court of summary jurisdiction under sect 225, sub-sect. 1 (*c*), and I cannot see that by specifying the particular punishment which a court of summary jurisdiction may inflict it shows any intention of excluding this special court from the general powers given *seriatim* in a number of sections. With regard to the question of the decision being conclusive under sub-sect. 2, it is well settled that the estoppel in law is only between the parties; and my own view is that this was intended to exclude any such question of estoppel, and to show that the parties interested were intended to have their interests bound by the decision of this court, which would not be the case if the common law doctrine of estoppel only was relied on, because the case would be between the King and the prisoner. That owners are intended to be included in the word "parties" I think is plain from the consideration of sect. 483, sub-sect. 1 (*d*), where the court may direct the sum to be retained by way of compensation to the owner, so that there would be an adjudication in favour of the owner or against the owner as the case may be. I think it is plain that it was intended to make the decision of the court binding in subsequent proceedings against the owner. The other point is as to the meaning of the word "duly." If "duly" means "rightly," it would make the section nugatory altogether. It can, to my mind, only mean an order properly made by the court on a case properly brought for its consideration. I think that the appeal fails and must be dismissed.

BUCKLEY, L.J.—For the decision of this case it seems to be necessary to see what was the complaint, what was done upon that complaint, what jurisdiction purported to be exercised, and whether the jurisdiction was exercised rightly. If it was, then, having regard to sect. 483, sub-sect. 2, the order is to be conclusive as to the rights of the parties. The complaint I take from the master's letter which is annexed to the report of the proceedings before the naval court. It is quite plain what the complaint was—namely, that certain seamen were guilty of continued wilful disobedience to lawful commands and continued wilful neglect of duty and of general insubordination subversive of discipline on board the *Ras Bera*, prejudicial to the owners' interests. The first two subject-matters there mentioned are within sect. 225, sub-sect. 1 (*c*); the third is not. Upon that complaint the proper authority convened a naval court to investigate "the following complaint made by the master," and then it is set out in identically the same words. Then the summons properly recites the complaint, but goes on in a way which I rather regret, because it is not precisely accurate. If it had run "and whereas the offence of which you are accused as aforesaid includes that of" so and so, it would have been perfectly correct; but, unfortunately, it says the offence is that of so and so, "being an offence against sect. 225, which is punishable on summary conviction." The whole matter is governed by the preamble which recites it fully, and, when I come to the proceedings before the naval court, there is no question as to what they were doing and what they found. They found that "the men were guilty of continued wilful disobedience to lawful commands of the officers and continued wilful neglect of duty without good and sufficient cause, and of insubordination subversive of discipline on board the steamship *Ras Bera* and prejudicial to the owners' interest," so that they accepted and adjudicated upon the whole subject-matter. That being the complaint, what were the powers of the naval court? They seem to me to be all those which are given by sect. 483 after hearing and investigating the case, sub-sect. 1 (*c*), (*d*), and (*h*). Clause (*h*) was that which a court of summary jurisdiction could have done under sect. 225. It seems to me that clause (*c*) and clause (*d*) are cumulative, and that this naval court which was sitting at a place abroad was constituted the authority to determine and settle the matters other than those which are included within sect. 225. It appears to me, therefore, that they were acting within their jurisdiction. Then if they acted within their jurisdiction, sect. 483 makes their order conclusive as to the rights of the parties. As to the order being binding between the shipowners and these seamen, I have nothing to add to what the President has said. I think the appeal must be dismissed.

Solicitors: *John T. Lewis*, agent for *Robert Jones* and *Everett*, Cardiff; *Holman, Birdwood*, and *Co.*

Feb. 5 *and* 6, 1907.

(Before COLLINS, M.R., COZENS-HARDY and MOULTON, L.JJ.)

JAMES NELSON AND SONS *v.* NELSON LINE (LIVERPOOL) LIMITED. (*a*)

APPLICATION FOR A NEW TRIAL.

Charter-party — Exceptions—Unseaworthiness at commencement of voyage—Damage to goods—Exceptions of damage "capable of being covered by insurance or which has been wholly or in part paid for by insurance"—Liability of shipowner.

Goods were shipped on board a vessel under an agreement which provided that the shipowner should not be liable "for unseaworthiness, provided all reasonable means have been taken to provide against unseaworthiness," or "for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance."

The goods were damaged owing to the ship being at the commencement of the voyage unfit to carry the cargo, and all reasonable means had not been taken to prevent such unfitness. The owner of the goods was partly insured, and had been paid three-fourths of his loss by the insurers.

Held (*affirming the judgment of Bray, J.*), *that the shipowner was not exempt from liability on the ground that the loss was caused by the ship being at the commencement of the voyage unfit to carry the goods.*

APPLICATION of the defendants for judgment or a new trial on appeal from the verdict and judgment at the trial before Bray, J. with a jury.

The plaintiffs brought this action to recover damages for breach of an agreement for the carriage of frozen meat for the plaintiffs in vessels belonging to the defendants from the River Plate to the United Kingdom.

The agreement was dated 18th June 1904 and was made between the plaintiffs as charterers and the defendants as shipowners.

By clause 10 of the agreement it was provided as follows:

The owners are not to be liable for any loss, damage, prejudice, or delay whatever or whenever occuring caused by the act of God, the King's enemies, pirates, robbers, thieves, whether on board or not by land or sea whether in the employ of owners or not, barratry of master or mariners, adverse claims, restraint of princes, rulers, and people, strikes or lock-outs, or labour disturbances or hindrances, whether afloat or ashore, or from any of the following perils—viz., insufficiency of wrappers, rust, vermin, breakage, evaporation, decay, sweating, explosion, heat, fire, before or after loading in the ship or after discharge, and at any time or place whatever, bursting of boilers, nor for unseaworthiness or unfitness at any time of loading or of commencing or resuming the voyage or otherwise, and whether arising from breaking of shafts or any latent defect in hull, boilers, machinery, equipment or appurtenances, refrigerating or electric engines or machinery, or in the chambers or any part thereof, or their insulation, or any of their appurtenances or from the consequences of any damage or injury thereto howsoever such damage or injury be caused. Provided all reasonable means have been taken to provide against unseaworthiness, collision, stranding, jettison, or other perils of the sea, rivers, or navigation of whatever nature or kind, and howsoever such collision, stranding, or other perils may be caused, and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance, nor for any claim of which written notice has not been given to the owners within forty-eight hours after the date of final discharge of the steamer. The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act, neglect, or default of the stevedores, master, mariners, pilots, engineers, refrigerating engineers, tugboats or their crews or other persons of whatsoever description or employment, and whether employed ashore, on board, or otherwise for whose acts or defaults the owners would in anywise in connection with the exception of this charter otherwise be responsible.

In March and April 1905 the plaintiffs shipped a cargo of frozen meat on board the steamer *Highland Chief*, belonging to the defendants, in the River Plate for carriage to London under the terms of the agreement.

When the steamer arrived a large part of the cargo was found to be seriously damaged.

The plaintiffs alleged that the damage was caused by reason of the vessel not being seaworthy at the commencement of the voyage and being unfit to carry the cargo of frozen meat, and that all reasonable means had not been taken to provide against that unseaworthiness and unfitness; and they claimed damages for breach of the agreement.

The defendants admitted that the cargo was damaged owing to the temperature of the insulated chambers in which the meat was carried not being kept low enough, but they alleged that this was due to the negligence of the engineers; they alleged that they had taken all reasonable means to provide against unseaworthiness; and they contended that the provisions of clause 10 of the agreement protected them from liability.

The plaintiffs had insured the cargo to the extent of 75 per cent. of its value, and after the commencement of this action they had been paid by the underwriters that proportion of the loss.

The action was tried before Bray, J. with a jury as a commercial cause. The jury, in answer to questions left to them by the learned judge, found that the *Highland Chief* was at the commencement of the voyage unfit to carry the cargo of frozen meat safely to its destination; that all reasonable means were not taken to prevent such unfitness; that the neglect was that of the defendants, their officers, and agents; that the whole of the damage was caused by such unfitness; and they assessed the damages at 23,900*l.*

The learned judge reserved for further consideration the questions of law arising upon those findings of the jury.

Pickford, K.C., *J. A. Hamilton*, K.C., and *Bailhache*, for the plaintiffs.

Isaacs, K.C., *Scrutton*, K.C., and *J. R. Atkin* for the defendants.

Cur. adv. vult.

Aug. 11.—BRAY, J. read the following judgment:—In this case the plaintiffs claimed damages for breach of an agreement between themselves and the defendants, dated the 18th June 1904. This agreement provided for the

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

carriage by sea by one of the defendants' line of steamers of a series of cargoes of frozen meat from the River Plate to the United Kingdom, and the breach alleged was that the defendants had failed to keep the temperature in the insulated chamber of the *Highland Chief* down to 25 degrees Fahrenheit during its voyage to the United Kingdom from April to June 1905, whereby the cargo of frozen meat belonging to the plaintiffs was greatly damaged. The defence was that the damage was caused by exceptions mentioned in clause 10 of the agreement. The case was tried before me with a special jury on various days between the 2nd and 14th July, and on the latter day the jury found by their verdict in effect that the *Highland Chief* at the commencement of the voyage was unfit to carry the cargo of frozen meat safely to its destination, that reasonable means were not taken to prevent such unfitness, that the neglect was the neglect of the owners, and that the damage was 23,900*l.* These findings appear to me clearly to entitle the plaintiffs to judgment, subject to two points which were reserved for me to deal with as being points of law, and these are the points I have now to decide.

The first was that under clause 10 the owners—*i.e.*, the defendants—were not to be liable for any damage to the goods capable of being covered by insurance, or which had been wholly or in part paid for by insurance. The second was that the clauses of the conference bill of lading attached, or stated in clause 22 to be attached, to the agreement were to form part of the agreement, and that under one of those clauses the owners were not to be accountable in any case beyond the invoice price of the goods damaged, which was stated to be less than 23,900*l.* With reference to the first point the plaintiffs contended that the owners were not exempted in the case of damage caused by unseaworthiness or unfitness at the commencement of the voyage when reasonable means had not been taken to prevent such unfitness. There is no doubt that it is well settled law that in shipping documents of this character the exceptions do not affect the obligation of the shipowner to provide a ship fit for the cargo at the commencement of the voyage unless it clearly appears from the document that this was the intention of the parties: (see *Steel* v. *State Line Steamship Company* (3 Asp. Mar. Law Cas. 516 (1877); 37 L. T. Rep. 333; 3 App. Cas. 72) and *The Glenfruin* (5 Asp. Mar. Law Cas. 413 (1885); 52 L. T. Rep. 769; 10 P. Div. 103). I think that all the exceptions in clause 10, including the one in question, are exceptions which come within this rule. Clause 6 provides that the owners are liable if they fail to keep the temperature down, unless prevented by the exceptions mentioned in clause 10, and this is one of the exceptions mentioned in clause 10. I can see no reason why the rule should not apply here. But the case is to a great extent covered by authority. In *Price* v. *Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 89 L. T. Rep. 731; (1903) 1 K. B. 750; (1904) 1 K. B. 412 it was held that a clause providing that "rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance" did not exempt the shipowner from liability for loss or damage caused by the negligence of his servants. There are, no doubt, additional words here, "or which has been wholly or in part paid for by insurance," but if the earlier part of the clause is subject to the warranty of seaworthiness, why should not these be. You cannot divide the clause and say that part is subject to the warranty, and not the rest.

The next point to be considered is whether, looking at the whole agreement, there is any clear indication that it was the intention of the parties that the warranty of seaworthiness should be affected. I think the indication is rather the other way. The earlier part of clause 10 provides that owners are to be exempted from liability for unseaworthiness only provided reasonable means have been taken to prevent it, and how can it be said that there is any indication that in this special case owners are not to be liable even when they have failed to provide such reasonable means? I think clause 18 also shows that the protection given to owners is always to be subject to the proviso that reasonable means must have been taken to prevent unseaworthiness. In my opinion, this is a stronger case against the owners than *Price* v. *Union Lighterage Company* (*ubi sup.*), and I must hold that the fact that the plaintiffs were covered to a large extent by insurance does not exempt the defendants from any part of their liability.

As to the second point, it appears very doubtful whether any of the clauses of the conference bills of lading apply, as none were attached to the agreement, but I will assume that they do. The clause in the bill of lading is this: "Claims, if any, for loss by damage or short delivery, or otherwise, arising out of this bill of lading to be settled direct with the owners in Liverpool according to English law, to the exclusion of proceedings in the courts of any other country. Owners not accountable in any case beyond net invoice price of the goods damaged or short-delivered." This is not a claim for damage under the bill of lading, but under the agreement. I do not think this clause was intended to form any part of the agreement. That alone is, I think, a sufficient answer. But what was the net invoice price of the goods damaged here? There was but one invoice, and all the goods included in it were damaged more or less, and the price was 23,444*l.* 8*s.* 4*d.* If freight is added to this, it would greatly exceed the 23,900*l.* I think it should be added. It has to be paid, and I think the intention was that the owners of the cargo should be indemnified against all costs. In some cases the holder of a bill of lading would buy at a price to include a freight, in some cases not. It could not have been meant that the amount for which the shipowner was to be liable was to depend on the chance of whether the invoice included freight or not. I think the real intention was that profit should be excluded and nothing more. I think I am bound to hold on these two grounds that the clause in the bill of lading does not in any way diminish the liability of the shipowner to pay the 23,900*l.* assessed by the jury. The plaintiffs put before me other contentions on this point well worthy of consideration, but it is unnecessary for me to give any opinion on them. In the result, therefore, there must be judgment for the plaintiffs for 23,990*l.*

Judgment for the plaintiffs.

The defendants appealed.

Pickford, K.C., *J. A. Hamilton*, K.C., and *Bailhache* for the appellants.—The learned judge was wrong in holding that the defendants are not protected by the provision in the exempting clause, which says, "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." The cases of *Sutton and Co.* v. *Ciceri and Co.* (62 L. T. Rep. 742 (1890); 15 App. Cas. 144) and *Price* v. *Union Lighterage Company* (*ubi sup.*) are distinguishable from the present case. In the former case the expression "insurance" was used in contradistinction to "freight," and it was therefore held that it ought be read in a more limited sense; and in the latter case the words were "any loss or damage which can be covered by insurance."

The principle of the decision in those cases was that a shipowner who wishes to exempt himself from liability for negligence, must do so in clear and unambiguous language. In the present case there are the further words, "or which has been wholly or in part paid for by insurance," which plainly and unambiguously exempt the shipowner from liability for any loss which has been paid for by insurance. This is a separate and independent exception in respect of any loss which is in fact covered by insurance. There is no reason why a shipowner should not limit his liability under any circumstances to the loss which has actually been suffered by the owner of cargo, and exempt himself from reimbursing the underwriters. The last part of clause 10 shows that the defendants are exempted from liability for loss caused by unseaworthiness arising from the negligence of their engineers or servants. They referred also to

Tattersall v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206 (1884); 50 L. T. Rep. 299; 12 Q. B. Div. 297;

Morris v. *Oceanic Steam Navigation Company*, 16 Times L. Rep. 533;

Phœnix Insurance Company v. *Erie and Western Transportation Company*, 117 U. S. Rep. 312.

Rufus Isaacs, K.C., *Scrutton*, K.C., and *J. R. Atkin*, K.C. for the respondents, were not called upon to argue.

Collins, M.R.—This is an appeal from the judgment of Bray, J. in a case tried before him with a jury, in which the construction of a charter-party was involved. The jury, in answer to questions left to them by the learned judge, gave a verdict which in the result the learned judge treated as a verdict for the plaintiffs. Two questions have been raised upon this appeal. The first point raised is upon the construction of a particular exception in the charter-party. The charter-party was made between the plaintiffs, as charterers, and the defendants, as shipowners, for the carriage of the plaintiffs' frozen meat in steamers belonging to the defendants from the River Plate to the United Kingdom. The controversy arises upon the 10th clause. The material parts of that clause are as follows: "The owners are not to be liable for . . . nor for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise. . . . Provided all reasonable means have been taken to provide against unseaworthiness . . . and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance. . . . The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act, neglect, or default of the stevedores, master, mariners, pilots, engineers, refrigerating engineers, tugboats or their crews, or other persons of whatsoever description or employment and whether employed ashore or on board or otherwise for whose acts or defaults the owners would in anywise in connection with the exception of this charter otherwise be responsible." In answer to the questions left to them the jury found that the *Highland Chief*, the vessel in question, was at the commencement of the voyage unfit to carry the cargo of frozen meat safely to its destination; that all reasonable means were not taken to prevent such unfitness; that the neglect was that of the defendants, their officers, and agents; that the whole of the damage was caused by such unfitness; and that there was neglect on the part of the defendants, their officers or agents in respect of each unfitness in respect of which they awarded damages. The first point taken on behalf of the defendants turns upon that part of the clause of exceptions which says: "The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." The defendants contend that the damage here in question is damage capable of being covered by insurance, and, further, that it has been partly paid for by insurance; and that therefore they are protected by the above exception, and are discharged from liability.

That is the first and chief question which has been argued before us. With regard to that question, it seems to me that the contention of the defendants is concluded by an authority, which appears to me to be directly in point and to cover this case. That authority is the case of *Price and Co.* v. *Union Lighterage Company* (*ubi sup.*), which was decided by Walton, J. I refer to that case, as decided by Walton, J., as being the leading authority upon this question, although the case came before the Court of Appeal and the judgment was there affirmed (*ubi sup.*), because I think that the judgments in the Court of Appeal do not add anything to the judgment of Walton, J. That judgment, in my opinion, stands as a complete and accurate expression of the law, summing up a long line of authorities and applying them to the facts of that case. The head-note to the report of that case is as follows: "Goods were loaded on a barge under a contract for carriage by which the bargeowner was exempt from liability 'for any loss of or damage to goods which can be covered by insurance.' The barge was sunk owing to the negligence of the servants of the bargeowner, and the goods were lost. Held, that the bargeowner was not exempt from liability for loss or damage caused by the negligence of his servants." Now, the words of the clause in that case and of the clause in the present case are, down to a certain point, the same. In that case the words of the exception were "for any loss of or damage to goods which can be covered by insurance"; and in the present case the words

are "damage or detriment to goods which is capable of being covered by insurance."

The latter words are practically identical with the former words, but in this case there are these added words, "or which has been wholly or in part paid for by insurance." In both parts of the clause now under consideration there is the word "insurance," and it seems to me that that word is used in the same sense in both parts. In the case before Walton, J., the learned judge, applying the principle of a number of decided cases, held that, unless it was in the most distinct terms so provided in the contract, the shipowner could not claim that he had contracted that he should not be liable for negligence; and, looking at this provision introduced by the carrier into his contract, excluding liability for loss or damage to goods which could be covered by insurance, Walton, J. read that provision as referring to insurance covering the liability peculiar to the position of a common carrier—that is, to the extraordinary liability of a common carrier, and not to the ordinary liability to take reasonable care; and, reading the word "insurance" in that sense, he held in conformity with a long line of authorities that the carrier had left open his obligation to use ordinary care while he had relieved himself from liability under the extraordinary obligation of a carrier beyond the obligation to use ordinary care; and putting that construction upon the word "insurance" in that case, Walton, J. held that the shipowner was not excused from liability for not using ordinary care.

Applying that decision to the present case, it seems to me that it exactly covers it, and that this provision must be read as not excluding liability for neglect to use ordinary care. It is perfectly clear upon the authorities that the first part will not exclude liability for not using ordinary care. Is that altered by the introduction of the second part of the clause, "or which has been wholly or in part paid for by insurance"? In my opinion insurance in the second part must be the same class of insurance and limited to the same extent as insurance in the first part of the clause. Therefore neither the fact that the loss can be covered by insurance, nor the fact that it has been paid for by insurance, exempts the shipowner from liability for neglect to use ordinary care. The contention of the defendants upon that point is, therefore, unsound, and the judgment of the learned judge upon that point cannot be impeached.

Another point has been taken by the appellants which rests upon another part of the exemption clause. That clause provides that the shipowners are not to be liable "for unseaworthiness or unfitness . . . provided all reasonable means have been taken to provide against unseaworthiness;" and in respect of that part of the clause the learned judge put the third and fourth questions to the jury. The third question was, "Were all reasonable means taken to prevent such unfitness?" and the answer was "No." The fourth question was, "If reasons able means were not taken, was the neglect the neglect of the captain, engineers, ship's officers or crew only, or was it partly the neglect of the defendants or their officers or agents?" and the answer was, "The neglect was that of the defendants, their officers and agents." This point is raised upon those two questions and answers. It is said that, unless the failure to use reasonable means is to be attributed directly to the defendants, the plaintiffs must fail by reason of the provision at the end of the clause of exemption by which the defendants have saved themselves from being responsible for the act or neglect of any agent. That provision is very wide: "The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act, neglect, or default of the stevedores, master, mariners, pilots, engineers, refrigerating engineers, tugboats or their crews, or other persons of whatsoever description or employment, and whether employed ashore or on board, or otherwise, for whose acts or defaults the owners would in any wise in connection with the exceptions of this charter otherwise be responsible." The defendants then say that the only persons who can be said to have failed to provide reasonable means against unseaworthiness were persons within the description in that clause, and that the clause prevents the defendants being liable for their acts or neglect and that they are therefore entitled to the benefit of the exception and are not liable. It seems to me that that clause cannot have the effect which the defendants seek to give to it. It comes at the end of a very long list of exceptions, and in my opinion it may be properly be read as applying only to those exceptions which have not been specially dealt with in the earlier part of the clause. Now, the exemption from liability for unseaworthiness is the subject of a very special provision, "provided all reasonable means have been taken to provide against unseaworthiness." It seems to me that we cannot qualify that special provision by reading into it the provision at the end of the clause which, if read with it, would have the effect of annulling it, because in the case of a company such as this which must act by agents it would be impossible to show that all reasonable means had not been taken by the company itself. I think that the part of the clause dealing with exemption from liability for unseaworthiness is complete in itself, and that it must not be read as qualified by the subsequent limitation at the end of the clause, which may be applicable to other exceptions, but ought not to be applied to an exception which is complete in itself. I think that we cannot read those two parts of the clause together, the one being contradictory of the other, and that as a matter of common sense and according to the recognised canon of construction we ought to apply the different parts of this clause so that one part does not defeat another part. We ought, if possible, to read the whole clause so that each part is consistent, and I can only do that by reading the provision at the end as applicable only to those exceptions which are not specifically dealt with in the same sense in the earlier parts of the clause. In my opinion, therefore, that point made on behalf of the defendants also fails, and the verdict and judgment in favour of the plaintiffs cannot be displaced. This appeal accordingly fails, and must be dismissed.

Cozens-Hardy, L.J.—I agree, and for the same reasons. This very long clause of exceptions is a patchwork which is ungrammatical and barely intelligible. Men of business ought to be able to

express in terms which are terse and clear that which they intend to effect in a matter of this kind, and if shipowners wish to exempt themselves from liability for unseaworthiness they ought to make that intention perfectly clear. In the present case they certainly have not done so. In my opinion the implied warranty of seaworthiness is in full effect except in the one event of all reasonable means being taken to provide against unseaworthiness, and that event, according to the finding of the jury, has not happened. With reference to that part of the clause upon which the second point of the appellants was founded, I entirely agree with what has been said by the Master of the Rolls. It is an ordinary rule of construction that general words in a document do not overreach or defeat a special provision earlier in the same document; if possible, both parts must be read together so as to make the whole document consistent. When we consider that a company can only act by agents, we can only give effect to both parts of the clause by holding that the later part is only intended to and can only operate upon those earlier parts which do not contain any special provision, such as "provided all reasonable means have been taken to provide against unseaworthiness." For these reasons I think that the appeal fails and must be dismissed.

Moulton, L.J.—I am of the same opinion, and I adopt the reasoning of the Master of the Rolls and Cozens-Hardy, L.J., but I desire to put the case in another way also. It is common ground that, in a case like this, there is an obligation upon the shipowner to supply a seaworthy ship. Though I have some doubt about it, I will assume that the exception in clause 10 with respect to unseaworthiness is an exception from the general obligation to supply a seaworthy ship. That exception is conditional, and, if I may paraphrase the exception very shortly, it would read like this —or for initial unseaworthiness, provided all reasonable means have been taken to provide against unseaworthiness. Now, the jury have found that all reasonable means were not taken to provide against unseaworthiness, and, therefore, that exception disappears and the initial obligation to provide a seaworthy ship remains. An ingenious argument has been pressed upon us founded upon the provision at the end of clause 10, immediately after the list of exceptions, "the above-named exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act, neglect, or default of," &c. The defendants contend that that must be applied to the condition as well as to the unseaworthiness, but I think that it is clear that it relates only to the origin of the mischief and not to what I may call the excuse. The exception itself still holds good, and the sole effect of the provision at the end of the clause is to make the exception read like this, "or for initial unseaworthiness, however arising, provided all reasonable means," &c. It leaves the exception subject to precisely the same condition, and, unless compliance with that condition can be proved, the exception will not operate. That is the present case, and it remains an ordinary case where there is an obligation to supply a ship which is seaworthy. The other point is one of some difficulty. The defendants say that the provision relating to insurance is really a separate and independent clause, and must be considered as a clause by itself. Assuming that it is a separate and independent clause, can the defendants claim the benefit of it? In my opinion they cannot. The fundamental obligation of the defendants is to supply a seaworthy ship, and this clause, which is a limitation of liability, cannot be relied upon by the defendants if they have failed to fulfil their fundamental obligation. It is a limitation of their liability if they do fulfil that obligation, but otherwise it is not. I think that, upon the broad ground that the defendants were under an initial obligation to supply a seaworthy ship and failed to do so, they cannot claim the benefit of this clause limiting their liability. I agree, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitors for the appellants, *Rawle, Johnstone*, and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

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

Tuesday, Feb. 26, 1907.

(Before Lord Alverstone, C.J., Farwell and Buckley, L.JJ.)

Von Freeden *v.* Hull, Blyth, and Co.; G. P. Turner and Co. and others, Third Parties. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Co-owners—Equitable ownership—Disbursements on authority of managing owner toward expenses of voyage—Agency—Contribution by co-owners.

The managing owner of a ship, who was the registered holder of certain shares therein, issued a circular inviting persons to purchase shares in the ship, the price to be paid by instalments. He afterwards executed a mortgage of all his shares to a banking company, by whom the same was duly registered. Subsequently the plaintiffs on the authority of the managing owner as such, and as agent on behalf of the other persons interested in the ship, made disbursements at a foreign port in respect thereof. The plaintiffs brought an action against the defendants as the registered and true owners of one sixty-fourth share in the ship, and as having given authority to the managing owner to navigate her on their behalf, to recover the amount of such disbursements. The plaintiffs having obtained judgment, the defendants claimed contribution from the persons who had entered into the contracts for the purchase of shares in the ship.

Held, that there was a right of contribution against those persons on the ground that in the circumstances the managing owner was the agent of such persons and clothed with authority to bind their credit.

Decision of Phillimore, J. (10 *Asp. Mar. Law Cas.* 247 (1906); 94 *L. T. Rep.* 849) *reversed.*

By an agreement dated the 11th June 1901, Short Brothers Limited, of Sunderland, agreed to build for and sell to G. H. Elder, trading as G. H. Elder and Co, a steel screw steamship, to be complete and ready for transfer in or about Aug. 1902.

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

The price was to be 38,000*l.* on the basis of net cash on the transfer of the vessel, but Elder was to have the option of paying 33,000*l.* by deferred payments on condition that he indorsed over the shareholders' acceptances to Short Brothers Limited.

Provision was made for these acceptances being three months' bills renewable, but so that one-tenth of the balance was paid off at every six months.

Interest at 5 per cent. was to be given for money, if any, paid before the completion of the vessel, and to be due at the same rate on unpaid instalments.

Clause 12 of the agreement provided that the vendors were to transfer shares to the purchasers as they were paid for, and to hold security on the remainder of the shares for the deferred payments until the same were fully paid.

Two or more steamships had been already built by Short Brothers Limited for Elder under similar agreements, and the way in which Elder had raised money for their purchase had been by getting friends or tradesmen who might expect to supply the ship to take shares, or a share or half a share, in the ship, paying their proportion of the cost.

The balance Elder had had to raise as best he could; some part he paid out of his own moneys, the rest by borrowing from his bankers or leaving it due on mortgage to Short Brothers Limited.

As to the *Dovedale*, which was the name given to the steamship built under the agreement of the 11th June 1901, the same course was to be pursued, which course was known to Short Brothers Limited and was contemplated by both parties, as the provision that Elder was to indorse over the shareholders' acceptances to Short Brothers Limited showed.

On the 21st Oct. 1902 Elder issued a printed circular inviting persons to take shares in the *Dovedale* on the terms of approximately one-seventh cash down and the balance in six monthly instalments with interest at 5 per cent.

Elder had issued a similar circular for his previous ships.

The arrangement as proposed by the circular made the instalments larger, and the periods of payment somewhat shorter, than those fixed by the contract of the 11th June 1903, possibly for the purpose of affording scope for some financing.

It was not very clear in the circular whether Elder proposed to receive from the shareholders and, if received, to keep their instalments, or whether Short Brothers Limited were to have them, and whether the shares were ultimately to be transferred to the purchasers by Elder or by Short Brothers Limited.

In practice Elder received all the payments so made and kept them, and did not even carry them to separate accounts. He did from time to time, though always too late, make further payments to Short Brothers Limited to the amount of 3500*l.*, which would have entitled him to six more shares, but he never got them.

The *Dovedale* was complete and ready for delivery on the 10th Jan. 1903.

A supplemental agreement was then made between Short Brothers Limited and Elder whereby Short Brothers Limited were to retain possession of fifty-six shares as collateral security for 33,000*l.*, but they were not to participate in the profits or to be liable for the debts of the ship.

They agreed not to deal with or realise the shares until default, and to transfer shares from time to time as bills were paid off.

At the same time apparently Elder paid them 5000*l.*—being rather more than the price of eight shares.

Simultaneously the *Dovedale* was registered in the name of Elder alone, and he appointed himself managing owner.

On the 13th Jan. 1903 Short Brothers Limited were registered as owners of fifty-six sixty-fourth shares, and remained so during all material times.

On the 19th Jan. 1903 Hull, Blyth, and Co. were registered as owners of one sixty-fourth share, which they had purchased from Elder; the other seven sixty-fourth shares remained in him.

Until the 22nd Jan. 1904 a banking company were registered as mortgagees of those other seven sixty-fourth shares under a mortgage executed on the 7th Feb. 1903.

Of the several persons who had applied for shares in response to the circular issued by Elder, Morgan had applied on the accompanying form and paid in full for half a share before the ship was complete.

Dixon received the circular and, though there was no proof that he signed the application form, he was treated as having taken one share on the terms of the circular, and he accepted that position. He paid by instalments, and had not completed his payments.

Turner, trading as G. P. Turner and Co., took two shares upon the terms of certain letters and an oral agreement that he should pay by instalments—in fact, in the same way as in the circular, but without reference to it. He was expressly promised that his acceptance for instalments should be in the hands of Short Brothers Limited. He completed his payments on the 27th Dec. 1904, but never got a bill of sale.

Holtzapfel and Dooley each took one share and Armstrong half a share. These persons all took their shares substantially on the terms of the circular, paid for them by instalments, and had not completed their payments.

Stockdale was in Elder's books as holder of a half-share, and was credited with certain payments and profits and debited with his unpaid instalments.

Dens, who was a foreigner and ought therefore to have acquired no interest in a British ship, took one share and was liable to forfeiture. He paid in full for his share on the 4th July 1903, and received a bill of sale for one share in the ordinary form on the 7th July 1903, but did not register it.

The first voyage of the *Dovedale* was a prosperous one, there being enough profits to pay all the disbursements and a dividend of 15*l.* a share.

The second voyage was also prosperous, but was not completed until Jan. 1905, at which date Elder had become bankrupt.

During that voyage Messrs. Von Freeden made disbursements and earned commissions at the port of Buenos Ayres in respect of services rendered to the *Dovedale* upon the authority of

Elder as managing owner and agent on behalf of the other persons interested.

Owing to Elder having become bankrupt, he had not applied the profits of the voyage in payment of the disbursements, commissions, or dividends.

Messrs. Von Freeden accordingly brought this action against Messrs. Hull, Blyth, and Co. as the registered and true owners of one sixty-fourth share in the *Dovedale*, and as having given authority to Elder, the managing owner, to navigate the ship on their behalf, to recover the sum of 1381*l.* 15*s.* 10*d.*, the amount of the plaintiffs' claim.

Of the other registered owners, Short Brothers, Limited were not joined as defendants, because though apparently owners, they were really only mortgagees of fifty-six sixty-fourth shares, and had given no authority to Elder to sail the ship for their benefit; and Elder was not joined because of his bankruptcy.

The defendants appeared and defended up to a certain point, and then delivered third-party notices to the persons who had applied for shares in pursuance of the circular which had been issued by Elder claiming contribution from those persons; and being satisfied that the amount claimed by the plaintiffs was due to them, and having obtained orders under which the third parties were to be bound by the judgment to be signed by the plaintiffs, they consented to such judgment.

The defendants contended that the third parties were jointly and severally liable with them to contribute to the discharge of the plaintiffs' claim, or that they were entitled to contribution from the third parties to the extent of their respective shares of the claim and the costs and expenses paid or incurred by the defendants; or, in the alternative, that the defendants were entitled to an indemnity from the third parties for such proportion of the claim and costs and expenses which the defendants had paid or incurred in excess of their proper or proportionate share thereof.

Dooley did not appear, and Armstrong, who was not represented before the court, agreed to be bound by the cases of the others.

Stockdale was found to have never authorised the transaction as to his half-share, and knew nothing about it.

In Feb. and March 1906 the action came on for trial before Phillimore, J. sitting in the Commercial Court without a jury, when his Lordship reserved judgment.

On the 12th March 1906 the learned judge delivered judgment, deciding (10 Asp. Mar. Law Cas. 247; 94 L. T. Rep. 849) that of the third parties (other than Stockdale) all were entitled to judgment except Dens, the foreigner, none of them being an "owner" of the ship either at law or in equity except the foreigner, who was an owner in equity, and therefore liable to make good to the defendants one-half of the amount which they had paid under the judgment.

From that decision the defendants now appealed against the remaining third parties.

Scrutton, K.C. (with him *Robertson Dunlop*), for the appellants, referred to

Frazer and Co. v. *Cuthbertson*, 6 Q. B. Div. 93; *Mitcheson* v. *Oliver*, 1855, 5 Ell. & Bl. 419.

Montague Lush, K.C. (with him *Leck*), for the respondents G. P. Turner and Co., referred to

The Bonnie Kate, 6 Asp. Mar. Law Cas. 149 (1887); 57 L. T. Rep. 203;
Abbott's Law of Merchant Ships and Seamen, 13th edit., p. 103.

J. A. Hamilton, K.C. (with him *A. Adair Roche*) for the respondents Morgan, Holtzapfel, and Dixon.

Scrutton, K.C. replied.

Lord Alverstone, C.J.—After listening to the very able arguments which have been addressed to us, I feel no difficulty in coming to the conclusion that this appeal in the main ought to succeed, and that the persons whom Mr. Lush and Mr. Hamilton represent, and the other persons, if any, in the same position, are liable to make contribution in order to pay the sums of money expended by Hull, Blyth, and Co. I will not pause to distinguish between the two cases which have been made—one depending on co-ownership and the other on partnership. But I will state at once the broad ground on which I think that this appeal ought to be allowed.

Hull, Blyth, and Co. were sued in respect of a claim for disbursements in connection with a ship called the *Dovedale*. They were the only persons on the register as part owners in respect of one sixty-fourth share. The persons whom they seek to make liable to contribute are persons who had made a bargain with Elder to take one or two sixty-fourths, or half sixty-fourths, the total amount to be taken by such persons being about eight and a half sixty-fourth shares. It is not disputed that there was no defence to the action brought against Hull, Blyth, and Co., and that they rightly paid the amount claimed from them, and that the judgment against them is binding against any other persons liable to contribute in respect of the debt originally incurred by Elder.

Therefore we have to consider whether the judgment of Phillimore, J. was right which practically decided that the only person liable to contribute was the man named Dens, who was in a position to be placed on the register if he had been a British subject. The result is that, if that judgment is right, all the other persons will escape the obligation to contribute. As I have already said, I should not be very anxious to decide by my judgment whether those persons sought to be made liable were equitable owners or not. All I need say is that I should have come to the conclusion that they had equitable interests in the ship, although there might be a difficulty in enforcing those rights because Elder was not in a position to complete the bargain. But still I think that those persons had an equitable ownership. However, in the view which I take it is not necessary for me to decide that point. But I may add that, if it were necessary to do so, I should not have concurred with the view taken by Phillimore, J. on that point. Now, I think it right to say, sitting in this court, that a great part of the difficulty arises from the way in which the case was presented in the court below. Too little attention was there paid to agency and partnership, and too much attention was paid to the extent to which the persons referred to were to be regarded as owners or equitable owners. But, on turning

over Phillimore, J.'s notes, I find one distinct reference was made by Mr. Scrutton in his reply to the question of agency, and therefore I have no doubt that this point was distinctly taken before Phillimore, J., although he does not refer to it in his judgment.

I propose to base my judgment on two or three propositions which I can state, without referring to any authorities, from the following passage in Abbott's Law of Merchant Ships and Seamen (14th edit., p. 55): "Many attempts have been made to hold persons liable for the price of goods supplied, or work done, to a ship, or for the torts of those in charge of, or on board, her, on the ground that such persons are registered as the ship's owners. As a general rule, the person so registered is liable, but not because he is owner. If such a person is sued in an action of contract, the plaintiff cannot ordinarily succeed unless the defendant has contracted in person, or by an agent, or has held out the actual contractor as his agent; nor is he, in general, liable in actions of tort, unless he in fact employed the person actually guilty of the tort. There may be some exceptional cases in which liability is imposed on him by statute, and in others his property may become incumbered by a maritime lien, and liable to an action *in rem*, but, apart from these exceptions, it is thought that the above is the test."

I think that that was what Butt, J., in deciding the case of *The Bonnie Kate* (*ubi sup.*), had in his mind when he said: "The real question, as I have said before, is whether McBride and Co. had authority to pledge Vasey's credit, for, if they had, of course Vasey would be liable. I hold that, on the facts of this case, he gave no such authority. Had he been asked if he would allow his credit to be pledged in respect of this share, who can doubt what his answer would have been? I think the plaintiff's case entirely fails, and I therefore dismiss Mr. and Mrs. Vasey from the suit, and order the plaintiffs to pay their costs." He stated the proposition as I think that it ought to be stated. Aye or no, was the order given on authority? Mr. Hamilton says that in the present case there was no authority to do more than to manage the ship and to have recourse to these persons if anything more was wanted. But in Carver's Carriage by Sea (4th edit., p. 41, sect. 36), which must now be regarded as a work of authority, it is said: "The business of a ship having several owners is ordinarily conducted by a managing owner, or a ship's husband, appointed by the owners for the purpose. He bears their authority, and acts as their general agent to do all the ordinary business of the ship. Thus, usually, he is empowered to make any such contracts for carrying goods in the ship, or for letting her, as are consistent with her ordinary employment; and to do what else may be 'necessary to enable the ship to prosecute her voyage and earn freight.' And the contracts so made are generally binding on all the part owners personally."

It seems to me to be pretty plain that as a fact and under these circumstances authority was given to Elder to incur this liability in respect of which judgment was obtained against Hull, Blyth, and Co., and that we are bound to come to the conclusion that there is a right in them to claim contribution against these other persons. That brings me to what I conceive to be the only question in the case—namely, what is the true position of the persons who signed the paper which accompanied the circular of Oct. 1902 or who have since come in on the terms of that paper? Phillimore, J. said that all the persons take their interests on the terms of that paper, and that seems to me to be the common-sense view. And, regarding it as a business document, I come to the conclusion that everybody who took shares in the ship or came in on the terms of this paper entered into the venture and undertook to pay for his shares which he was bound to take, and meanwhile he was to have the benefit of the undertaking. If that document had stood alone, I should have come to that conclusion. The vessel was intended to be sailed for the benefit and on behalf of the persons who subscribed. Somebody was to manage it, and it is not suggested that anyone but Elder should be the manager, and during the year 1903 the ship proceeded on her voyage, and, as regards the first voyage, accounts were sent to each of these persons which show that to the knowledge of these shareholders a voyage had been completed on the terms of the paper which accompanied the circular in respect of which no liability had been incurred, and they were told that the ship was going on another voyage. It is clear to my mind that they were partners in one undertaking in which the amount of their interests was to be ascertained by the quantum of co-ownership. It is quite impossible to contend that Elder was not the agent in fact of these various persons to manage the ship, and there is no equity in throwing the burden of the loss on the one person who was alone on the register. I think, therefore, that this appeal should be allowed.

Farwell, L.J.—I agree. Phillimore, J. has found that all parties came into this adventure either as signatories of the paper which accompanied the circular or on the terms of it, and I see no reason to differ from that finding. The question therefore resolves itself into one of fact depending on the construction of the documents and subsequent acts of the parties. It is clear that all these persons knew that there was to be a joint adventure and intended to take shares in it, and the question of equitable ownership is in my opinion a matter of no importance. But I am unable to doubt that these first signatories did acquire an interest in equity in the ship. I cannot follow the argument that there was no equitable interest. But whether you regard these persons as co-owners or co-partners their liabilities are entirely the same. Having appointed an agent to act for them, they have clothed him with authority. There is a passage in Lindley on Partnership, 6th edit., p. 384; 7th edit., p. 416, which is in point here. It is there said: "The general principle, however, that partners must contribute rateably to their shares towards the losses and debts of the firm is not open to question. Their obligation to contribute is not necessarily founded upon, although it may be modified and excluded altogether by, agreement. For example, where there is no agreement to the contrary, it is clear that if execution for a partnership debt contracted by all the partners or by some of them when acting within the limits of their authority is levied on any one partner, who is compelled to pay the whole debt, he is entitled to

contribution from his co-partners. So, if one partner enters into a contract on behalf of the firm, but in such a manner as to render himself alone liable to be sued, he is entitled to be indemnified by the firm, provided he has not, as between himself and his co-partners, exceeded his authority in entering into the contract; and if, in such a case, he with their knowledge and consent defends an action brought against him, he is entitled to be indemnified by the firm against the damages, costs, and expenses which he may be compelled to pay." The result is that, from whichever point of view you look at it, everything else follows, and Elder as agent had power to bind the credit of these persons. The appeal should therefore be allowed.

Buckley, L.J.—Judgment was given in the action against Hull, Blyth, and Co. for 1381*l.* 15*s.* 10*d.* on account of disbursements made on the authority of Elder, the managing owner. The question is whether the respondents to this appeal are liable as co-owners to make contribution, which depends on a question of fact whether Elder was the agent of the several respondents for the purpose of incurring this debt. In the court below it was much discussed whether these persons were owners or not. There was certainly no legal ownership, but the absence of legal or equitable ownership would not determine that Elder was not the agent of these persons. Elder was originally entitled to the sixty-four sixty-fourth shares in the ship. He mortgaged the greater part of those shares, and agreed to transfer certain of them. It seems to me that in equity such transferees were equitable owners. Elder's duty was to discharge the mortgage and complete the equitable title by conferring the legal title on the persons who had become contractually entitled. But, whether they were or were not equitable owners, was not Elder their agent for this purpose—the purpose of dealing with the ship? As regards all parties there is one document which is common to all. Cheques were sent for the dividend accompanied by an account. Each of the parties is there treated as a person entitled to a sum of money per share. The account is addressed to the "owners" of the steamship *Dovedale*. After dealing with the figures, it ends with carrying forward a sum of money, and the persons are informed that the ship has entered on her second voyage, and with that they receive the cheque for the dividend. All that seems to me to be evidence in support of the agency of Elder. Each person has an interest measured by the share which he held or which he was contractually entitled to have from Elder. I think that these persons were so dealing with Elder as that he was managing the ship on their behalf, and that this appeal must succeed.

Appeal allowed.

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

Solicitors for the respondents, *William A. Crump* and *Son; King, Wigg*, and *Co.*, agents for *Wilkinson* and *Marshall*, Newcastle-upon-Tyne.

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Monday, Dec. 17, 1906.

(Before Channell, J.)

Leonis Steamship Company Limited *v.* Joseph Rank Limited. (*a*)

Charter-party—Bill of lading—Commencement of lay days — Demurrage — "Bahia Blanca and there load"—Port or usual loading place within port—"Time for loading shall commence to count twelve hours after written notice has been given"—Time taken in getting to berth.

A charter-party provided that a vessel should "proceed as ordered by the charterers or their agents to the undermentioned place or places and there receive a full and complete cargo of wheat . . . cargo to be loaded at the rate of 200 *tons per running day, Sundays and holidays excepted (if ship be not sooner dispatched), and time for loading shall commence to count twelve hours after written notice has been given by the master . . . that the vessel is in readiness to receive cargo . . . and all time on demurrage over and above the said laying days shall be paid for by the charterers. . . ."*

The charterers' agents ordered the vessel to go to Bahia Blanca. The vessel arrived and anchored off the pier in the river within the port on the 24*th Feb. Notice was given by the captain the same day. The vessel had anchored in a possible, but not the usual, loading place. The berths alongside the pier were occupied, through the crowded state of the port. The charterers wanted the vessel to go alongside the pier to load. On the* 30*th March the vessel obtained a berth. The loading was completed on the* 5*th April.*

Held (rejecting a claim for demurrage), that, although there is in general (and subject to a few possible exceptions) an obligation on the ship to go to the berth selected by the charterer, yet the terms of the charter must be looked at to see whether that is to be done in the shipowner's time before the ship can be treated as an arrived ship, or in the charterer's time after the lay days have commenced. There was nothing in the charter-party to definitely guide on this point. The time taken in getting to the berth could not be included in the lay days.

The rule as stated by Brett, L.J. in Nelson v. Dahl, Donkin, and Co. (4 *Asp. Mar. Law Cas.* 172, 392 (1879); 44 *L. T. Rep.* 381; 12 *Ch. Div., at p.* 582) *and followed in* Pyman *v.* Dreyfus (6 *Asp. Mar. Law Cas.* 444 (1889); 61 *L. T. Rep.* 724; 24 *Q. B. Div.* 152) *followed.*

Commercial action tried before Channell, J. sitting without a jury.

The plaintiffs claimed demurrage and freight and a declaration that they were entitled to exercise a lien upon 120 tons of wheat in respect thereof.

The plaintiffs were the owners of the steamship *Leonis*, and the defendants were the receivers of certain cargo shipped on the steamship *Leonis* and holders of bills of lading dated the 31st March and the 3rd and 5th April 1905.

In March and April 1905 the vessel loaded a cargo of 4196 tons of grain at Bahia Blanca, upon

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

the terms of a charter-party dated the 30th Dec. 1904.

Phillimore, J., on a preliminary trial, held that the terms of the charter-party were incorporated into the bills of lading.

The material parts of the charter-party were as follows:

Buenos Ayres, . . . 30th Dec. 1904. The Uniform River Plate Charter-party, 1904. Homewards—Steam. It is this day mutually agreed between Thomas L. M. Rose, as broker for and on behalf of owners of the good screw steamship called the *Leonis*, of the measurement of 2660 tons gross and 1701 tons net register, . . . now trading, and Messrs. Brauss, Mahn, and Co., Buenos Ayres, charterers (3)—that the said ship, being tight, staunch, and strong, and in every way fitted for the intended voyage, shall . . . after arrival at Montevideo . . . and after discharge of her inward cargo, if any, proceed as ordered by the charterers or their agents to the undermentioned place or places, and there receive from them a full and complete cargo of wheat . . . in bags and (or) bulk, to be loaded as follows—viz., (4) at one or two safe loading ports or places in the river Paraná, not higher than San Lorenzo, . . . which cargo the said charterers bind themselves to ship, not exceeding what she can reasonably stow and carry over and above her tackle, apparel, provisions, and furniture; . . . (5) and, being so loaded, shall with reasonable speed therewith proceed to St. Vincent . . . for orders (unless these be given . . . by charterers on signing bills of lading) to discharge at a safe port in the United Kingdom, . . . or so near thereunto as she can safely get (always afloat) and deliver the cargo, in accordance with the custom of the port for steamers, on being paid freight at and after the following rates—viz. (6) 18*s.* 3*d.* per ton for cargo loaded in the river Paraná . . . (10) charterers have the option of loading the entire cargo at Bahia Blanca at the rate of 17*s.* 6*d.* per ton; . . . (21) orders for the first loading port are to be given by the charterers (or their agents) immediately upon the written application of the master, brokers, or agents, between 9 a.m. and 6 p.m., . . . upon master's report of arrival in ballast, . . . at Montevideo or at an Argentine port, as per clause 3, otherwise time used in waiting for orders shall count as lay days, and the cancelling date shall be correspondingly extended; . . . (22) lay days not to commence before the 15th Feb. 1905, unless charterers begin shipping sooner, and should steamer not be ready to load by 6 p.m. on the 15th March 1905, charterers to have the option of cancelling this charter-party, and for the purpose of this clause the preliminary twelve hours' notice of readiness to load, stipulated for in clause 23, shall not be obligatory; . . . (23) cargo to be loaded at the rate of 200 tons per running day, Sundays and holidays excepted (if the ship be not sooner dispatched), and time for loading shall commence to count twelve hours after written notice has been given by the master, . . . on working days between 9 a.m. and 6 p.m. to the charterers or their agents that the vessel is in readiness to receive cargo . . . and all time on demurrage over and above said laying days shall be paid for by the charterers . . . to the ship, at the rate of fourpence sterling per gross register ton per day. . . . (31) . . . Vessel to have a lien on cargo for recovery of all such bill of lading freight, dead freight, demurrage, and all other charges whatsoever. . . . (39) If the cargo cannot be loaded by reason of riots or any dispute between masters and men occasioning a strike or lock-out of stevedores . . . railway *employés*, or other labour connected with the working, loading, or delivery of the cargo proved to be intended for the steamer, or through obstructions on the railways or in the docks or other loading places beyond the control of charterers, the time lost not to be counted as part of the lay days (unless any cargo be actually loaded by the steamer during such time), but lay days to be extended equivalent to the time lost owing to such cause or causes.

The bills of lading were as follows:

Shipped in good order and condition by Messrs. Brauss, Mahn, and Co., in . . . the *Leonis* . . . now riding at anchor in Bahia Blanca and bound for destination as per final B/L . . . A quantity of Barletta wheat in bulk weighing . . . and to be delivered in the like good order and well conditioned at the port of destination (the act of God, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature or kind soever excepted) unto order or to their assigns, they paying freight for the said goods as per charter-party. . . .

On the 21st Feb. the vessel arrived at Montevideo, and notice was given to the ship's agents by the captain. The charterers, having heard of the arrival of the ship, communicated with the ship's agents at Buenos Ayres, and on the 22nd Feb. the vessel was ordered to go to Bahia Blanca.

On the 24th Feb., about noon, the vessel arrived at Bahia Blanca and anchored in the river within the port, about three ship's lengths from the railway pier.

At 4.30 p.m. on the same day notice of readiness to receive cargo was given to the charterers, who desired the vessel to go alongside the pier to load. On the steamship's arrival about forty-six vessels were in the port, and all the berths alongside the pier were full.

The vessel remained anchored until the 28th March, when, on receipt of orders, the vessel went alongside another vessel which had a berth alongside the pier. A lighter came and discharged to the vessel.

On the 29th March the vessel got an inner berth, and commenced loading on the 30th March and completed on the 5th April.

It appeared from the evidence that a vessel which was lying higher up in the river than the steamship *Leonis* was receiving cargo from lighters, and that there had been a strike of railway *employés* and military disorders during the early part of the month of February, which, it was alleged, caused obstruction on the railway and at the port.

When the steamship *Leonis* arrived in the United Kingdom the plaintiffs exercised a lien for demurrage and freight, and deposited 120 tons of wheat, part of the cargo, with the dock company, under the powers granted by the Merchant Shipping Act.

The defendants, in order to release the wheat, deposited, without admitting liability, 105*l.* with the dock company in respect to the freight, and paid 641*l.* 4*s.* 8*d.*, the amount of the lien for demurrage, and the company's charges.

The plaintiffs alleged that, as the lay days expired on the 22nd March 1905, fourteen days' demurrage—at 4*d.* per gross register ton per day—was due, and they claimed 105*l.* for freight and 620*l.* 13*s.* 4*d.* for demurrage, and a declaration that they were entitled to exercise a lien on the 120 tons of wheat until those sums had been paid.

The defendants alleged that no demurrage was due, and claimed damages for the detention of the wheat, and for the return of 641*l.* 4*s.* 8*d.* paid to the dock company and interest thereon.

J. A. Hamilton, K.C. and *Bailhache* for the plaintiffs.—The vessel arrived at Bahia Blanca on the 24th Feb., and notice to load was given the same day. The lay days expired on the 22nd March, and fourteen days' demurrage have been incurred. The charter-party has to be read as if the vessel was to "proceed to Bahia Blanca and there load." According to the authorities, when notice was given of readiness to load, the vessel was an arrived ship and the lay days began to run after the expiration of twelve hours from the giving of the notice. Time taken in getting to the berth must be counted in the lay days.

The authorities deal with two classes of cases, the one where the vessel has to go to a port, the other to a place in a port. This charter-party provides that the vessel was only to go to Bahia Blanca—that is, the port of Bahia Blanca—and not to any particular place in the port. In *Pyman* v. *Dreyfus* (*ubi sup.*) the vessel had to proceed to "Odessa or so near thereunto as she might safely get," and Huddleston, B., at p. 155, explains the point. That case is in point, and has not been overruled. *Sanders* v. *Jenkins and Co.* (1897) 1 Q. B. 93; 2 Com. Cas. 12) is distinguishable. When a fixed period is allowed for loading and the place named in the contract for the loading is of wide extent, and not a definite spot, the lay days begin when the ship is ready and at the charterers' disposal within the named place, although she may not be in the berth or dock where the particular cargo is to be loaded, or even in a place where the loading could be done. The period fixed by the charter-party in such cases for "loading" is a period within which the charterer undertakes that the ship, after she is ready within the named port or place, shall get to her place of loading and load:

> Carver's Carriage by Sea, 4th edit., sects. 624 (*a*) and 627 (3).

On the 24th Feb. the ship had arrived and was ready to be loaded, and time ran twelve hours from notice as the ship was at the disposition of the charterers. In *Pyman* v. *Dreyfus* (61 L. T. Rep. 724; 24 Q. B. Div. 152) Mathew, J., at p. 157, says: "The vessel arrived on the 22nd Dec. at a point where she was at the disposition of the charterers. . . . The place of loading chosen by the charterers was a place where she could not load, as it was a part of the port then crowded by other ships, and she had to wait a considerable time. It appears to me that during all this time the charterers were contracting a liability under their contract that the ship should be loaded during the time specified in the charter-party." "Proceed to Bahia Blanca" meant proceed to the commercial port at Bahia Blanca. If the charter-party meant that the vessel had to go to a loading part of the port, then the vessel, when she had anchored, had arrived at such a place, for there is evidence to show that loading could be done at such a place. The case of *The Felix* (3 Mar. Law Cas. O. S. 100 (1868); 18 L. T. Rep. 587; L. Rep. 2 A. & E. 273) is distinguishable.

Scrutton, K.C. and *A. J. Ashton*, K.C. for the defendants.—The vessel had to go to the place stated in the charter-party; that means to the usual place of discharge at that place. The lay days did not begin until the vessel went to a berth alongside the pier. It was not a customary place at which to load where the vessel anchored. If a place is named by the charterers to which the vessel has to go, the risk of waiting is on the ship, and the lay days do not begin to run until the place of discharge named in the charter-party or selected by the charterer under any option expressed or implied in the charter-party has been reached:

> *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.

The cases of *Sanders* v. *Jenkins and Co.* (1897) 1 Q. B. 93; 2 Com. Cas. 12) and *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*) are in point, and the latter case in effect overrules *Pyman* v. *Dreyfus* (*ubi sup.*). The latter case treats the lay days as commencing when the ship is at the disposition of the charterer in the port, and not when it reaches the berth to which it is ordered to load. *Pyman* v. *Dreyfus* (*sup.*) is therefore contrary to *Tapscott* v. *Balfour* (1 Asp. Mar. Law Cas. 501 (1872); 27 L. T. Rep. 710; L. Rep. 8 C. P. 46) and to *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*):

> Scrutton's Charter-parties and Bills of Lading, 5th edit., pp. 99, 100, 101.

Alternatively, if the lay days commence from the expiration of twelve hours after notice—that is, if they include the time taken in getting to the berth—then there was a delay to the loading caused by an insurrection, military riot, or strikes and obstructions on the railways or in the docks. Clause 39 of the charter-party, therefore, protects the defendants. The lay days, if they commenced from the expiration of twelve hours after notice, and there was no strike, ended, allowing for Sundays and holidays, on the 24th March. They also cited

> *The Carisbrook*, 6 Asp. Mar. Law Cas. 507 (1890); 62 L. T. Rep. 843; 15 P. Div. 98;
> *Ashcroft* v. *Crow Orchard Colliery Company*, 2 Asp. Mar. Law Cas. 397 (1874); 31 L. T. Rep. 266; L. Rep. 9 Q. B. 540;
> *Davies* v. *McVeagh*, 4 Asp. Mar. Law Cas. 149 (1879); 41 L. T. Rep. 308; 4 Ex. Div. 265;
> *Nelson* v. *Dahl*, *Donkin*, *and Co.*, 4 Asp. Mar. Law Cas. 172 (1879); 44 L. T. Rep. 381; 6 App. Cas. 38;
> *Murphy* v. *Coffin*, 12 Q. B. Div. 87;
> *Brereton* v. *Chapman*, 1831, 7 Bing. 559; 5 M. & P. 526;
> *Dall' Orso* v. *Mason*, 3 Sess. Cas., 4th series, 419; 13 Sc. L. Rep. 270;
> *The Katy*, 7 Asp. Mar. Law Cas. 510, 527 (1894); 71 L. T. Rep. 709; (1895) P. 56.

Channell, J. read the following judgment:—I have to give my decision upon a point raised at the end of the plaintiffs' case, which, if decided one way will put an end to the case, if decided the other way there will be further points to be gone into. The steamship *Leonis* was under a charter to go to Montevideo for orders to proceed to one or other of certain South American ports, including Bahia Blanca. She was ordered to Bahia Blanca, and the charter-party has to be construed exactly as if it had been only to proceed to Bahia Blanca and there load. The charter provided that the lay days were to begin twelve hours after notice that the ship was ready to load. The ship arrived off the pier at Bahia Blanca and anchored in the river within the port a few ship's lengths off the pier. The master then gave the

notice that the ship was ready to load. The charterer desired the ship to go alongside the pier to load, which she eventually did, but was delayed in getting a berth there owing to the crowded state of the port, and the question is whether the lay days begin twelve hours after the notice or only after her getting the berth alongside.

There are very numerous cases on the question when lay days begin, and some judges, particularly the late Lord Esher in *Nelson* v. *Dahl, Donkin, and Co.* (*sup.*) and in *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*), have endeavoured to lay down rules, but there have been considerable differences of opinion at various times and on various points, and eminent writers of text-books have followed the example of the judges both in endeavouring to lay down rules and also in differing as to what those rules are. Now, some are fairly clear. Where the charter is to proceed to a dock and there load, it is sufficient if the ship gets into the dock, and the lay days then begin, although there may be delay in her getting to the loading berth in the dock: (*Tapscott* v. *Balfour*, *sup.*, and other cases). If the charter is to proceed to a port and there load, and nothing more is said, then it is, I think, clear that it is not sufficient for the ship to get within the outskirts of the port, but she must get to some usual loading place within the port. This is expressed by the late Mr. Carver by saying that the ship must get within the commercial port as distinguished from the legal or geographical port. He means, I think, by this the same thing as to a usual loading place in the port. Then it certainly was supposed at one time to be the rule that if the ship got so far (there being nothing further in the charter-party than to go to the port) it was sufficient, and she was then an arrived ship, and the lay days began. This appears to have been decided in *Pyman* v. *Dreyfus* (*sup.*), but this is the proposition which is now questioned.

Next, it is, of course, clear that if the actual loading berth is named in the charter-party the ship must get there, and lay days do not begin until she does. Further, if the charter contains an express option to the charterer to name a berth, the berth when selected and named is to be treated as written into the charter, and the charter is to be construed as if the berth had been named there originally. This is decided in *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*). In the next place, whether such an option is expressed in the charter or not, there nevertheless is an obligation on the ship to go to the berth selected by the charterer: (see *The Felix*, *sup.*). There questions of demurrage and lay days were no doubt discussed, but it does not seem to have been necessary to decide these points, and the decision proceeded on general grounds. It is obviously the right of the charterer whose cargo it is which has to be loaded, and which he is bound to have ready there for loading, to select (of course, within the limits of the port or other place named in the charter) the particular place for loading, and not for the shipowner to say where he will take the cargo, but this obligation arises not necessarily from the terms of the charter but rather from the relative positions of shipowner and charterer and the purpose and object of the contract—viz., to take the charterer's goods. The existence of this obligation is quite consistent with its being performed in the shipowner's time (that is, before the lay days commence) or in the charterer's time (that is, after the lay days commence), and you must, I think, look to the terms of the charter-party and to the rules for its construction to see in whose time it is that the getting to the berth selected is to be done. It is not necessary for my present purpose to consider how far the general right of the charterer to select the loading berth is to be qualified, as, for instance, by saying that he must not select a place the physical access to which is obstructed or that he must select a place to which access can be got in a reasonable time. There have been differences of opinion, at all events on the latter point.

Now, this being the state of the authorities when the case of *Sanders* v. *Jenkins and Co.* (*sup.*) came before Collins, J., he got from Mr. Bankes, the counsel arguing, an admission that the obligation to go to the berth selected by the charterer existed, and he treated that as an admission that the obligation arose under the charter in that case. If it were so of course it followed from *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*) that the place selected by the charterers had to be written into the charter-party. This is the case mainly relied on by Mr. Scrutton, while Mr. Hamilton relies on *Pyman* v. *Dreyfus* (*sup.*), which case Mr. Scrutton suggests has been overruled. I do not, however, find that it has been either expressly overruled or even dealt with by any judges as a discredited case. It was quoted in *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* (*sup.*), but it is not mentioned in the judgment, although both Lord Esher and Bowen, L.J. go through the cases and say which they think right and which they consider they are overruling. If the two cases *Pyman* v. *Dreyfus* (*sup.*) and *Sanders* v. *Jenkins and Co.* (*sup.*) really are inconsistent, I think I should be bound to follow the decision of a Divisional Court rather than the decision of a single judge at Nisi Prius.

I am, however, prepared to go beyond that, and say that I think Mr. Scrutton's view of *Sanders* v. *Jenkins and Co.* (*sup.*) cannot be right, for if it is it amounts to saying that Collins, J. in that case laid down a new rule, and that now whatever the charter-party may say (unless, of course, it contains express provision to the contrary, or unless perhaps there is some binding custom of the port to the contrary) the rule now is that lay days do not begin until the vessel reaches the loading berth selected by the charterer. That gives delightful simplicity, and is a rule which the House of Lords may perhaps be good enough to lay down, or even the Court of Appeal might perhaps feel able to do so, but as it involves giving the go-by to some scores of cases, I think a judge of first instance can hardly do it. Moreover, the new rule would be inconsistent with the well-established rule as to cases where the charter-party names a dock, and it would be very peculiar if there was a greater obligation on the ship as to going to a specific berth where the charter-party was less specific by naming a port only than where it was more specific and named a dock.

I think the true rule is that, although there is in general (and subject to a few possible

exceptions, which I do not deal with) an obligation on the ship to go to the berth selected by the charterer, yet the terms of the charter must be looked at to see whether that is to be done in the shipowner's time before the ship can be treated as an arrived ship, or in the charterer's time after the lay days have commenced, and I do not think the old rules as to when lay days begin can be considered abrogated, and I think that Collins, J. in *Sanders* v. *Jenkins and Co.* (*sup.*) treated the admission of counsel as meaning that the charter-party in that case obliged the ship to go to the charterer's berth, and therefore held the case governed by *Tharsis Sulphur and Copper Company Limited* v. *Morel Brothers and Co.* In the case before me I find nothing in the charter-party to guide me definitely on this point, and I must follow the rule as stated by Brett, L.J. in *Nelson* v. *Dahl, Donkin, and Co.* (12 Ch. Div., at p. 582), followed in *Pyman* v. *Dreyfus* (*sup.*). The lay days are to begin twelve hours after notice that the ship is ready to load, and if the ship was, when notice was given, in a usual loading place within the port, I think she was ready, and although she would have to go to the berth alongside the pier, as ordered by the charterers, yet she would go there in the lay days. I have some evidence from the captain that the place were he brought up was a usual loading place, but I understand there is evidence to the contrary taken on commission, and that evidence, I think, I must hear. [After further evidence had been given, the learned judge continued:] Though the evidence is not very satisfactory, the inference I draw is that the place where the vessel anchored was not the usual loading place, but was merely a possible loading place, and that the time taken in getting to a berth cannot be included in the lay days. Judgment for the defendants on the claim and on the counter-claim that the money be paid out to the defendants, and no interest.

Judgment for the defendants.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton,* and *Lewis,* for *Bolam, Middleton,* and *Co.,* Sunderland.

Solicitors for the defendants, *Pritchard* and *Son,* for *Hearfields* and *Lambert,* Hull.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

May 17, 18, 21, 22, *July* 2, *Aug.* 7, *Nov.* 21, *Dec.* 1, *and* 12, 1906.

(Before Sir GORELL BARNES, President.)

THE JOHANNESBURG. (*a*)

Damage action—Practice—Action against Tyne Improvement Commission—Judgment for defendants — Public authority — Costs as between solicitor and client—Statutory power—Authorised works — Deviation — Act done in "intended" execution of public duty — Public Authorities Protection Act 1893 (56 *& 57 Vict. c.* 61), *s.* 1, *sub-s.* (*b*)*—Railway Clauses Consolidation Act* 1845 (8 *Vict. c.* 20), *ss.* 11, 12, *and* 15.

An action for negligence and breach of duty in not providing an efficient coal staith was brought against a port authority, the Tyne Commission, and was dismissed.

The defendants applied for costs as between solicitor and client on the ground that they were a public authority within the meaning of the Public Authorities Protection Act 1893, *sued in respect of a breach of their public duty. The plaintiffs opposed the application on the ground that the Act only applied to persons exercising powers on behalf of the public as a whole, such as a municipal corporation, and also that the commission were not sued in respect of an act done in the "intended" execution of a public duty, as the negligence and breach of duty alleged against them was in respect of unauthorised works, as the limits of deviation allowed by sects.* 11, 12, *and* 15 *of the Railway Clauses Consolidation Act* 1845 *had been exceeded.*

Held, that the defendants were a public authority, and as such entitled to have their costs taxed as between solicitor and client, as the application of the Act was not limited to municipal authorities; that the sections in the Railway Clauses Consolidation Act 1845 *relied on by the plaintiffs had no application, as they were enacted for the benefit of adjoining landowners, and that, even if the works were unauthorised, they had been erected in the* bonâ fide *belief that they were part of the authorised works, and having been opened to the public there was a duty on the commission to keep them in a fit state.*

ACTION of damage.

The plaintiffs were the owners of the steamship *Johannesburg.*

The defendants were the Tyne Improvement Commission.

The plaintiffs issued a writ against the defendants on the 2nd June 1905 claiming damages for the injury sustained by their steamship *Johannesburg.*

The statement of claim delivered by the plaintiffs alleged that the defendants owned No. 5 coal staith on the Tyne, which they held out as a fit place at which to coal ships, and invited steamships to coal there, receiving payment therefor; that on the 3rd March 1905 the defendants, on payment of dues by the plaintiffs, invited the *Johannesburg* to the staith, and she was being loaded with bunker coals when a fire broke out on the staith and seriously damaged the ship; that at the time the fire occurred an hydraulic loading spout, owned by the defendants, was projecting over the ship, and the defendants' servants negligently failed to move the spout, whereby the ship was prevented from moving quickly and suffered more damage. The plaintiffs alleged that by the invitation and by holding out the staith as a proper place to load at, and by receiving payment for the use of it, the defendants impliedly warranted that it was a fit place, that the defendants had taken reasonable care to make it so, and impliedly undertook that reasonable care should be taken that the steamship should not be injured while being loaded. They further alleged that the staith was not a fit place, and that no proper care had been taken to make it safe. They alleged that the staith was constructed of a very inflammable material, creosoted timber, lit by electric light, which rendered the structure

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

highly dangerous unless the greatest care was taken with regard to the electric light installation, that no proper care was taken of the installation, and that it caused the fire. They further alleged that the defendants had used the installation in a negligent manner when it was in a defective state, and negligently failed to have a proper self-recording apparatus to register the defects, and that the fire was caused by the negligence, and that they negligently failed to provide any proper fire extinguishing apparatus on the staith, and so the fire spread to the ship.

The defendants by their defence denied that that there was any warranty or undertaking as alleged, or that they were guilty of negligence, or that the fire arose through any fault of their servants, and alleged that it was an accident. They also alleged that the loading spout was raised clear of the vessel shortly after the outbreak of the fire, and that the plaintiffs could have moved her away, but did not. They traversed all the facts contained in the statement of claim, and, while admitting that the fire extinguishing appliances were not on the staith when the fire originated, alleged that the absence of them did not cause the fire to spread to the ship, and that the plaintiffs could by the exercise of ordinary skill and care have avoided the damage done by the fire. The defendants alleged that the fire was caused by a burning brake block falling from a coal waggon on the six-foot way about a hundred yards from the river end of the staith.

The trial of the action began on the 17th May, and on the 21st May the President intimated that he did not think the electric installation had anything to do with the outbreak of fire.

The plaintiffs then applied to amend their claim by alleging that the fire was caused by the defendants negligently allowing a burning brake block to fall on inflammable material, and not having fire extinguishing apparatus ready. The defendants denied the negligence alleged with regard to this matter.

On the 22nd May the president dismissed the action on the ground that the plaintiffs had failed to make out their case. The defendants then asked for an order that their costs might be taxed as between solicitor and client on the ground that they were a public authority within the meaning of the Public Authority Protection Act 1893, s. 1, sub-s. (*b*), which is cited in the judgment, together with the sections of various local Acts referred to in the course of the case.

The engineer to the Tyne Commissioners was called on the 7th Aug. and stated that the staith and railway in question were the railway No. 8 and staith mentioned in sect. 10 of the Tyne Improvement Act 1867, but that the railway took a different line to that on the plan, being about twice as long and being raised about 7ft. in order to accommodate higher ships, though both railway and staith were in the limits of the plan.

July 2, *Aug.* 7, *Nov.* 27, and *Dec.* 1.—*J. A. Hamilton*, K.C. and *D. Stephens* (*Rufus Isaacs*, K.C. with them) for the defendants, the Tyne Improvement Commission.—The defendants are the port and harbour authority for the river Tyne, and are a public authority within the meaning of the Public Authorities Protection Act 1893. They are therefore entitled to have their costs taxed as between solicitor and client under sect. 1 (*b*) of the Act. This staith was built under sect. 10 of the Tyne Improvement Act 1867. Sect. 15 of that Act provides that the work should be completed within seven years, but that time was extended by sect. 45 of the Tyne Improvement Act 1897 for ten years to 1907. The staith was built in 1903, the electric light was installed in 1904, and the fire took place in 1905. The Harbour Docks and Piers Clauses Act 1847 is incorporated with the local Acts by sects. 70 and 71 of the Tyne Improvement Act 1897. That being so, sect. 33 of the Act of 1847 applies to this staith, and upon payment of a rate the staith is open to all persons for the shipping and unshipping of goods. The case made by the plaintiffs was that this was not a safe place at which to bunker a steamship, which means that the commissioners are charged with a breach of a public duty. This action is similar to that brought against the Bradford Corporation in the case of *Jeremiah Ambler and Sons* v. *Bradford Corporation* (87 L. T. Rep. 217; (1902) 2 Ch. 585), and in that case the corporation were held to be entitled to solicitor and client costs. A harbour authority has been held to be a public authority within the meaning of the Act of 1893:

> *The Ydun*, 81 L. T. Rep. 10; 8 Asp. Mar. Law Cas. 551; (1899) P. 236.

And see

> *Fielding* v. *Morley Corporation*, 79 L. T. Rep. 231; (1899) 1 Ch. Div. 1.

In *Attorney-General* v. *Company of Proprietors of Margate Pier and Harbour* (82 L. T. Rep. 448; (1900) 1 Ch. 749) the defendants were only held to be outside the Act because they were a dividend paying company; the commissioners here make no profit. A tramway company has been held to be within the protection of the Act:

> *Lyles* v. *Southend Corporation*, 92 L. T. Rep. 586; (1905) 2 K. B. 1.

Pickford, K.C., *Laing*, K.C., and *The O'Conor Don* for the plaintiffs, the owners of the *Johannesburg*.—The judgments in the case of *The Ydun* (*ubi sup.*) and *Fielding* v. *Morley Corporation* (*ubi sup.*) suggest that some limitation must be placed on the Act of 1893. It is submitted that the protection of the Act can only be claimed when the public authority is sued in respect of something done when exercising its functions or performing a duty for the whole of the public and not for a limited class who may chance to avail themselves of what is done. In the case of the *Attorney-General* v. *Margate Pier and Harbour* (*ubi sup.*) a distinction is drawn between acts done by a public body such as a municipal body and acts done by public bodies which only benefit a class, and the Act of 1893 only applies to acts done by bodies such as municipal authorities. [THE PRESIDENT.—Would the Mersey Docks and Harbour Board come within the Act?] There have been cases brought against them in which they have not asked for solicitor and client costs. It is clear the protection afforded by the Act of 1893 is not as wide as the protection afforded by the repealed Acts, for one of the repealed Acts is the Knackers Act (26 Geo. 3, c. 71), and they

cannot be said to be public authorities. The Act of 1893 only applies to acts done by public authorities for the benefit of the public as a whole. No case has decided that the Act applies where a body does a thing of public utility which only benefits those who pay for it. Under the Tyne Improvement Acts there is nothing which benefits the public as a whole, but only the particular class who use the works. [The PRESIDENT.—The commissioners have public duties in respect of the whole river. This case cannot be decided with regard to their duty in respect of this staith only.] The defendants in the *Attorney-General* v. *Margate Pier and Harbour* (*ubi sup.*) had a duty to perform in respect of the whole harbour, but they were held to be outside the Act of 1893. The Railway Clauses Consolidation Act 1845 and the Railway and Canal Traffic Act 1888 are both incorporated in the Tyne Improvement Act 1897. Under sect. 92 of the Act of 1845 anybody may use this railway on paying the proper toll, and under sect. 11 of the Act of 1888 the railway commissioners may make all kinds of orders in favour of the public. These sections apply to every railway, but every railway company is not a public authority, neither are the Tyne Commissioners. This staith was not erected by the defendants under powers conferred on them by Act of Parliament. It is suggested that it was erected under the Tyne Improvement Act 1867, but the works authorised by that Act were to be completed in seven years. The extension of time granted by sect. 45 of the Act of 1897 can only refer to sections which were still operative when the Act of 1897 was passed. Even if the extension of time applies to these works, the staith and railway were not built in accordance with the powers granted to the commissioners, for they have overstepped the limits of deviation allowed by sects. 11 and 15 of the Railway Clauses Act 1845. *Dowling* v. *Pontypool and Newport Railway Company* (L. Rep. 18 Eq. 714), *Doe d. Payne* v. *Bristol and Exeter Railway Company* (6 M. & W. 320), *Crawford* v. *Chester and Holyhead Railway Company* (11 Jur. 917) are cases which show the position of a company who have deviated from their deposited plans. It cannot be said, therefore, that the railway is built under any statutory authority and the railway is not an authorised line. [The PRESIDENT.—If that is so they have no right to charge tolls.] As these are not authorised works the Harbour Clauses Act of 1847 does not apply to them, and the commissioners are under no obligation to admit the public to them. The evidence of the engineer shows that these works are not authorised by the Tyne Improvement Act 1867; they are not made under any other statutory power, and the commissioners could be restrained from making them:

Herron v. *Rathmines Improvement Commissioners*, 67 L. T. Rep. 658; (1892) A. C. 498.

It is impossible to say that this was an act done in the intended execution of a public duty, for the commissioners were under no obligation with regard to these structures at all.

Hamilton, K.C. in reply.—If the suggested distinction between acts done for the whole of the public and acts done for a class who pay for them is correct, words could have been inserted in the Act of 1893 to make the distinction clear. No such distinction can be drawn, for a public authority who own a tramway is protected by the Act if sued by one of its passengers:

Parker v. *London County Council*, 90 L. T. Rep. 415; (1904) 2 K. B. 501.

The Act applies to all public authorities, and is not confined to municipal authorities:

Sharpington v. *Fulham Guardian*, 91 L. T. Rep. 739; (1904) 2 Ch. 449;
Southwark and Vauxhall Water Company v. *Wandsworth Board of Guardians*, 79 L. T. Rep. 132; (1898) 2 Ch. 603.

It is said that the commissioners are not protected by the Act as the line and staith are unauthorised works. Sects. 11 and 15 of the Railway Clauses Act 1845, however, have no application to this case, for this railway and staith are made on land belonging to the commissioners and do not affect any private property. Even if those sections did apply they are enacted solely for the benefit of property owners who are adversely affected by the deviation and do not touch the present question. The commissioners have made this railway and staith *bonâ fide* as part of their authorised works, and they were therefore built in the intended execution of a public duty:

Selmes v. *Judge*, L. Rep. 6 Q. B. 724;
Herman v. *Seneschal*, 6 L. T. Rep. 646; 32 L. J. 43, C. P.
Hardwick v. *Moss*, 4 L. T. Rep. 802; 31 L. J. 205, Ex.
Joliffe v. *Wallasey Local Board*, 29 L. T. Rep. 582; 2 Asp. Mar. Law Cas. 146; L. Rep. 9 C. P. 62.

Dec. 12.—The PRESIDENT.—This is an action by the owners of the steamship *Johannesburg* against the Tyne Improvement Commissioners, which was heard before me in the month of May 1906. The statement of claim in the case alleged the ownership of the steamship *Johannesburg* to be in the plaintiffs, and that the defendants were the owners of a staith known as No. 5 staith on the Tyne, and it further alleged that in March 1905 the steamer, on the invitation of the defendants, and on payment of dues, was being loaded with bunker coal at that staith, and that there was a warranty on the part of the defendants that the staith was a fit and proper staith for the steamer to load at, and that they had taken all reasonable care to render the staith a fit and proper place for that purpose, and that they undertook that all reasonable care should be taken that the steamer was not damaged while so loading, and they alleged that a fire broke out at the staith which damaged the steamer. And in par. 4 the plaintiffs alleged that a spout projected over the steamer, and that the defendants, through their servants, negligently failed to raise it and thereby prevented the steamer being removed. And in par. 5 they charged that the staith was not a proper place for the steamer to load, and that proper care was not taken to render it a safe staith, but that it was constructed of an inflammable material and was lighted by electric light which rendered the structure highly dangerous unless the greatest care was taken in the construction, maintaining, and looking after the electrical installation, and that the installation was not in fact properly maintained and looked after, and in fact caused the fire. Then there is another charge in par. 6 of negligently using the installation, not having it watched or inspected,

and alleging that the damage was in consequence of that neglect, and then there are particulars of what was alleged to be wrong with the installation, and a charge against the defendants of neglecting to provide proper fire-extinguishing apparatus, by reason of which the fire spread. In the course of the case, if I recollect rightly, there was an amendment made in the statement of claim adding a charge that a brake block had been negligently allowed to get on fire and set fire to the staith.

When the case had been fully heard before me I decided it altogether in favour of the defendants, and thereupon an application was made on the part of the defendants under the Public Authorities Protection Act of 1893, s. 1, sub-s. (*b*), which says: "Whenever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client." The application was therefore that the defendants should be allowed solicitor and client costs in this case on the ground that the action had been one against the defendants for "an 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 main question which was argued at first on this application was whether the defendants were a public authority within the meaning of the Act. I ought to have read this; it is headed: "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." The main point was very fully argued, and a number of cases were cited on both sides, and at the close of the arguments the plaintiffs required the defendants to prove that the staiths and railway adjoining in connection with the general railway system were erected under their Act, and so the case stood over for a short time in order that that should be proved. Then evidence was given on that point, and Mr. Walker, the engineer to the Tyne Commissioners, was called, and gave evidence about it. To make intelligible what I have to say about this case it is necessary to refer to the plan which shows what was originally contemplated as being the works to be executed by the Tyne Commissioners and what the works actually executed were. In this plan which was put before me the staiths as constructed are coloured red, and the No. 5 staith is the most easterly staith of all the staiths. The staiths and railway shown on the deposited Parliamentary plans in 1866 are coloured green, and they show how it was originally intended that these staiths should be erected. Then the plan also shows a border line between land which was required by a certain Act of 1867, which I must refer to, and certain lands required by an Act of 1872, and the division is shown by a dotted black line edged with brown, which is to the westward of the place where No. 5 staith is in fact erected, but to the eastward of where the most easterly green drawing of a staith is shown. The limits of deviation on the deposited Parliamentary plan of 1866 are shown on this plan also, and those limits of deviation extend a very long way back to the eastward and westward of all the works that have been considered in this case, and there is no doubt that the staith is a long way within the limits of deviation shown on the plan. The Albert Edward Dock is to the eastward of the position of these staiths, and the greater part of this is inside the limits of deviation, but there is a small bit of it to the eastward apparently, but I do not think it has been considered in this matter at all. The limits of deviation on the plans deposited in 1871 are also shown, and those extend still further to the eastward than the limits of deviation on the plans of 1866 and appear to include the whole of the Albert Edward Dock and to include the staith in question in this case. The plan also shows the quay which was to be constructed, and which was constructed, along the face of the river, and that is marked in brown. The western end is to the westward of this No. 5 staith and the eastern end of it is to the eastward of No. 5 staith. It runs a considerable distance along the river, and, as I understand it, it is shown in the plan as proposed and the deposited plan of 1871 as constructed, and the staiths in question and the railway, which is also in question, ran to the end or partly over this quay. That sufficiently explains the locality. Mr. Walker seemed to consider that this staith was erected under the statute of 1867 which I have to refer to. It has in effect been argued that if it was not constructed under that it may be treated as constructed under the Act of 1872. The No. 5 staith, I understand, was, in fact, constructed in the year 1903—that is to say, about a year before the accident which is in question took place.

On the evidence which was given by this witness the O'Conor Don, one of the counsel for the plaintiffs, who was then, I think, alone in court, made a certain point as to the way in which the structure had been carried out. The railway by which the staith, and I suppose therefore the staith itself, which is a continuation on which the railway goes, is 7ft. higher than the plans deposited, and the railway is also longer by about 200 yards to the eastward of the place on the plan on which the staith was shown originally in 1866, and the point was therefore taken that in these two particulars the defendants had not acted within the authority conferred on them by the Act when regard is had to the provisions of the Railway Clauses Consolidation Act. That point apparently took the defendants somewhat by surprise, though I understood from counsel for the plaintiffs on the last hearing that a notice had been given that the point would be made, and thereupon in order to meet it the case had to stand over again. It stood over until last week, when all points connected with that part of the case were finally argued. So, although there has been a very long discussion of this case, numberless points really have cropped up in the course of it, and there is no doubt, I think, that it is in a state of considerable complexity.

But after giving it the best consideration which I can, it seems to me that certain broad points emerge from the obscurity of the various Acts of Parliament and the statutes, and that things that had originally been contemplated to be done have in fact been done. The first broad point that was taken by counsel for the plaintiffs on the main issue was that the defendants were

not a public body within the meaning of the statute of 1893. Of course the word "person" is there used, but I am speaking of the way in which the broad point was dealt with. I think it is clear that the Act relates to public authorities, and that was the main point which was contested in this case. The conclusion to which I have come is based on consideration of the Act of Parliament which relates to this particular structure, and also to the general position and powers of the Tyne Commissioners. To establish this point it is necessary to refer—I do not mean to do it in any great detail—broadly to the Acts under which the Tyne Commissioners were constituted. The first of those is an Act of 1850, which recites that, "The mayor, aldermen, and burgesses are willing, on the terms herein expressed, that commissioners be appointed for carrying into execution some of the provisions and purposes of this Act, and that the authorities, duties, and obligations of the mayor, aldermen, and burgesses, as the conservators of the port, so far as in this Act expressed, be transferred to and imposed on such commissioners, and that for the purpose of providing a fund expressly for the improvement and conservancy of the port and of the river, a certain portion of the dues received and belonging to the mayor, aldermen, and burgesses, subject as hereinafter mentioned, should be placed at the disposal of such commissioners for the purposes of such improvement and conservancy." Sect. 10 appointed the Tyne Improvement Commissioners, and in sect. 48—I am only referring to a few sections to illustrate what I have to say upon this part of the case, because of course all the Acts have a bearing upon it—provides for an establishment of the Tyne Improvement Fund. The next Act, of 1852, gives further powers to the commissioners, including a power to levy tonnage rates upon vessels entering the port. That is in sects. 33 and 36. Sect. 33 says: "That from and immediately after the passing of this Act it shall be lawful for the commissioners to demand and receive for every vessel which shall enter within the limits of the port of Newcastle-upon-Tyne the sum of one farthing for every ton burden which such vessel shall measure or contain." And sect. 34 gives power to discontinue the same. Then there was also power given by sect. 63 to levy pier rates, and also by sect. 66 to levy dock rates, and by sects. 68 and 70 there was a provision that they should lower their rates and dues accordingly as they had a surplus, after paying all expenses. Then in 1857 there was another Act, which conferred further powers, and by sect. 8 incorporated the Tyne Commissioners, and they had powers to take rates for vessels and goods at the Coble Dene Dock. That is by sects. 42 and 43, and they were to lower the same as they had a surplus. That is by sect. 52 and sect. 55. Then there were several other Acts, called Tyne Improvement Acts, of 1859, 1861, 1865, and 1866, all giving further powers, and then we get to the Act of 1867, which is the important Act to consider in this case. According to the Act of 1867, sect. 2 incorporated the Lands Clauses Consolidation Act of 1845 and the Railways Clauses Consolidation Act of 1845; and there is a recital to this effect: "And whereas the receipts and expenditure of the Commissioners in relation to the Northumberland Docks are directed to be kept separate from the other receipts and expenditure of the Commissioners, and the rates, tolls, duties, and moneys received in respect of the Northumberland Docks are carried to the account of a fund which is in this Act called the Northumberland Dock Fund: And whereas the accommodation provided in the Northumberland Docks has become inadequate for the increased and increasing trade on the northern side of the river Tyne, and it is expedient that the commissioners be authorised, in connection with the Northumberland Docks, to erect and provide such shipping staiths and works on or near the river Tyne as are by this Act authorised, and to connect the same by means of railways with the Blyth and Tyne Railway, the Cramlington Railway, the Blackworth Railway: And whereas it is expedient to make such provision in respect of the cost of works by this Act authorised, as in this Act expressed, and that the application of the surplus revenues arising from the Northumberland Docks, and the appropriation of certain moneys out of the Tyne Improvement Fund, provided for in the Tyne Improvement Act 1861 (in this Act called the Act of 1861), and the Tyne Improvement Act 1865 (in this Act called the Act of 1865), be respectively altered: And whereas plans and sections describing the lines and levels of the said railways and works by this Act authorised, and the lands to be taken or used for the purposes thereof, with books of reference to the plans, have been deposited with the respective clerks of the peace for the county of Northumberland and for the county town of Newcastle-upon-Tyne, and are in this Act referred to as the deposited plans, sections, and books of reference: And whereas it is expedient for the purposes aforesaid and other objects of this Act to confer on the commissioners such further powers as are in this Act mentioned." Then follow the usual provisions as to the enactments. That shows the object of the Act.

Then sect. 8 is as follows: "Subject to the provisions of this Act and the Acts incorporated herewith, the commissioners may enter upon, take, and use such of the lands described on the deposited plans, and in the books of reference thereto, as may be requisite for the purposes of this Act, and in and upon or under those lands respectively may make, maintain, and execute the several works by this Act authorised to be executed (such works not to include the Railway No. 3 on the deposited plans), and respectively within the limits of deviation, and according to the lines and levels shown on those plans and sections." And in sect. 10, towards the latter part of it, there is a provision for a diverging line, of Railway No. 8. It says that "A diverging line of Railway (No. 8) one furlong four chains and twenty-five links in length or thereabouts, commencing in the said township of Chirton, by a junction with Railway No. 4, and terminating on a shipping staith to be constructed on the said river in connection with and for the purposes of Railway No. 8, in the said township of Chirton and parish of Tynemouth, and in the said township and parish of St. Nicholas, or some or one of them." That, I understand, is an authorised railway, No. 8, which has been contemplated. Then towards the very end of sect. 10 there is specified work to be executed: "A wharf or quay, with tramways

and other works, commencing at or near the timber platform, and terminating at or near Whitehill Point aforesaid, all in the said township of Chirton and parish of Tynemouth, and in the said township and parish of St. Nicholas, or some or one of them. Staithes for shipping coals in the river Tyne in the said township of Chirton and St. Nicholas and parishes of Tynemouth and St. Nicholas, or any of them, in connection with, and for the purposes of, railways numbers 4, 5, 6, 7, and 8." That deals with the railways and staiths as originally contemplated.

Then there is a provision in sect. 11 which it is important to refer to, which is stated in the margin to be for the protection of the Duke of Northumberland. It says: "The following provisions shall be in force for the protection of the said duke, his heirs, assigns, and successors in estate: The lands authorised to be purchased and taken under the provisions of this Act shall be used in such manner as the commissioners shall see fit for the purposes of promoting, extending, and improving their undertaking, but the commissioners shall not on any portion of the land purchased or taken from the said duke, construct, or permit to be constructed, any railways other than those authorised to be constructed by this Act (including all necessary works and conveniences connected therewith) without the previous consent in writing of the said duke, his heirs, assigns, or successors in estate, first had and obtained." And "the commissioners shall not sell any part of the land purchased under the provisions of this Act without the licence of the said duke, his heirs, assigns, or successors in estate, in writing for that purpose first had and obtained." I think that is all that I need refer to on the matter of structure.

But there are one or two other sections that have to be mentioned. The first is sect. 15, which provides for a period for the completion of the work within seven years from the passing of the Act. There was a point made about this which I may as well dispose of now: That as the seven years had expired, and had not been completely and properly arranged for by the other Act before this, within which the railway was to be completed, that the powers given by the Act had lapsed. But I think that is really made an end of by the 45th section of the Tyne Improvement Act of 1897, which says: "Sect. 7 of the Tyne Improvement Act 1886 is hereby repealed, and in lieu thereof it is hereby enacted that the time limited by any of the Tyne Improvement Acts 1850 to 1890, for the completion of any of the works authorised by any of such Acts save the deepening and dredging of the bed of the river, to which no limit of time is applicable, is hereby extended until the expiration of ten years from the passing of this Act, and the Tyne Improvement Acts 1850 to 1897 shall be read and have effect accordingly." The point was thereupon made that that was too late for an Act of Parliament after the powers had expired to do what the section purported to do; but that seems to me an untenable proposition, because the effect would have been perfectly ludicrous if it was read in that way, and have no effect whatever. To my mind it extends the powers conferred upon the Tyne Commissioners in its terms, just as if those terms had been originally incorporated which gave the powers.

Going back to the Act of 1867, the sections upon the question of public authorities are important; sect. 23, which gives the commissioners a right to take the same dues on vessels using any shipping staith as if the vessel had entered the Northumberland Dock, and gives them power to levy further dues under sect. 24; and sect. 25 gives them power to vary the rates, so that they do not exceed the sum in the schedule to the Act. Sect. 27 provides that "The tolls, rates, and duties received by the commissioners under the authority of this Act shall be carried to the credit of the Northumberland Dock Fund, and shall form and be part of that fund, and such fund shall be applicable to the purposes of this Act in preference to the purposes of the Act of 1861." Now there is another Act of 1870, which I do not think has any real bearing on this case; but there is an Act of 1872 which I think is important.

It incorporates the Lands Clauses Consolidation Act of 1845 and the Railways Clauses Act of 1845. By sect. 2 and by sect. 4 there is this authority conferred. The marginal note is: "Works authorised by this Act." And clause 4 says: "Subject to the provisions of this Act, and the Acts incorporated herewith, the commissioners may enter upon, take, and use such of the lands described on the deposited plans and books of reference as may be requisite for the purposes of this Act, and in and upon or under those lands respectively may make, maintain, and execute the several works by this Act authorised to be executed, and respectively within the limits of deviation, and according to the lines and levels shown on the deposited plans and sections." And in sub-sect. 2 of that sect. 4 there is this: "A quay or river wall, with tramways or railways and other works connected therewith in the townships and parishes aforesaid, or some or one of them, commencing at the east end of the new quay in the course of construction by the said commissioners, near to Whitehill Point, and terminating at the entrance of the said dock or docks, at or near Coble Dene aforesaid." That is the quay, or river wall, which extends to the east and west of the spot where this staith is.

Then sect. 5 is, I think, a very important section. It is a section which is stated in the margin to be for the protection of the Duke of Northumberland, and it recites: "Whereas the Most Noble Algernon George Duke of Northumberland is or claims to be the owner of nearly the whole of the lands which the commissioners are authorised to take by compulsory purchase for the purposes of this Act, and it is expedient to make provision for the protection of the said duke, his heirs, assigns, and successors in estate. Therefore the following provisions shall be in force for the protection of the said duke, his heirs, assigns, and successors in the said estate: (1) The land of the said Duke of Northumberland authorised to be purchased and taken by the commissioners under the provisions of this Act shall be used in such manner as the commissioners shall see fit, but only for the purposes of promoting, extending, and improving their undertaking." Then sub-sect. 2 says: "The commissioners shall construct a quay and dock

within the limits shown on the deposited plan, and shall in or upon the land to be acquired by them as aforesaid under the authority of this Act, and on the land which has been acquired by them under the authority of the Act of 1867, construct and maintain in such manner as they shall arrange, all requisite railways, railway approaches and shipping places in connection with the said quay and docks, with all necessary sidings, standage, and conveniences." And then it proceeds to enact that the duke shall be permitted to form junctions, and so on; and winds up, "and all persons using such quay, dock, railway sidings, and conveniences provided by the commissioners under this Act, or the Act of 1867, shall pay dues to the commissioners, as authorised by this Act, or the Act of 1867." In sect. 12 there is a provision for the consolidation of the various funds of the Tyne Commissioners, and by sect. 14 there are powers to borrow on consolidated fund. In sect. 32 there is a time limit imposed, and the point with regard to that I have already dealt with. Sects. 33 and 34 provide that the same rates and duties as are payable to the Northumberland Dock are to be payable in respect of vessels using the dock or docks authorised by the Act, or any shipping staith, quay, or wharf provided by the commissioners under the powers of the Act, and so on. And sect. 34 provides for additional rates to be recovered; and sect. 35 gives power to vary all or any of the sums specified in the said schedules to the Acts of 1852 and 1867 respectively.

I think now I have read all that it is necessary to refer to in that Act. There are several other Acts which I pass by as giving powers, and dealing with rates and borrowing powers, and so forth. In the last Act of 1897, which I have already partly referred to in connection with the extension of time, there is only one other section which I wish to refer to, which is sect. 70, which incorporates the Harbours, Docks, and Piers Clauses Act as follows. It says: "The Tyne Improvement Acts 1850 to 1890 shall be read and have effect as if each of them had contained a declaration that the Harbours, Docks, and Piers Clauses Act 1847 was incorporated therewith, except the words 'authorising the construction or improving of a harbour or pier in clause 2 of that Act,' and the Harbours, Docks, and Piers Clauses Act of 1847 is incorporated with this Act, except the same words." And there is a proviso which I do not think bears upon the present question. Sect. 71 only completed this point about the incorporation of the Harbours, Docks, and Piers Clauses Act. It is necessary to see what there is in the Act of 1847 which bears upon this case, and the only section which I think it is necessary to refer to is sect. 33 of the Harbours Act of 1847, which provides for the payment of rates as regards the landing of passengers, and so on. Then a subsequent section deals with the collection and recovery of rates.

That, I think, is the position of the legislation so far as it is necessary to consider this first point whether this is a public authority or not. It seems to me perfectly clear, from a general review of the Act which I have made, and, of course, bearing in mind the whole sections of the various Acts which show the scheme, that this body is a public authority. They are the conservators of the port; they have power to levy tolls for various purposes; they have power to borrow money for various purposes; and there are, as I have shown, schemes in the sections for keeping the rates down as there is an increase of work at the port, and there is nothing whatever to show that anybody is in a position to make any personal gain or profit out of the working of these Acts. They are clearly, I think, a public authority, and almost as fully owners of this port as it is possible to conceive; so that my view is entirely against the plaintiffs upon this first general point.

But counsel for the plaintiffs took a further point; he said that there is no case in which a body other than a municipal corporation had been held to be a public authority within the meaning of this Act of 1893, and for this reason he says that this is, therefore, not a public authority within the meaning of the Act. I am afraid I cannot quite agree with that view which he thus presents, because I find that in several cases bodies, who I think can hardly be considered as municipal, have been treated as public authorities, and it is only necessary to give one or two samples upon this point. In the case of *Southwark and Vauxhall Water Company* v. *Wandsworth Board of Works* (79 L. T. Rep. 132; (1898) 2 Ch. 603) there the Court of Appeal gave the defendants their costs as between solicitor and client under the Act. It may, perhaps, be termed popularly a municipal corporation, but it is not in the strict sense a municipal corporation. Again, in the case of *Sharpington* v. *Fulham Guardians* (91 L. T. Rep. 739; (1904) 2 Ch. 449). And the arguments in that case were really unnecessary unless the Act was applicable. Again, the case of *Parker* v. *London County Council* (90 L. T. Rep. 415; (1904) 2 K. B. 501), which followed the case of *The Ydun* (81 L. T. Rep. 10; 8 Asp. Mar. Law Cas. 551; (1899) P. 236). They seem to me to fortify the view I have taken of this case; but in the course of the argument I asked: What would be the position of the Mersey Docks and Harbour Board, a very striking example, in the case of an action brought against them? I find, upon looking into the matter carefully, that there is actually a decision on this point, and that is the case of *Williams* v. *Mersey Docks and Harbour Board* (92 L. T. Rep. 444; (1905) 1 K. B. 804), in which I find that it was actually not disputed that the defendants were a public authority within the meaning of the Act. The case dealt with another point, but that was actually admitted in the course of that case, and I should have thought it was perfectly clear; and so I think that point fails, and that the defendants were a public authority, and that the Act is not limited in the way he suggests. The next point he took was that, even although in one sense they might be called a public authority, yet this Act of 1893 did not apply, for the reasons which are given in the case of *Attorney-General* v. *Margate Pier and Harbour Company* (82 L. T. Rep. 448; (1900) 1 Ch. 749). That case was relied upon by counsel for the plaintiffs, and he said that this body of commissioners was not capable of being treated on a different footing from the proprietors of the Margate Pier and Harbour in that case. I do not take that view, and for that reason it was that I went through the sections of the Act. The reason why that case was decided in the way that it was was this. Kekewich, J.

says at p. 753 of the report: "They are a company for maintaining the pier and the harbour. Piers and harbours are no doubt works of great importance to the public, and the maintenance of them is for the public utility. So is a railway, so is a tramway, so is a canal; and one might mention other things in the same category. The company are to spend their money in paying interest on charges, they are to keep up their pier and harbour, and beyond that there is to be a sinking fund provided. They are a commercial company intending to earn, and in fact earning, dividends year by year for the benefit of the shareholders. I do not see myself the distinction between that and a railway company incorporated by special Act with reference to the Lands Clauses Act, and the Railways Clauses Consolidation Act 1845, and subsequent Acts." The real basis of that decision is that they could not be treated as a public authority having done something in execution of their Act, or neglecting their duty under their Act, because it was merely a commercial undertaking. The distinction between that case and this is obvious when all the Acts are considered, because this was a commercial undertaking working for nobody's profit at all, simply working for the benefit of the public, and no pecuniary advantage was derived by anybody. There are borrowing powers, and persons lending them money will get interest on the money; but counsel for the plaintiffs endeavoured to point out that that makes it the same kind of case as the *Margate* case. To my mind it is not; these people are simply creditors, and nobody in this case takes any profit upon it as a commercial transaction. The result is that those points are, to my mind, all to be decided in favour of the defendants. I think counsel for the defendants simply put this point with regard to the *Margate* case in this way: that the body of the commissioners rendered services with no idea of profit or private gain, or for the benefit of any particular persons —they are simply rendering a public duty. I agree with that view.

But I am afraid that that does not dispose of this case, because the next point taken was that there was no duty whatever upon the commissioners in connection with matters complained of in this case. That appears to me to be erroneous when it is to be remembered that sect. 33 of the Harbours, Docks, and Piers Clauses Act of 1847 is incorporated in these Acts, and if this second railway staith was authorised to be made by the private Act the Harbours, Docks, and Piers Clauses Act applies, and sect. 33 applies, and sect. 2 shows that it applies to any works authorised by the said Acts which have incorporated the Harbours, Docks, and Piers Act; and so the commissioners, although it may be they were under no duty to create and construct the pier and staith, when they had constructed it and opened it to the public, it seems to me that it became their duty under their Act to take proper care to keep it in such a state that ships should be in safety, and to entitle them to charge their tolls, and so forth. But that again does not make an end of this case, because the next point is one of considerable complexity, and it is this: that the staiths were not made under the Act at all or either of them, because it was said (on the points that were taken about its former structure I have already referred to) that it is 7ft. higher than shown on the plan, and 200 yards away from the position which was shown on the plan, and the point that was there made was made in consequence of the provisions of the Railway Clauses Consolidation Act of 1845. I am afraid it will take too long to read them through for this judgment, but the sections relied on were sects. 11, 12, and 15, and I think I may state in substance the effect of them. Sects. 11 and 12 deal with this, that the company which is making the railway authorised is not to make it more than 5ft. higher in any place without getting the consent of the owners and occupiers of the land, and so forth, and if they can get those consents they still have to give public notice previous to making alterations, they have to get a certificate from the Board of Trade, and at the end of sect. 12 it says: It shall not be lawful for the company to make such deviations except in conformity with such certificate. It is not said here that the commissioners had any certificate to increase the height more than 5ft. above the level shown and make it up to 7ft., but I think it is tolerably plain from what took place afterwards in connection with the Act of 1872 that they had practically the consent of the surrounding landlord, who was only in this case the Duke of Northumberland. That is the practical position, having regard to the Act of 1872. Then the 15th section provides that it is not lawful for the company to deviate from the line drawn, because there is no line drawn on the plan to show where the railway shall go to a greater extent than 100 yards from the side line. And so the point is made that under those provisions this staith and railway are wholly unauthorised structures. There is no doubt that this is a difficult point, and there are an enormous number of cases in connection with this subject in which railways and other companies have exceeded the strict limits of what is stated by their Act and by the sections to be lawful. But I think it is difficult to find anything to show that there was any effectual remedy or restraint on this except for the benefit of those persons who are affected by what they have done; and a case which was cited in the course of the argument before me—namely, *Sir Robert Herron* v. *Rathmines and Rathgar Improvement Commissioners* (67 L. T. Rep. 658; (1892) A. C. 498) —contains one or two passages in the judgment, one by Lord Halsbury and one by Lord Watson, which deal with this class of case from a broad point of view. Lord Watson, for instance, says: "The only remedy which the court can give is by enjoining the respondents to desist from interfering with the water of the river Dodder until the Act has been complied with, and in my opinion the appellants are entitled to this remedy." I have looked through a great many cases on this subject, and all appear to me to be cases in which somebody has a grievance either by the water being cut off or complaining of the increase of height, deviation, and so on, for which they seek to get an injunction to restrain a company from doing that which is complained of, but I confess I have very considerable difficulty in working that out sufficiently in this case, that when a railway and staiths are within the limits of deviation on land taken for the purpose, and where nobody has complained

in any shape or form, when the commissioners themselves cannot say they have done what is wrong, when the plaintiffs in this case are taking advantage of the staiths, I think it is extremely difficult to make out that this is such a wholly unauthorised structure, even under this Act, as to say that the commission no longer ought to be treated as a public authority acting under the Act and no longer ought to have the benefit of the Public Authorities Protection Act, because we are not complaining of an act you have done in the execution or intended execution of your powers, nor of any neglect or default of what you have done under your powers, because everything you have done is wholly unauthorised. It seems to me too strong a proposition to be reasonably maintained. Even if that is not a correct view of the effect of the Railway Clauses Consolidation Act on the Act of 1867, there still remains a very strong point in favour of the defendants in relation to this Act of 1872; and, although it is perfectly true they say that the following provisions shall be enforced for the protection of the said dues, in terms it gives authority, and not only authority, but more than authority. It says: "The commissioners shall construct a quay and dock within the limits shown on the deposited plan, and shall, in or near the land to be acquired by them as aforesaid under the authority of this Act, and on the land which has been acquired by them under the authority of the Act of 1867, construct and maintain, in such manner as they shall arrange, all requisite railways, railway approaches, and shipping places in connection with the said quay and docks, with all necessary sidings, standage, and conveniences." Even if that is for the protection it may involve something more, especially when I regard this, that at the close of sub-sect. 2 of sect. 5 of the Act of 1872 there is a provision that all persons who use the quay, dock, or railway and conveniences provided within this Act or the Act of 1867 shall pay dues to the commissioners authorised by that Act and by the Act of 1867. Well, possibly that section was only put in with a view of dealing with the duke's position, but it seems to me to go beyond the mere limit of that protection, and that the railway and staith in this case might be treated as having been constructed under the powers which are there conveyed. But I ought not to omit to say that the only answer that was made to this point that I could appreciate—unless, perhaps, the point was made that this was only for the protection of the duke, which I think it was, and I have already dealt with it—the only substantial point which was dealt with by counsel for the plaintiffs was that the staith and railway were not in connection with the quay, the works being railway and other works connected therewith, and sect. 4, sub-sect. 2, says: "Railways, railway approaches, and shipping places in connection with the said quay and docks." And on sect. 5, sub-sect. 2, he contended that the quay and railway were not connected at all, that the one was not connected with the other because the supports of the railway staiths, although on the quay, were supporting a railway staith above the quay, and if you were going over the top of the quay you were not going on anything connected with it. I confess to my mind that is too great a refinement. It appears to me when there is a quay, and that quay is a shipping place alongside which vessels come, it is a work of convenience connected with the quay, because that is practically the only way in which the quay is used, and therefore I am prepared to decide this case on the ground, so far as this point is concerned, that the work may be reasonably treated to be authorised by the Act which confers their power on the commissioners. It would be a very awkward thing indeed for the commissioners if it was not so, because this particular point would not end their difficulty. It is a small matter compared with the point as to whether they succeed in getting solicitor and client costs in this case. It is not at all a small matter if they have no right to levy any tolls in this case and no right to do anything of that kind.

One other point I should wish to refer to, it may not be necessary to express a definite opinion on it, but it is on the terms of the Act itself of 1893. The first section I have already read; there are just two sentences which are important—the object is to give protection against "any action, prosecution, or proceeding." There was a point made on this by counsel for the defendants, which, even if it could be successfully established, that these works were not strictly authorised by the Act, and he stated that what was complained of having been done was that the defendants had done something which they were not authorised to do, and that had done damage. And the point counsel for the defendants took was that even if that was not done in pursuance of an actual authority, it was done, at any rate, in intended execution of an Act of Parliament, and of their public duty, or authority. The answer made by counsel for the plaintiffs was that that could only be a sound point if the duty was in fact established; that is to say, that unless there was a structure made within the terms of the Act so as to bring in the Harbours, Docks, and Piers Clauses Act there never was any duty at all, and therefore, as the matter was a wholly unauthorised structure, the Act could not apply. I am not quite sure myself that that answer is a sound one. I think possibly if these sections are construed without the light of any decision before it might be said that the words "act done" meant something that was being complained of, not in the negligent way of doing the act, but in fact that the act was done itself either in pursuance, execution, or intended execution of the Act of Parliament, or public duty, or authority; and that the latter part, namely, something which is done where the proceeding is in respect of a neglect, or a default, that the execution of such act, duty, or authority, might be limited to a case where there was in fact a constituted duty, or authority. But there is one case which seems to go a little farther than that view, though not on this particular section, and that is the case of *Joliffe* v. *Wallasey Local Board* (29 L. T. Rep. 582; 2 Asp. Mar. Law Cas. 146; L. Rep. 9 C. P. 62). The Wallasey Local Board had erected a pier at New Brighton, and had placed an anchor out which was part of the means of keeping the pier in its place, and had neglected properly to buoy the anchor. And one point was taken in that case that all the material part of the works were outside the powers of the Wallasey Local Board, and that, at any rate, even if they were within the powers of the Wallasey Local Board the neglect to put a buoy

was not an act done; the act done was putting the anchor, and what was complained of was not putting the anchor, but neglecting to buoy it. That case does not really distinctly decide what is necessary for the present case, because I think the court decided that these works were in fact authorised by the Acts which gave the power to erect them, but they did decide this further, that an act done includes not only the act itself but the negligently doing of the act, and there are several passages in the judgment of Keating, J. and Brett, J.—as he was then—afterwards Lord Esher, which show that the words "act done" are not limited merely to the doing of the act, but doing it in an improper manner, and at p. 88 of the 9th volume of the Common Pleas Reports the late Lord Esher said this: "But Mr. Aspinall takes another point. He says, as the anchor was negligently placed out of the limits of the board's jurisdiction, the omission to mark its position could not be a thing done, or intended to be done, under the provisions of the Act; that is to say, that, though a negligent omission may give them a right to notice, yet for a negligence upon a negligence they are not entitled to notice That proposition cannot, as it seems to me, be maintained. All the conduct which gave rise to the cause of action was something which was *bonâ fide* intended to be done by the defendants under the provisions of the Act." Well, if that is strictly applicable to this section of the Act of 1893 now under consideration, it is an authority in favour of the defendants. Speaking for myself, I should have thought that it was, to say the least, doubtful on that section. Where you have to contrast between the act done, which is complained of, and neglect or default which is complained of, different considerations might apply, and I only deal with this point rather for the purpose of noticing it, and showing that I have not neglected it before concluding my judgment, because the defendants' position seems to me to be covered by what I have already said. But I think it is quite possible that this section may be construed so as to give protection to a body in the position of the defendants if they do something in the honest belief that their Acts are being complied with, and intend to comply with them, and then a complaint is made that they have not done what they ought to have done, and have not done properly what they have in fact done. They require this protection if they have any protection as a public authority at all, just as much as if they are being sued for neglect of an admitted duty. I prefer to place my judgment on this point on the other parts of the case, because I think they are more important to the commissioners. For these reasons I am of opinion that the commissioners are entitled to have their costs taxed as between solicitor and client. Judgment has already been entered for them, but it must be added that they are to have their costs on that footing, and in taxing the costs the registrar will do so on the assumption that the arguments which began after the 22nd May were continued without a break and finished within a reasonable time.

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

Solicitors for the defendants, *Thomas Cooper* and *Co.*, for *Clayton* and *Gibson,* Newcastle-on-Tyne.

HOUSE OF LORDS.

Feb. 25, 26, *and March* 18, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, and ATKINSON.)

ASSHETON-SMITH AND OTHERS *v.* OWEN. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Port—Limits of port—Fiscal port—Docks excavated contiguous to port—Carnarvon Harbour Acts 1793 (33 *Geo.* 3, *c. cxxiii.*) *and* 1809 (49 *Geo.* 3, *c. xxiv.*).

The "port of Carnarvon" within the Carnarvon Harbour Acts 1793 *and* 1809 *must be construed to mean the fiscal port, not the port in its ordinary sense.*

Therefore, where a landowner had constructed docks and quays of his own on his own land, at a place in the Menai Straits about four miles north of the harbour of Carnarvon, which place was, at the time of the passing of the Carnarvon Harbour Acts, dry land, and was in the habit of loading vessels at such quays with slates from quarries on his land, which vessels usually passed out at the north end of the straits without passing or using the harbour of Carnarvon, and returned by the same route bringing goods for the use of the landowner, which were unloaded at his quays:

Held, that the docks and quays so constructed must be considered as an extension of the port, being within the limits of the fiscal port, and that the harbour trustees were entitled to demand tolls from the vessels using the docks, and dues on the goods shipped or landed at the quays, in accordance with their Acts.

Judgment of the court below affirmed.

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Stirling, and Cozens-Hardy, L.JJ.) affirming a decision of Kekewich, J.

The case is reported 10 Asp. Mar. Law Cas. 164; 94 L. T. Rep. 42; (1906) 1 Ch. 179.

The action was brought by the appellants against the respondent, who was the collector and treasurer of the Carnarvon Harbour Trust, they being able by statute to be sued in his name, for a declaration that Port Dinorwic, where the plaintiff Assheton-Smith and his predecessors in title had constructed docks, wharves, and quays, was not within the limits of the port or harbour of Carnarvon; that the trustees were not entitled to claim tolls on vessels passing through the north end of the Menai Straits to or from Port Dinorwic, or any dues or rates on goods loaded or unloaded on or from such vessels at the docks, wharves, or quays of the plaintiffs; and an injunction restraining the trustees from claiming from or enforcing payment by the plaintiffs of any such tolls, dues, or rates as above mentioned.

The facts appear from the headnote above and from the report in the court below, where the sections of the Carnarvon Harbour Acts of 1793 and 1809 are set out.

Danckwerts, K.C., *P. O. Lawrence,* K.C., and *Peterson,* K.C. appeared for the appellants, and contended that Port Dinorwic, which was situated

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

in the Menai Straits, about four miles to the north of Carnarvon, was not within the limits of that port in the ordinary meaning of the words, and the Acts must be construed in accordance with the ordinary use of language. Straits may be divided between two jurisdictions:

Reg. v. *Cunningham*, 1 Bell's Cr. Cas. 72; 28 L. J. 66, M. C.;
Wright v. *Harris*, 49 J. P. 628;
Reg. v. *Kleyn*, 2 Ex. Div. 63;
Direct United States Cable Company v. *Anglo-American Telegraph Company*, 36 L. T. Rep. 265; 2 App. Cas. 394;
Reg. v. *Musson*, 8 E. & B. 900;
Embleton v. *Brown*, 3 E. & E. 234; 30 L. J. 1, M. C.;
Hale de Jure Maris, c. 4, p. 10.

At common law it is part of the prerogative of the Crown to fix the limits of a port, and to grant to a subject a franchise of a port empowering him to levy tolls. The real question is the distinction between the "port" in the ordinary, local, shipping sense, and in the artificial fiscal sense. See

Blundell v. *Catterall*, 5 B. & Ald. 268.

The words of an Act of Parliament must be construed at any time in the same sense that they bore when it was originally passed. See

Rex v. *Cockerton*, 84 L. T. Rep. 488; (1901) 1 K. B. 726;
Attorney-General v. *County Council of West Riding of Yorkshire*, 95 L. T. Rep. 845; (1907) A. C. 29.

When these Acts were passed, what is now Port Dinorwic was dry land. As to the interpretation of statutes, see

Metropolitan Water Board v. *New River Company*, 20 Times L. Rep. 687;
Stockton and Darlington Railway Company v. *Barrett*, 11 Cl. & F. 590;
Hull Dock Company v. *Priestly*, 1 Nev. & Man. 85;
Stourbridge Canal Company v. *Wheeley*, 2 B. & Ad. 792;
Kingston-upon-Hull Dock Company v. *Browne*, 2 B. & Ad 43.

All these cases lay down that a tax must be clearly and unambiguously imposed to make the subject liable, and that private Acts of Parliament are to be construed strictly against the promoters. [The LORD CHANCELLOR.—Is there not a distinction between a profit-earning company and such a body as the corporation of a town?] There is no real distinction. The harbour trustees are seeking to impose a tax on the public. It is not put on the ground of profit-earning in the cases, but includes everyone who wishes to impose a tax on the public. See also

Gildart v. *Gladstone*, 11 East, 675;
Tennant v. *Smith*, 66 L. T. Rep. 327; (1892) A. C. 150.

In this case the ships going to or from Port Dinorwic for the most part pass in and out at the north end of the straits, and do not come near the local harbour of Carnarvon at all, or derive any benefit from it, and the tolls are imposed upon those who receive a benefit from the use of the harbour in its ordinary shipping sense, not in the fiscal sense. The trustees do not clean or maintain the appellants' docks. See

Trustees of Clyde Navigation v. *Laird*, 8 App. Cas. 658;
Matson v. *Scobell*, 4 Burr. 2258;
Pole v. *Jonson*, 2 Wm. Bl. 764;
Harvey v. *Mayor of Lyme Regis*, 21 L. T. Rep. 227; L. Rep. 4 Ex. 260;
Reg. v. *Hannam*, 2 Times L. Rep 234;
Price v. *Livingstone*, 5 Asp. Mar. Law Cas. 13 (1882); 47 L. T. Rep. 629; 9 Q. B. Div. 679;
Hunter v. *Northern Marine Insurance Company*, 13 App. Cas. 717;
Sailing Ship Garston Company v. *Hickie*, 53 L. T. Rep. 795; 15 Q. B. Div. 580.

The appellants and their predecessors in title have paid the tolls in former years, but contemporary usage is not conclusive in the interpretation of statutes. See

Northam Bridge Company v. *The Queen*, 55 L. T. Rep. 759.

Warmington, K.C., *Eldon Bankes*, K.C., and *Montgomery*, who appeared for the respondent, were not called on to address their Lordships.

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

March 18.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: The main question raised in this case is whether or not Port Dinorwic and certain docks, quays, and wharves there situated are "within the limits of the said port" of Carnarvon as those words are used in the 5th section of a private Act of Parliament passed in 1809. This private Act follows upon and supplements another private Act passed in 1793. Now, it is admitted that rates and duties have been paid for a long series of years by the late Mr. Assheton-Smith and his predecessors in title upon the footing that the places in question were within the said port. But it is now maintained that the words "the limits of the said port" mean the limits of the local or popularly understood port of Carnarvon, and not the wider limits of the fiscal port of Carnarvon. If so, then, as these places are not within the local port, the rates and duties ought not to have been paid and are not now payable. In my opinion, the words "limits of the said port" mean the limits of the fiscal port. Those limits were in 1809 already perfectly ascertained by a return of commissioners dated the 21st Nov. 1723, which, pursuant to certain general Acts, settled "the extent, bounds, and limits of the said port." I think that the 5th section of the Act of 1809 was worded in accordance with that return, and meant to embrace all the limits therein settled. It is reasonable that it should have been so, for a clause imposing rates and duties presumably refers to some known area. The area of the fiscal port was rigidly ascertained; but the area of the local or popularly understood port is indefinite and unascertained. I agree also with Cozens-Hardy, L.J. in thinking that sect. 7 of the Act of 1809 confirms this view, and is inconsistent with any other. Nor can I find, upon examination of the two private Acts, any expressions which are incompatible with the view that rates and duties were to be imposed throughout the fiscal port. I will not go through the sections. It was argued that in cases of doubt we ought to consider the benefits bestowed by the Act in return for the taxation, and to measure the incidence of the tax by the extent of the benefit. I do not think that there is really any doubt here, but if there be, then it seems to me that

this argument tells against the appellants. The entire area of the fiscal port derives benefit from the works and services provided for in these two private Acts, the execution and maintenance of which is in part, at all events, made possible by the tax which the appellants seek to escape while reaping its fruits. In regard to the contention of the appellants that the loading and unloading at a dock or quay constructed by excavation by the appellants' predecessors in title on places where there was dry land in 1809 is not loading or unloading within the port as it existed in 1809, I think that the point cannot be seriously argued. It seems impossible, for example, to suppose that, if a frontager on the Thames chose to excavate some hundreds of feet long and some 50ft. deep of his frontage backward from the river, he could then construct a quay there and say that in loading and unloading he was outside the Port of London. Yet that is the logical conclusion of the appellants' argument. These places must be in some port, and, in my opinion, are in the port of Carnarvon. Nor, indeed, is any other port suggested. I am therefore of opinion that this appeal should be dismissed with costs.

Lord MACNAGHTEN and Lord JAMES OF HEREFORD concurred.

Lord ATKINSON.—My Lords: Two questions are raised for decision in this case. First, what is the true meaning of sect. 5, the charging section in a confused and ill-drawn local Act (49 Geo. 3, c. xxiv.) passed in the year 1809, which is *in pari materiâ* with an earlier local Act, equally confused and equally ill-drawn (33 Geo. 3, c. cxxiii.), passed in the year 1793, which must be construed together with it? And, second, the question whether the owner of land abutting on the foreshore of a port or harbour in which dues are levied under statutory authority for the loading or unloading of ships who excavates contiguous to this foreshore a dock in his land, and also a canal to conduct the water of the harbour into that dock, can, by loading and unloading his ship in the dock so constructed, escape the liability to dues? I concur with Stirling and Cozens-Hardy, L.JJ. that these new works must be regarded as an artificial extension of the port or harbour, and that it would not be consistent either with common sense or reason to hold that the person loading and unloading ships within the limits of the extension should escape liability to the appropriate tolls or dues. I therefore dismiss this question from further consideration.

There remains the question of the proper construction of the language of the statutes. I concur with the judges of the Court of Appeal in thinking it a difficult question. As I understood Mr. Danckwerts, he was towards the end of his argument obliged, rather reluctantly, to admit that the expressions "port of Carnarvon" and "harbour of Carnarvon" meant the same thing—namely, the local port of Carnarvon, as distinguished from the fiscal port, and, further, that this local port had no defined or ascertained limits. I gather from the judgment of Vaughan Williams, L.J., if I rightly understand it, that he was of opinion that, while the word "port" in the charging sections should be construed to include the port of Dinorwic, it did not mean the fiscal port. And after dealing with the payment of dues by Mr. Assheton-Smith, his predecessors in title, and others for many years for loading and unloading vessels in Dinorwic, he apparently condensed the reasons for his judgment on this point in the following sentence: "And I think that we ought in the light of this practice to hold that the words 'within the limits of the said port of Carnarvon' in the sections relating to the loading and unloading of vessels within the limits of the said port, whether these words do or do not extend to the whole Customs port, extend at least to an area which covers Port Dinorwic." The other Lords Justices adopted the construction contended for by the trustees, and held that the word "port" meant the fiscal port, whose limits had been defined by the commissioners acting under 13 & 14 Car. 2, c. 11. For myself I must confess that I am unable to form any conception of what the extent or limits of that port must be, which is at once larger than the local port, smaller than the fiscal port, and yet extensive enough to include within it the port of Dinorwic. And I am unable to find anything in either of the private Acts to suggest that such a port comes within their purview. In the interpretation of these statutes the choice must therefore, I think, lie between the fiscal port and the local port, and, in my opinion, it has been rightly made in favour of the former. In the year 1793 the limits of the fiscal port remained as they had been ascertained and defined by the order of the commissioners of the 21st Nov. 1723. The port extended from the Britannia Rock to Afon-Hen. The open places for loading and unloading goods within this fiscal port, styled the port of Carnarvon, had been by the same order defined. They are either embraced within the harbour, or local port, or immediately contiguous to it. The first thing that strikes one on looking into the Act of 1793 is this, that the *ex officio* members of the body of trustees constituted for putting the Act in force are not only the mayor, deputy-mayor, and bailiff of the town and liberty of Carnarvon, but the justices of the peace for the entire county of Carnarvon, and the officers whose jurisdiction and authority extended over the entire fiscal port, the collector, comptroller, and surveyor of the Customs of the Port of Carnavon (*i.e.*, the fiscal port) for the time being; and that by the fasciculus of sections from 6 to 18 inclusive powers over practically the whole area of the fiscal port, such as are usually conferred on port or harbour authorities, are given to these trustees. Sect. 8 clearly contemplates the existence of banks and shores existing in the port of Carnarvon upon which buoys and beacons are to be placed, as well as banks and shores leading to the port of Carnarvon. It is impossible, in my opinion, to hold that in this section the words "port of Carnarvon" can be confined to the harbour or local port, or more especially when it is remembered that sect. 10 evidently contemplates that the harbour should be thoroughly scoured and all obstructions removed from it.

Again, sect. 9 authorised the erection of a lighthouse at Llandwyn Point, and sect. 12 vests in the trustees all the works they may erect in pursuance of the Act wherever situate, as well as the ground on which these works stand. The expression "port of Carnarvon" only occurs in three sections of the Act preceding the 16th section—namely, the first, second, and third. In the first and second

it is no doubt part of the description of an officer, but in the third section this is not so. It is there used to denote the geographical limits within which the powers of the trustees can be exercised. The question is, what does the expression "limits of the said port" mean in sect. 16, the charging section? It is an obviously unnatural mode of construction which would give different meanings to the same expression occurring in several sub-sections of the same section unless the language used necessitates it. In sub-sects. 2 and 3 a clear distinction is drawn between the operations of "arriving in" or "coming to" the "said port by stress of weather or otherwise," and "passing or sailing through the Menai Straits." It cannot be supposed that it was ever contemplated that a foreign vessel which sailed though the straits should pay 6*s.* or 3*s.* per ton dues, but that a vessel which, driven by stress of weather or for some reason was sailed up the river, was anchored, and lay opposite Dinorwic, and was then sailed out again, never going into the harbour of Carnarvon at all, should pay nothing. Or that a vessel which, from stress of weather or for some other cause, anchored and lay inside the bar, but some miles from the harbour, should pay nothing either. And yet the last-mentioned vessel, if not the former, must escape unless the word "port" as used in sub-sect. 2 extends to waters miles above or below the local port. The words used in sub-sect. 3 are "coming to" as distinguished from "arriving in" used in the preceding sub-section. I do not think that by reason of this change of language a different meaning can be given to the word "port" in the two sub sections. It would be irrational to draw such a distinction as it would necessitate between the treatment to be given to British and foreign vessels. If then the words "the said port" cannot be restricted to the local port or harbour in sub-sects. 2 and 3 of sect. 16, neither can they be so restricted in sub-sects. 1, 3, 4, and 5 of the same section, in which the phrase "limits of the said port" are consistently used. If, therefore, the question turned upon the construction of the 16th section of the earlier statute alone, it should, in my opinion, be decided in favour of the contention of the trustees. The next matter to be considered is whether the provisions of the Act of 1809 restrict the meaning to be given to the words "the said port" and "the limits of the said port" in sect. 16 of the earlier Acts. So far from that I think sects. 5, 7, 15, 16, 17, and 20 of the Act of 1809 clearly draw a distinction between the port and the word "harbour," and require that a wider meaning should be given to the former word than to the latter. For instance, in sect. 15 the words used are caused to be removed "all, every, or any docks at the Swellies or in any other part of the said straits within the said port of Carnarvon for the more convenient passage of vessels to and from said harbours and through the said straits." If that clause would empower the trustees to blast a rock opposite the port of Dinorwic, as unquestionably it was intended that it should, then it could only do so because the rock was within the port of Carnarvon, since it was not situated either at "the Swellies" or near the harbour. In sect. 5 the words are "or within the limits of the said port," and, as has been pointed out in the Court of Appeal, the only port that had its limits defined was the fiscal port. Reading these two Acts together, as it is conceded that they must be read, I am of opinion that the construction contended for by the trustees is the true construction; that the judgment of the Court of Appeal was right; and that the appeal should be dismissed with costs.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Hasties*, for *Lloyd, Carter*, and *Vincent*, Carnarvon.

Solicitors for the respondent, *Rooke* and *Sons*, for *C. A. Jones*, Carnarvon.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Jan. 31, *Feb.* 5, *and March* 22, 1907.

(Present: The Right Hons. the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN and DAVEY (*a*), and Sir ARTHUR WILSON.)

OWNERS OF STEAMSHIP LANGFOND *v.* CANADIAN FORWARDING AND EXPORT COMPANY. (*b*)

ON APPEAL FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC.

Charter-party—Breach—Withdrawal of ship.

A charter-party contained a clause providing: "Payment of the said hire to be made in cash monthly in advance, . . . and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of the charterers."

A month's hire became due on the 11th Sept. On the 1st Oct. it was still unpaid, and the owners gave notice that they withdrew the ship, which was at that time at sea.

On the 2nd Oct. the month's hire was paid, and on the same day the ship arrived in port.

On the 4th Oct. the master, under instructions from the owners, withdrew the ship.

Held (affirming the judgment of the court below), that there was a breach of the charter-party for which the owners were liable in damages, because at the date of withdrawal there was no hire in arrear.

APPEAL from a judgment of the Superior Court for the Province of Quebec (Tait, Loranger, and Doherty, JJ.), affirming a judgment of Fortin, J. in favour of the respondents (the plaintiffs below) in an action brought by them as charterers of the steamship *Langfond*, against the owners, for damages for a breach of the charter-party.

The facts are fully set out in the judgment of their Lordships.

J. A. Hamilton, K.C. and *Maurice Hill*, for the appellants, referred to

Tyrer v. *Hessler, Re an Arbitration between*, 9 Asp. Mar. Law Cas. 186 (1901); 84 L. T. Rep. 653; reversed on appeal, 9 Asp. Mar. Law Cas. 292 (1902); 86 L. T. Rep. 697;

Grimwood v. *Moss*, 27 L. T. Rep. 268; L. Rep. 7 C. P. 360;

Price v. *Worwood*, 4 H. & N. 512;

Tonnelier v. *Smith*, 8 Asp. Mar. Law Cas. 327 (1897); 2 Com. Cas. 258.

(*a*) Lord Davey was present during the argument, but died before their Lordships gave judgment.

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

Atkin, K.C. and *Macdougall*, K.C. (of the Colonial Bar) for the respondents.

J. A. Hamilton, K.C. was heard in reply.

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

March 22. — Their Lordships' judgment was delivered by

Sir ARTHUR WILSON. — The action out of which this appeal arises was brought by the respondents, as charterers, against the appellants, as owners, of the steamship *Langfond* to recover damages for breach of the charter-party. The charter-party was made in New York on the 17th Feb. 1902 between Bennett, Walsh, and Co, agents for owners of the steamship *Langfond*, of Stavanger, and the respondents. By it the owners agreed to let and the respondents to hire the ship, from the time of delivery, for a period of about two months, fourteen days more or less, with an option in the charterers to continue the charter for a further period of two months, fourteen days more or less. By subsequent agreements the term of the charter was extended to at least the month of November, and its commencement was fixed as the 11th April. The clauses of the charter which need be noticed are as follows: "(4) Charterers shall pay for the use and hire of the said vessel 760*l.* per calendar month, commencing on and from the day of her delivery as aforesaid, and at and after the same rate for any part of a month, hire to continue until her delivery with clean holds to the owners (unless lost) at a port in the United Kingdom or on the Continent between Bordeaux and Hamburg at charterers' option. (6) Payment of the said hire to be made in cash monthly in advance in New York, . . . and in default of such payment or payments as herein specified, the owners shall have the faculty of withdrawing the said steamer from the service of charterers without prejudice to any claim they, the owners, may otherwise have on the charterers in pursuance of this charter."

The owners, who, from the steamship's port of registry, seem to be Norwegian, had agents in England, Clark, Gray, and Co. They had agents in New York, Bennett, Walsh, and Co., the firm by whom the charter-party was executed. They had agents in Montreal, McLean, Kennedy, and Co. The respondents carried on their business in Montreal, and all their direct communications, connected with the charter-party, were with McLean, Kennedy, and Co., through whom all monthly payments were made, up to and including that in August. Up to that time the monthly payments were made and were accepted, though the payments were not made with strict punctuality. The controversy between the parties arose out of the payment which fell due on the 11th Sept. When that payment was about to become due the steamship was in an English port, Maryport, loading a cargo of rails on account of Messrs. Hine Brothers, who had a sum of advance freight to pay to the respondents, which it was estimated would be sufficient to meet the monthly payment due by the latter to the owners on the 11th Sept. Under the charter-party the monthly freight was payable in New York, but on this occasion it was proposed and agreed that it should be met by Messrs. Hine Brothers paying the freight due by them to the English agents of the owners. This is made clear by a telegram from McLean, Kennedy, and Co. to Hine Brothers, dated the 8th Sept., three days before the monthly freight became due, referring to the arrangement. The completion of this transaction was delayed by the fact that an agent of the respondents in Rotterdam raised a claim to the freight payable by Hine Brothers. It was some time before this difficulty was overcome, but ultimately, on or before the 2nd Oct., Hine Brothers paid to the English agents of the owners 607*l.*, being the amount of freight payable upon the Maryport cargo. On learning the amount paid in England by Hine Brothers, the respondents, on the 2nd Oct., paid the balance remaining due by a cheque in favour of McLean, Kennedy, and Co. The result was that on that day nothing remained due in respect of the monthly freight payable on the 11th Sept. As to the footing upon which these payments were made and accepted there seems to their Lordships to be no room for doubt. All the documents, both before and after the final payment, show that what was in question was payment in satisfaction of the sum due on the 11th Sept. as the hire of the ship from that day up to the 11th Oct. In the meantime before the payments were completed, on the 29th Sept, Bennett, Walsh, and Co. telegraphed from New York to McLean, Kennedy, and Co., in Montreal: "London cables notify charterers owners say they consider charter violated; steamer has been withdrawn." And on the 1st Oct. that notice was communicated by McLean, Kennedy, and Co. to the respondents. The steamship arrived at Montreal on or about the 2nd Oct. with her cargo for that port, and the respondents were at first allowed to proceed, not only with the unloading of the ship, but with the lining of her for an outward voyage. But on the 4th Oct. the captain gave a verbal notice to the respondents' manager that, under instructions from his owners, he must refuse to allow them to continue shipliners' work or loading the outward cargo. And on the same day the captain at the manager's request embodied this notice in a letter. On the 8th Oct. this action was begun by *saisie conservatoire* of the ship on the part of the respondents. The declaration stated the facts, alleged the withdrawal of the ship on the 4th Oct. as a breach of the charter-party, and claimed damages. The plea justified the withdrawal of the ship, on the ground of the charterers' failure to pay the monthly hire on the 11th Sept. The case was tried before Fortin, J. in Jan. 1905; and on the 31st of that month the learned judge gave judgment in favour of the plaintiffs with damages 3347.22 dollars. On the 27th Jan. 1906 the Superior Court in review affirmed the judgment of Fortin, J., and against that decision the present appeal has been brought.

On the argument of the appeal, the first question discussed was, when was the ship withdrawn? It was contended for the appellants that the withdrawal occurred when Bennett, Walsh, and Co.'s telegram, saying that the owners declare the steamer has been withdrawn, was communicated to the respondents — that is, on the 1st Oct.; that at that date the monthly hire was still in arrear; that the election to enforce the forfeiture was then complete, and that nothing which happened afterwards could

alter its effect. It is unnecessary to consider, whether, in the case of a ship at sea, carrying a cargo for the charterers or for shippers under them, a mere notice could operate as a present withdrawal within the meaning of the charter-party. To give it that operation in the present case would be to give it a meaning which it was never intended to bear, and no person concerned ever supposed it to bear. On the 1st Oct. Bennett, Walsh, and Co. cabled to the owners asking the specific question, when they withdrew the steamer; and got back the answer, "after outward cargo discharged from Montreal." The respondents never thought that the steamer had been withdrawn on the 1st, for they not only paid up what was due, but commenced the shipliners' work for an outward voyage. The master was of the same mind, for he allowed the work to proceed till the 4th Oct., when he interrupted it.

Their Lordships think it clear that there was no withdrawal of the steamer until that effected by the master on the 4th Oct. And on that date there was nothing to justify a withdrawal; for there was nothing in arrear, the full hire for the month ending the 11th Oct. having been paid and received. Much stress was laid in argument upon the case of *Tonnelier* v. *Smith* (8 Asp. Mar. Law Cas. 327 (1897); 2 Com. Cas. 258). That case related to a charter-party similar in many respects to the present one. At the beginning of a month, it was clear that the charter-party would come to a natural termination during the month, so that the amount actually earned would be less than the monthly sum which in that case, as in this, was payable in advance. The question was whether an estimate was to be made at the beginning of the month of what would be earned, and that amount only paid, or whether the full monthly sum was to be paid at the beginning of the month, leaving the adjustment to be made afterwards? The Court of Appeal adopted the latter view. The case does not seem to their Lordships to afford much assistance in the decision of the present case. The appellants further raised a question as to the propriety of the damages awarded against them. But their Lordships, in the course of the argument, intimated their opinion that the objections so raised were not well founded. Their Lordships will humbly advise His Majesty that the appeal should be dismissed. The appellants will pay the costs.

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

Solicitors for the respondents, *Lawrence Jones* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 25 *and* 26, 1907.

(Before Sir GORELL BARNES, P., FARWELL and BUCKLEY, L.JJ.)

MOEL TRYVAN SHIP COMPANY LIMITED *v.* KRUGER AND CO. LIMITED. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Bill of lading—"All other conditions as per charter-party"—Negligence clause in charter-party—Charterers presenting bills of lading for master's signature without negligence clause—Negligence—Implied contract of indemnity—Ship totally lost by master's negligence—Liability of shipowners to indorsees of bills of lading—Right to indemnity from charterers—Breach of contract.

The plaintiffs, who chartered a vessel to the defendants, excepted themselves in the charter-party from accidents of navigation even when occasioned by negligence of the master, and it also provided that the master should sign clean bills of lading at any rate of freight without prejudice to the charter-party.

The vessel loaded a cargo at Rangoon, and the charterers presented for the master's signature bills of lading which contained certain excepted perils, but did not contain the negligence clause. The clause "freight . . . and all other conditions as per charter-party" was inserted. The master and the charterers thought that that clause incorporated all the exceptions in the charter-party. Whilst on the voyage the vessel was totally lost through the master's negligence. The shipowners thereupon became liable to the indorsees on the bills of lading. In an action by the shipowners against the charterers (1) *for damages for breach of duty as agents, or* (2) *on an implied contract to indemnify the plaintiffs:*

Held, that the charterers had committed a breach of contract by presenting bills of lading to the master to sign which imposed a greater obligation on the owners than they were subject to under the charter-party, and, as the damages flowed from that breach, the charterers were bound to indemnify the owners.

Held, also, by Buckley, L.J., that assuming the master had authority to sign the bills of lading in the form in which they were presented to him, the charterers were bound to indemnify the shipowner against the consequences of the master having signed them at their request.

Decision of Phillimore, J. (10 *Asp. Mar. Law Cas.* 310 (1906); 95 *L. T. Rep.* 614; (1906) 2 *K. B.* 792) *affirmed.*

APPEAL from a decision of Phillimore, J. sitting as a judge in the Commercial Court.

By a charter-party dated the 22nd April 1903 the defendants chartered the plaintiffs' ship, the *Invermore*, to load a cargo of rice at Rangoon, and, being so loaded, to proceed thence to Rio de Janeiro, and there deliver the cargo. The

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

material clauses of the charter-party were as follows:

6. The act of God, perils of the sea, fire, barratry of the master and crew, the King's enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

7. The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight, without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading.

25. Charterer's liability under this charter to cease on ship being loaded, provided the cargo is worth the freight, the owners having an absolute lien on the cargo for all freight, dead freight, demurrage, average, and any other lawful claim they may have under this charter, which lien they are hereby bound to exercise.

The vessel loaded a cargo at Rangoon, the defendants entering and clearing the vessel. The defendants presented the following bill of lading to the master for signature:

Shipped in good order and well conditioned by Kruger and Co. Limited on and upon the good sailing ship called the *Invermore* . . . now riding at anchor in the port of Rangoon and bound for Ilha Grande for free pratique, and then to proceed to Rio de Janeiro; 14,109 bags cleaned Ngasein rice, No. 2 quality, each weighing 131lb. net . . . to be delivered in the like good order and well conditioned at the aforesaid port of Rio de Janeiro (the act of God, the King's enemies, fires, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever excepted), unto order or to its assigns, freight for the said goods, and all other conditions as per charter-party, dated London, the 22nd April 1903.

The bill of lading did not contain the exception "accidents of navigation . . . even when occasioned by negligence . . . of the master," as in the charter-party, but both the charterers and the master thought that the clause in the bill of lading, "freight . . . and all other conditions as per charter-party" incorporated for all purposes every exception in the charter-party. This, however, was incorrect, according to the decisions in *Serraino* v. *Campbell* (7 Asp. Mar Law Cas. 48; 64 L. T. Rep. 615; (1891) 1 Q. B. 283) and *Diederichsen* v. *Farquharson* (8 Asp. Mar. Law Cas. 333; 77 L. T. Rep. 543; (1898) 1 Q. B. 150).

When the bill of lading was presented to the master, he asked whether it contained the ordinary clause "conditions as per charter-party," and, on being informed by the charterers that it did, he signed it, and the vessel proceeded on her voyage until the 12th Oct. 1903, when by the negligence of her master she stranded, and with her cargo became a total loss.

The plaintiffs alleged that it was the defendants' duty as charterers to present, and as the ship's agents to present, or see that there were presented, to the master for signature bills of lading in accordance with the terms of the charter-party; but, in breach of their duty so to do, presented and (or) allowed to be presented to the master for signature bills of lading which did not incorporate the exception in the charter-party as to accidents of navigation even when occasioned by negligence of the master.

In consequence, as the plaintiffs alleged, of the defendants failure to incorporate the exception in the negligence clause the plaintiffs had been adjudicated in the Admiralty Division to be liable to the holders of the bills of lading.

The plaintiffs claimed an indemnity against the amount which they would have to pay by way of damages under the judgment, and against all costs of the Admiralty action and of the proceedings taken by the plaintiffs to limit their liability in the Admiralty action.

The defendants by their defence denied that either as charterers or under clause 19 of the charter-party or otherwise they became under any duty to the plaintiffs with regard to the form of the bills of lading to be presented to the master for his signature.

Alternatively the defendants alleged that, if they were under any duty to the plaintiffs with regard to the form of the bills of lading, then such duty was only to use reasonable care and skill to see that the bills of lading appeared to incorporate the terms of the charter-party, and that there was no breach of such duty. Further, the defendants alleged, that the damages were not caused directly or at all by any act or default of the defendants.

Phillimore, J. decided in favour of the plaintiffs, and the defendants appealed.

J. A. Hamilton, K.C., *Montague Lush*, K.C., and *Chaytor* for the appellants.—The evidence shows that the appellants were not the ship's agents at Rangoon for the purpose of presenting bills of lading for signature to the master. No undertaking of indemnity is implied unless the facts show that the person to be indemnified did the act for the benefit of the person at whose request he did it. In this case the master on being requested to sign bills of lading was not asked to do an act which he ought not to do, but one which it was his duty to do. There is no implied indemnity in a case where the request is only to carry out a legal contract. An indemnity is only implied in cases where a person asks for something which the other is not bound to give him. Here the master's duty with reference to these bills of lading was not merely ministerial, and therefore *Sheffield Corporation* v. *Barclay* (93 L. T. Rep. 83; (1905) A. C. 392) does not apply. There the duty of the corporation was merely ministerial, and they did not register the transfer of the stock in pursuance of a contract. The foundation of that judgment was that a person, who was interested in having the transfer registered, came to the person who was compelled to register the transfer by ministerial duty and requested that the transfer should be registered, and the House of Lords held that, as they were compelled to register by ministerial duty, the respondents, who had requested them to register the transfer, must indemnify them against the loss which they incurred in consequence. The master could have refused to sign the bills of lading presented to him unless the negligence clause was inserted. The case of *Hansen* v. *Harrold Brothers* (7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612) is not in point. There was no breach of duty in presenting these bills of lading. The charterers were only the owners' agents for the purpose of entering and clearing the ship, and that imposed no duty on them as to the form of the bills of lading.

The master and the defendants considered that the clause "All conditions as per charter-party" incorporated all the exceptions in the charter-party. The defendants are not liable for negligence because they put a mistaken construction on those words. The principle as to implied indemnity appears from *Ex parte Ford* (16 Q. B. Div. 305). They also referred to

Stumore, Western, and Co. v. *Breen*, 12 App. Cas. 698.

Scrutton, K.C. and *Bailhache* for the respondents.—Looking at this case from a business point of view, is it likely that a shipowner would enter into a contract the result of which would be that so long as the cargo belonged to the charterer he should not, but when the cargo came to belong to a third party he should be liable? It was the duty of the defendants to present bills of lading to the master for signature, which were in accordance with the charter-party. But the judgment of Lord Esher, M.R. in *Hansen* v. *Harrold Brothers* (*ubi sup.*) shows that if the master had known that the exception of negligence was not incorporated in them he would have been bound to sign them, and *Rodocanachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100 (1886); 56 L. T. Rep. 594; 18 Q. B. Div. 67) is to the same effect. The meaning of the words "without prejudice to the charter-party" has been settled by *Shand* v. *Sanderson* (4 H. & N. 381). The master only has authority to sign bills of lading in the usual form:

Grant v. *Norway*, 16 L. T. Rep. O. S. 504; 10 C. B. 665.

The defendants for their own purposes presented bills of lading to the master, which imposed greater liability on the owners than the charter-party, and therefore there was an implied contract of indemnity by the charterers. But if there was no duty on the master to sign these bills of lading, then he was called upon to exercise a ministerial duty, and acted without any default on his own part, and the defendants are liable to indemnify the plaintiffs (per Lord Davey in *Sheffield Corporation* v. *Barclay*, *ubi sup.*):

Milburn v. *Jamaica Fruit Importing and Trading Company of London*, 9 Asp. Mar. Law Cas. 122; 83 L. T. Rep. 321; (1900) 2 Q. B. 540;
Dugdale v. *Lovering*, 32 L. T. Rep. 155; L. Rep. 10 C. P. 196.

The law as to implied indemnity is stated in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (55 L. T. Rep. 699; 34 Ch. Div. 261, 272), where Cotton, L.J. said: "If A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss . . . the law implies a contract by A. to indemnify B. from the consequence of his doing it."

Hamilton, K.C. in reply.

Sir GORELL BARNES (after stating the facts continued:)—I think, in order to appreciate the difficulty which has arisen and in order to apply the law to the solution of the difficulty, it is necessary to see exactly how this matter stands looked at from a legal point of view. In former times a difficulty of this kind could not have arisen, because the bill of lading given under a charter-party had really no effect upon the contractual relationship between the shipowner and the charterer; it was a receipt for the goods, and the whole relationship of the two parties was governed by the contract contained in the charter-party. If, as business required it, the charterers passed the bill of lading over to a consignee or purchaser, and a dispute arose at the port of delivery or about the loss of the goods, there were only two ways of dealing with the difficulty so far as it affected the purchaser or consignee of the cargo. The action for its loss had to be brought in the name of the original contractor who shipped the cargo and made the charter-party and took the bill of lading; or, if the goods had been delivered at the port of destination, there were cases in which, from the fact of delivery and the abandonment of a lien for freight, and so forth, by the shipowner in making delivery, a contract might be implied, and was applied in some cases, against the consignee to recover freight. But where the difficulties arose with regard to non-delivery, such as in a case of loss like this, the remedy had to be enforced in the name of the original contractor. Then the Bills of Lading Act 1855 was passed, which gave the same rights of suit to a person who was the consignee of goods named in a bill of lading, or indorsee of a bill of lading, to whom the property in the goods passed upon or by reason of the consignment or the indorsement, and subjected him to the same liabilites as if the contract contained in the bill of lading had been made with himself. I do not know that that was strictly a correct form of expressing the matter, but in substance the Act treated the original shipment under the bill of lading as a contract which could be transferred, and which did, when transferred, give rights to the person to whom it was transferred.

It is by virtue of those powers that in the present case the transferees of the bills of lading acquired the right to sue, their rights being based solely upon the bills of lading, and not being controlled by the charter-party, except, of course, if the goods had been delivered, so far as the conditions of the charter-party affected the delivery. That is how a suit against the shipowners could be brought and came to be brought, and there was no answer to it as soon as negligence could be proved which caused the loss. Now, the difficulty in the present case has arisen because those persons who presented the bill of lading do not seem to have appreciated that situation, and do not seem to have appreciated that the bill of lading which was being issued would not protect the shipowner from loss by negligence, although it is quite obvious from the evidence that the point as to whether the exception as to negligence should be put in had over and over again been brought before them. They say some captains asked for it and others did not, and both they and the captain seem to have considered that the fact of putting on the bill of lading "all other conditions as per charter-party" would have the effect of making all the exceptions and all the liabilities and rights practically the same as they were in the charter-party. I confess I am very much surprised to hear that that was the state of things existing in Rangoon. More than twenty years ago shipowners were sued, one might say, almost day after day, certainly week after week, by underwriters using the name of cargo owners for losses caused by negligence in

navigation, and there was, speaking from my memory of it, almost a common form in which that action was brought.

There was a Board of Trade inquiry which disclosed circumstances of negligence by reason of which a ship had got on a rock, then an action was brought, particulars of the negligence were taken from the Board of Trade inquiry report, interrogatories were then administered to the shipowner which he was compelled to answer by asking his captain for the information necessary to answer them; those answers usually put him out of court on the question of negligence, because he had to admit the facts; then a well-known expert was called in as a witness to expound to the jury how it was that there was negligence and what ought to have been done, and there was a verdict, almost as a matter of course, for the plaintiff. That produced verdicts for plaintiffs for many hundreds of thousands of pounds, and the result was that in 1885, I think, there was a conference to stop this, and as a result of the conference the negligence clause was inserted in nearly every bill of lading after that time, and steps were taken to insist upon it being done. I confess I feel surprised to find that that does not seem to have been sufficiently and adequately realised in Rangoon, and that they appear to have thought that it was sufficient to put in "other conditions as per charter-party," which over and over again has been decided not to control the exceptions in the bills of lading and to bring in the exceptions in the charter-party.

That being the position of things, the question which we have to determine is, what are the rights of the parties in this matter? It is only necessary for me to refer to one or two clauses of the charter-party. [His Lordship then referred to clauses 7 and 25.] Now, the first question to my mind is whether the liability of the plaintiffs has arisen in consequence of any breach of the obligations which the charterers undertook under the charter-party? There is a subsidiary point as to whether, if there was a breach by having bills of lading prepared and signed in the way in which these were, the damages flowed from that breach, but I think there is really nothing in that latter point; it can hardly be contested, I think, having regard to the nature of this case, that, if there was a breach, and if these bills of lading were taken in the way they were and indorsed over by the charterers to persons having greater rights than they had against the shipowners, the damage which happened in this case would flow therefrom. The first and, I think, the main question is whether there has been a breach of contract by the charterers? Now, it is obvious that the charter-party itself, if the charterers remained the owners of this cargo, placed the risk of the carriage of the goods on them, even when one of the perils which are enumerated was occasioned by the negligence of the master, or pilot, or mariners, of other servants of the shipowners. The risk of loss, therefore, in that event was contemplated by the charter-party as being cast upon the charterers, and there is this observation to be made in approaching the construction of this charter-party, that there are three different parts of it to look at.

Firstly, those parts which deal with the performance of the contract up to the time of loading; until the ship is loaded the charterers must perform all that is stipulated for with regard to the loading. As soon as the loading is completed they can get rid of their liability by properly preserving the lien on the goods in favour of the shipowner by virtue of the 25th clause. That does not come into operation so far as to require anything to be done by the shipowner until the vessel arrives at her port of destination, when he may have to put in force such remedies by the way of lien and otherwise as he has against the consignee to whom the bills of lading have been transferred, and who has to discharge whatever liens or rights are preserved against him under those bills of lading. That is the second part of it. The third part is that which deals with the transit from the one port to the other, and that is dealt with substantially by the exceptions, which, of course, are exceptions out of the contract that the goods shall be carried properly and safely from the shipping port to the port of destination. Now, I think it is necessary to bear these matters in mind in seeing what ought to be done as a matter of business under a contract of this kind up to the time of shipment. The shipowner deals with the shipper. From the moment of shipment he wants to be in the same position as regards carrying the goods whether the goods remain the property of the shipper or whether the shipper chooses to sell them and pass the property to someone else. That is a matter of common sense. No shipowner would desire to be under one set of obligations to the charterer and under heavier obligations if the charterer chooses to sell his goods. That is not business. Therefore it is natural to look to this contract to see whether there is anything in it which would show that there is any such bargain, and that any such right is given to the charterer to alter the position of the shipowner.

It seems to me that we have only then to consider the terms of the contract, and to apply to the terms of the contract one or two well-known propositions. The first of these propositions is that a master of a ship, when she has been chartered by his owners to a charterer, has no right to alter that charter-party or to depart from its terms. The ship is to be employed on that charter-party, and everything that has to be done in connection with her must be done under that charter-party, and that, in my opinion, is the limit of the master's authority. The second is, that, as a matter of business—and it necessarily must be so—the charterer is to prepare the bills of lading; he has to select how many parcels of goods he wishes the shipment to be divided into, to select whether he will send the bills of lading to certain specific persons named, or have them made out to order and indorse them. It is obvious that it must be for the charterer, and that that is contemplated, to make out the bills of lading and tender them for signature. The third point is that the provision that there shall be bills of lading at all is a provision which, in my opinion, is entirely introduced for the benefit of the charterer. So far as the shipowner is concerned, it does not matter to him whether there are bills of lading or not. If the cargo is shipped under the charter-

party and nothing is said at all, he is bound to carry it and to deliver it to the person to whom he has contracted to deliver it, or to that person's authorised representative. But, as a matter of business, for centuries past bills of lading have been adopted as a means to enable the persons presenting them as a voucher at the port of delivery to obtain the cargo; and now under the Bills of Lading Act 1855 they are not only vouchers, but they give the right to obtain the cargo.

That being so, it is obvious, to my mind (and this is the third point), that it is for the benefit of the charterer that the master should sign bills of lading in order that the charterer may carry out his objects. Therefore, considering those three things, that the master has no right to depart from the charter, that the charterer has to prepare the bills of lading and must necessarily do so, and that it is for his benefit that he should have such documents, it seems to me to follow almost as a matter of course that he has an obligation upon him by virtue of the terms of the charter-party to prepare such bills of lading as are in accordance with it; in other words, bills of lading which will not impose upon the shipowner with regard to the transit (which is what the shipowner from the time of the signature of the bills of lading requires to deal with) a greater obligation than he undertook to the charterer. I think that to apply the charter-party in any other way to the rights of the parties would be to produce very considerable difficulty. One contention (it is hardly a contention, but perhaps a suggestion) on the part of the defendants, I think, was that it might be said that the clause as to signing bills of lading might mean signing usual bills of lading. If that were so I think great difficulty would arise, because it is obvious in this case that there certainly were bills of lading in two forms, one with the negligence clause and one without the negligence clause, and who would have to settle then which form should be adopted. My view is that the contract is that the bills of lading shall be in accordance with the contract contained in the charter. Now, I have pointed out that until the bills of lading are indorsed it makes no difference in what terms they are. They may have as many exceptions as you please, whether greater or less than the charter-party; and it seems to me that until the contract is indorsed the charter-party is the governing document, the charterer and the shipowner are bound by its terms, and the bill of lading is a mere receipt. Of course it makes a very great difference in the shipowner's position if the bills of lading have lesser exceptions in them than the charter-party when they are indorsed, because then they impose greater liabilities upon him. But why should that, as a matter of business, be allowed? Does not that consideration drive one to the conclusion that the proper view to take is that the charter-party is to be carried out by the master on the terms which are provided for, and that, so far as the transit of the goods is concerned, he is to sign bills of lading in accordance with it, and in accordance with the exceptions which are therein contained? I find nothing whatever in the charter-party to alter that view. I do not find any authority to the master to sign anything he pleases. There are certain stipulations as to clean bills of lading, and as to the rate of freight which do not affect the question. But, apart from that, it seems to me that the true reading is that he ought to sign such bills of lading as are in accordance with the charter-party, so that the contract of carriage referred to in it may be in such terms as to leave the shipowner in the same position as he would have been in under the charter-party, no matter who is the owner of the cargo in question.

The master appears to me, therefore, to have no authority as between himself and the charterer to sign the bills of lading in any other form, and it seems to me that in this case he had no authority to sign these bills of lading, which imposed a greater obligation upon the shipowner than the charter-party contemplated. The only case to which I wish to refer on this part of the case is *Rodocanachi* v. *Milburn*, where Lord Esher, in the course of his judgment, said (*ubi sup.*): "It seems to me that in either of the views I have been expressing the case is really covered by the authorities, which expressly hold that, as between the charterers and the shipowners, the bill of lading does not alter the contract between them contained in the charter-party. But, assuming that under this clause of the charter-party the master was to sign bills of lading in the form customary at the port of lading, and that the form of this bill of lading was such customary form, so that only a bill of lading in this form could be signed in accordance with the charter-party, then the result would be that the bill of lading to be signed under the charter-party would be one of the stipulations which were in part not the same as those of the charter-party. What in this case is the rule as to the construction of the two documents? In my opinion even so, unless there be an express provision in the document to the contrary, the proper construction of the two documents taken together is, that as between the shipowner and the charterer, the bill of lading, although inconsistent with certain parts of the charter, is to be taken only as an acknowledgment of the receipt of the goods"; and Lord Lindley said: "It seems to me that the charter-party must be the governing instrument. The meaning of the 10th clause of it is not altogether easy to ascertain." That 10th clause was this: "The master to sign bill of lading at any rate of freight, and as customary at port of lading, without prejudice to the stipulation of this charter-party, receiving the difference if less than the rates specified therein at port of lading, against his receipt for the same." Lord Lindley goes on: "It is difficult to say exactly what is meant by the words 'as customary at the port of lading.' I doubt whether they mean anything more than 'as usual.' I am clearly of opinion that they do not mean that the captain is to have authority to sign bills of lading containing stipulations contradicting the provisions of the charter-party."

So far as those judgments go, they are in accordance with the views which I have been expressing—that the master had no authority to sign this bill of lading imposing upon his owner, when it got into the hands of third persons, greater liabilities than those which were contemplated by the charter-party, and that that having been done, and the charterers having

been bound in my opinion to present bills of lading which carried out the charter-party, they have committed a breach of their contract, and they have done that which, although they were quite mistaken about the matter, and did it without any improper intentions—in fact, cast a greater obligation upon the shipowner than he ought to have had cast upon him; and, to my mind, the damages flow as a matter of course from that position, having regard to the circumstances under which this loss occurred, and the action which was afterwards brought. That is dealing with this case upon the assumption that there was a breach of contract, because the master had no authority to sign these bills of lading, and the shipowner and the charterers were parties to that breach of contract, and must be taken to know that the master had no authority. But now let me turn to the other alternative. If the master had authority to sign this bill of lading in the form in which it was signed, it seems to me it could only be derived from the powers conferred upon him by the charter-party—namely, to sign bills of lading in accordance with clause 7; and if he had authority it means in effect that he was bound to sign such a bill of lading as this when it was presented to him. It is not necessary to go so far as to say that he would be bound to sign anything extraordinary, but, if the bill of lading was not in an unusual form, it might be said that he had authority to sign such a document, and that he derived it from clause 7. If he had authority, it seems to me that it would logically follow that the contention must be that he was bound to sign it. If he was bound to sign it, then his act in so doing is merely a ministerial act in carrying out the contract which is mentioned in the charter-party; and then the principle which was adopted in the case of *Sheffield Corporation* v. *Barclay* (*ubi sup.*) applies. Then, it seems to me, that when the other terms of the charter-party on this assumption are referred to, the proper effect of the clauses is that the master, having had authority and being bound to do that which he did for the benefit of and at the request of the charterer, the necessary inference to draw from the charter-party itself and from the position in which the parties are placed at the time when the contract is being carried out under the charter-party is to impose upon the charterers the necessity of indemnifying the shipowner against that which they have asked the captain to do.

I think it necessarily follows because otherwise it would place the owner in the most extraordinary position—namely, that so long as the charterers held the bill of lading it was immaterial, but the moment they indorsed the bill of lading and conferred greater rights upon other people than they had themselves, he is to be called upon to pay for the goods which he never intended to pay for if they had remained the charterers' unless he was not within the exceptions mentioned in the charter-party. What, then, is it that the charterers in such a case would be asking the captain to do? They would be asking him (and I am assuming for the purpose that they would have a right to ask him) to sign something which gave them an advantage, which placed the shipowner under a liability which he was not under to the charterers, and that it seems to me, having regard to the whole of the terms of those clauses, necessarily leads to the inference that there was to be an indemnity to the shipowner against the consequences. If that is not so, it seems to me that it renders wholly nugatory the 6th clause of the charter-party, the exception clause, because I do not suppose there is a single case in which the merchant at Rangoon would remain the owner of property until it got to its destination; in every case it would be sold, in every case there would be bills of lading, and in every case they would be indorsed over. What then is the value of those exceptions in the charter-party? If they are to be cut down by the bills of lading being dealt with in this way it seems to me that it follows as a matter of course that you cannot give effect to the original exceptions in the charter-party, or to the words, "Without prejudice to the charter-party," if you allow the shipowner's position to be prejudiced, and if you in fact allow those exceptions to be cut down without inferring from it that an indemnity is to be given if the charterer takes advantage of that position and uses it so as to cast a greater liability upon the shipowner. Now, the only way in which it seems to me that Mr. Hamilton seeks to get out of that position is this, he rather leaves on one side the effect to be given to the charter-party and says that what he is really dealing with is the view which was expressed by the learned judge in the court below, and that it can be got out of by saying that on the occasion of the signing of the bill of lading the master and the charterer both of them reasonably thought that they were right in supposing that the bill of lading incorporated these exceptions as well as the other conditions of the charter-party, and the master had authority to determine whether they did or did not. I think that is putting upon the master a power and authority which he does not possess. It is no part of his business to determine in a charter case what the contract is which is contained in a bill of lading; his business is to carry out the charter-party.

It is quite a different matter of course if the ship is put up as a general ship, and the master is left to settle on what terms the goods are to be carried; that is a totally different question, and does not seem to me to be applicable to the particular case which is before us. The other point which was made by Mr. Hamilton in connection with this part of the case is that where there is a *bonâ fide* mistake, such as was made by the master and the charterer here, in that case no inference can be drawn from which a contract of indemnity can be gathered. But that, I think, again leaves out of consideration the charter-party to begin with. It may possibly be so if there was no prior relationship between the parties, and I do not think it is necessary to pursue the view which was expressed by Phillimore, J. in his judgment, and which is based upon the passage which has been quoted from the judgment of Cotton, L.J. in *Birmingham and District Land Company* v. *London and North-Western Railway Company* (*ubi sup.*). I feel certain difficulties about that branch of the case, although I am not prepared to say, as I am not deciding the case upon that point, that that difficulty might not be decided in favour of the

charterers. In my judgment the case may be placed on the first, and the broad point on which I have dealt with it—namely, that there was a breach of contract on the part of the charterers which has had consequences of this character to the shipowner. That being so, in my judgment the decision of the court below ought to be affirmed.

FARWELL, L.J.—I agree in the conclusion at which Phillimore, J. has arrived, although I do not agree with the reasons which he has given for it. To my mind the request which has been urged upon us has absolutely nothing whatever to do with it. The antecedent request which is necessary to form the consideration to support an action for work done or money paid has no relation to a request to perform an existing contract. The request adds nothing to the existing contract; the question of carrying it out or not carrying it out depends on the terms of the contract itself. Secondly, to my mind, the representation as to the effect of that contract innocently made cannot give rise to any cause of action whatever. The statement that the bill of lading contained the words "and all other conditions as per charter-party" was true. The real misrepresentation, if any, was as to the legal effect of those words. Both parties were equally ignorant of that legal effect. Therefore it seems to me to be impossible to say that any right of action arises as between two independent persons from the statement of one, if he made the statement concurred in by both, that the construction of the words used in that document was one thing, when in law it was another. But I agree with the conclusion at which the learned President has arrived on the same ground that he has first put—namely, on the construction of this contract.

The nature of the transaction between the parties must be borne in mind. We have here the charterer and the shipowner in London contracting with reference to the carriage of rice from Rangoon to Rio. The bill of lading is one of those documents which are necessary for the assistance and benefit of the charterer. The parties provide therefore that if the charterer desires it he is to be armed with a document which is primarily a receipt to him, but which secondarily is for some purposes and to some extent a negotiable instrument enabling him to raise money. The parties accordingly contract in the terms of clause 7 of the charter-party. Now, that, to my mind, imports a contract by the charterer to tender to the master such a bill of lading as shall not prejudice the charter (that is to say, shall be consistent with the terms of the charter), on which tender the master is bound by the contract of the shipowner to execute it. That has been held in *Oriental Steamship Company* v. *Tylor* (7 Asp. Mar. Law Cas. 377; 69 L. T. Rep. 577; (1893) 2 Q. B. 518). But it would be said possibly that the circumstances were somewhat different. There one-third of the freight was to be paid on signing bills of lading; it was therefore to some extent to the advantage of the shipowner that the bills of lading should be signed. The bills of lading were to be signed within twenty-four hours after the cargo was on board. After the commencement of the voyage, and before bills of lading were signed, the vessel sank and the cargo was lost. The charterers thereupon refused to present bills of lading for signature, and the shipowner sued them for breach, and it was held that the charterer was bound to present bills of lading for signature in order to enable the shipowner to recover his freight. Lord Bowen said: "It is plain that the bills of lading cannot be signed until they are properly made out and presented to the captain or agent in accordance with the charter-party. The first step must be taken by the charterers. It is inconceivable that the rights which are given to the shipowner on signing bills of lading can be delayed by the act of the charterers in not presenting bills of lading for signature. It is obvious that there must be an implied term in the charter-party, in order to make the contract effectual, that the charterers should present bills of lading to the captain or agent for signature within a reasonable time, so as to give effect to the rights of the shipowner. The case comes within the well-known rule that where the contract as expressed in writing would be futile, and would not carry out the intention of the parties, the law will imply any term obviously intended by the parties which is necessary to make the contract effectual." It may be said that in that case it was to the interest of both parties that bills of lading should be prepared, but it appears to me to be immaterial. Supposing this contract is read, not in the terms I have suggested of a positive contract by the charterer to tender such bills, but in what is perhaps a more natural way of reading it, as under the charter-party it appears to me to be solely for the benefit of the charterer, namely, on condition that the charterer do tender bills of lading properly made out in accordance with the charter, then the master, as attorney for the shipowner, shall execute them, bearing in mind that of course this execution is to be in all probability effected at the other side of the world. The President has already referred to the extent of the master's authority, and I need not refer again to that. Now, supposing it is simply on the condition that the charterer tender that the master executes, and the master has executed the document which was so tendered to him, it is well settled law that a condition precedent of that nature alters its nature when the other party has performed his part of the contract, and becomes then a separate and independent contract of itself. The apprenticeship cases are illustrative of that, one of which is *Ellen* v. *Topp* (6 Ex. 424). So that whichever way you read the contract, whether you read it as the positive contract by the charterer or a condition that on the charterer doing something the master shall execute as attorney, it appears to me that it makes no difference, and that there is an express contract to tender for execution a proper bill of lading in conformity with and so as not to prejudice the actual charter. That appears to me to apply whether the words are as in the present case or whether they are as in two of the cases cited, "as required by" or "as tendered by the charterer." In both those cases on construction it was held that the words "without prejudice to the charter" overrode the rest, and it appears to me to have been rightly so held. The whole case, therefore, to my mind, turns upon this, that the master is simply the bare attorney of the shipowner for the pur-

pose of executing a deed which is to be prepared and tendered to him for the benefit of the charterer by the charterer. Now, in the present case of course the bill of lading tendered is entirely different from that, and the charterer has therefore committed a breach of contract in preparing and tendering and obtaining the execution of such a contract as that. I do not think it is material to say that the master may, if he likes, look at the document and say, "This is not within my authority." Supposing it was not a bill of lading at all, he is not bound to execute it. Supposing it was a bill of lading which he saw at first sight declared that it was to omit all the terms of the charter, it would still be open to him to say, "I am not attorney to execute such a document as that." That is a totally different proposition from treating the master as the agent of the shipowner for the purpose of negotiating and settling the terms of the bill of lading. I do not think that the case of *Sheffield Corporation* v. *Barclay* (*ubi sup.*) has any reference to this case at all. If the master is to be treated as having plenary authority, and is to be treated as a principal contracting there with the charterer as to the terms of the bill of lading and what is to be contained therein, it appears to me that no rights would arise from any uch representation as to the legal effect of the words as is here suggested. In *Sheffield Corporation* v. *Barclay* (*ubi sup.*) the bank tendered for registration a deed which they represented to be a good deed. It was in fact a forgery, and they asked the company, which had the merely ministerial duty of registering, to register on their statement. There was a statement of fact there on which they were invited to act, and on which they did act to their detriment, acting at the request and for the benefit of the person who produced the deed. But here there is nothing analogous to that. If you treat these two persons as parties contracting at arm's length for the purpose of settling what the terms of the document were to be, then the case I will suggest seems to me to be unanswerable. Two laymen agree for the conveyance of a house, and they choose to prepare a deed for themselves; one of them has seen the words "beneficial owner," and has used them in the conveyance. The vendor happens to be a trustee, and he tells the purchaser that it is all right, those are the usual words, and those words remain in. The purchaser afterwards sells to another purchaser for value, and he gets the real estate without notice of the mistake. There is no possibility of rectifying as against him, and nobody would contend that there was any liability for misrepresentation or a right arising upon request or anything of that sort, because both parties honestly and *bonâ fide* misunderstood the legal effect of the words they were using. It appears to me that if these parties are to be treated as ordinary persons dealing at arm's length, *Sheffield Corporation* v. *Barclay* would have no application and the action would fail; but in my opinion it succeeds on the point which I have put upon the construction of the contract.

BUCKLEY, L.J.—I also am of opinion that this appeal fails. As between the charterer and the shipowner the contract as contained in the charter was that the latter was not liable to the former for loss occasioned by negligence. Bills of lading, however, were given in such a form as that between the holder of the bill of lading and the shipowner the latter was liable to the former for loss occasioned by negligence. The holder of the bill of lading sued the shipowner, and recovered judgment against him. If bills of lading had not been given and indorsed, the shipowner would not have been liable. In this action the shipowner sues the charterer for damages or for indemnity. His case is that the liability to which he has been exposed is one in respect of which he expressly contracted with the charterer that he should not be liable, but in respect of which he had nevertheless by the act of the charterer been rendered liable. As a matter of business I have difficulty in understanding how it can be reasonably probable that a shipowner would ever have entered into such a charter. I cannot express it, I think, better than in the terse words which Mr. Scrutton used: "Is it likely that a shipowner would enter into a contract the result of which would be that, so long as the cargo belonged to the charterer, he should not, but when the cargo came to belong to a third party he should, be liable for negligence."

The shipowner's liability, it will be noted, arose by reason of two things: first, that the bills of lading did not except negligence; and, secondly, that the bills of lading were indorsed. The existence of either one of these without the other would have left the shipowner free from liability. The liability therefore arises, amongst other things, from an act over which the shipowner, of course, had no control, the charterer having obtained the bills of lading and indorsed them to a third party. Now, I propose to deal with the case upon two alternatives: first, that the master had, and, secondly, that the master had not, authority to give bills of lading in the form in which they were given. If he had authority to give bills of lading in that form his act bound the shipowner, and upon this hypothesis was an act authorised within the charter-party. But the charter-party provided by art. 7 that the master signing clean bills of lading, &c., should do so without prejudice to this charter. As to the meaning of those words, I refer to what Pollock, C.B. said in *Shand* v. *Sanderson* (*ubi sup.*), what Lord Esher said in *Rodoconachi* v. *Milburn* (*ubi sup.*), and what Lord Esher again said in *Hansen* v. *Harrold* (*ubi sup.*), the outcome of which is, reading the words in the last-mentioned case, that "it is a term of the contract between the charterers and the shipowners that, notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." And, further down, he says, when the bills of lading have been signed, it does not affect the contract contained in the charter-party. Upon the alternative, therefore, the master *ex hypothesi* has by authority signed bills of lading, exposing the shipowner to a liability to the holder of the bill of lading, the terms being that the stipulations of the contract as between the shipowner and the charterer that the shipowner shall not be liable, shall remain and prevail. It seems to me to follow from that that by contract he is liable to indemnify, because as between those parties it has been agreed that the shipowner shall not be subject to a liability (to which by an act, which I am assuming now he does of his own free will,

he is exposed) to indemnify the person who has thus contracted with him.

Then take the second alternative, that the master had not an authority to sign the bills of lading in the form in which they were signed. Then it appears to me that the position is this, that the charterer goes to the master and says: "Give me an instrument by which, if I indorse it, I shall create against your principal a right of action in a third party to which as between your principal and the charterer he is not to be exposed," and the master does so. In giving that instrument, signing the bill of lading, the master must be acting on behalf of the shipowner—that is to say, for this purpose he is the *alter ego* of the shipowner. The shipowner, therefore, it appears to me, is as against the charterer entitled to say: "For the purposes of the liability as between us, the request was made to me, the shipowner." If that be so, then I think that the principles stated by Cotton, L.J. in the case of *Birmingham and District Land Company* v. *London and North-Western Railway Company* (*ubi sup.*), and by Lord Halsbury in *Sheffield Corporation* v. *Barclay* (93 L. T. Rep. 85; (1905) A. C. 397), approving of the argument of Mr. Cave in *Dugdale* v. *Lovering* (*ubi sup.*) applies—that is to say, that A. has made to B. a request to do a thing for him, and B. in consequence of his doing this act is subject to a liability or loss from which the law implies a contract by A. to indemnify B. Speaking for myself, I prefer to rest it upon this ground rather than upon the ground of the decision in *Sheffield Corporation* v. *Barclay* (*ubi sup.*). It seems to me that it was not a ministerial act. If it was an act done under the contract it was done not ministerially, but in performance of the contract. On the other hand, if it was not under the contract, then it was something which the master owed nobody a duty to do, ministerially or otherwise. An argument has been pressed upon us that we ought to regard it as material whether the master and the charterer at the moment when the bills of lading were signed were or were not under the common belief that the bills of lading were proper in point of form. It appears to me that that is immaterial. In the two passages which I have cited I do not find anything stated to the effect that when A. requests B. to do the act he must have a belief that there will be something to be indemnified against. The right in law seems to me to follow from this, that he requests him to do an act and then the law implies that if liability results from the act there will be an indemnity given by the one party to the other. The other way of arriving at the same result is that which has been elaborated by the members of the court who have preceded me, and it is this: that art. 7 of the charter-party extended only to such bills of lading as should be consistent with the charter-party. The authority of the master, of course, is not given by the charter; that is not an instrument to which the master is a party. The limitation and scope of the master's authority are governed by the charter in the sense that he is there on behalf of his principal to give effect to the contents of the charter, and he ought to act according to the charter. Then clause 7 extends only to such bills of lading as are consistent with the charter-party. The charterer ought to have tendered to the master for signature bills of lading such as would be consistent with the charter-party. If he tendered to him other bills of lading not consistent with the charter-party then the charterer committed a breach of contract in so doing. The results are liability to damages, and the measure of damage is the loss which the shipowner suffered by reason of his being induced to create such a right in the bill of lading holder as has been enforced against him. There remains only one other point, and that is this: It has been argued that the master at the port of loading was the agent of the shipowner for the purpose of determining whether the bill of lading was right in form or not; but it seems to me to be unnecessary to decide that. Assuming that he was, then that only brings you back to the case with which I dealt first, of the bill of lading being signed by the master with authority to sign it, and it falls under the first case. For these reasons I think that the decision of the court below was right, and that this appeal ought to be dismissed.

Solicitors: *Hollams, Sons, Coward,* and *Hawksley*; *Holman, Birdwood,* and *Co.*

Wednesday, Feb. 13, 1907.

(Before Collins, M.R., Cozens-Hardy and Moulton, L.JJ.).

The Burns. (*a*)

Action in rem—*Action "against any person"*—*Public Authorities Protection Act* 1893 (56 *&* 57 *Vict. c.* 61), *s.* 1 (*a*).

An action in rem *to enforce a maritime lien for damage caused by collision is not an action against any person within the meaning of the Public Authorities Protection Act* 1893, *and therefore such action will lie although commenced more than six months after the date of the negligence causing the collision.*

The Longford (6 *Asp. Mar. Law Cas.* 371 (1889); 60 *L. T. Rep.* 373; 14 *P. Div.* 34) *followed.*

Appeal from a decision of Bargrave Deane, J. dismissing a motion to set aside a writ and dismiss the bail in an action *in rem* to recover the damage caused by collision on the ground that the action was barred by the provisions of the Public Authorities Protection Act 1893.

The steamship *Burns*, owned by the London County Council, was proceeding down Barking Reach on the 24th Jan. 1906, conveying sewage to sea, when she collided with the steamship *Gervase*. On the 25th Oct. 1906 the owners of the cargo on the *Gervase* issued a writ *in rem* against the *Burns* to enforce their maritime lien and recover the damage they had sustained by reason of the collision.

The writ was in the ordinary form of a writ *in rem*: "Between the owners of cargo lately laden on board the steamship *Gervase*, plaintiffs, and the owners of the steamship *Burns*, defendants," and directed the owners and parties interested in her to cause an appearance to be entered for them, and contained a statement that in default of their so doing the plaintiffs might proceed to judgment in their absence.

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

The indorsement on the writ claimed "compensation against the steamship or vessel *Burns* for damages occasioned by a collision."

The writ was served on the *Burns*, and that vessel was arrested by the marshal.

The London County Council moved the court to set aside the writ in the action on the ground that the action had not been commenced within six months next after the act, neglect, or default complained of, as provided by sect. 1 (*a*) of the Public Authorities Protection Act 1893.

It was admitted that the London County Council had a duty imposed on them to dispose of the sewage.

The following is the section of the Public Authorities Protection Act 1893:

Sect. 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. . . .

Scrutton, K.C. and *A. D. Bateson* for the defendants.—This action was admittedly started more than six months after the accident and is barred by the statute. The only question is whether an action *in rem* is an action against a person. By an action *in rem* the property of the owners may be arrested and the action may proceed in default of appearance, but if the owners appear the action becomes an action against them personally:

The Dictator, 67 L. T. Rep. 563; 7 Asp. Mar. Law Cas. 251; (1892) P. 304; approved in *The Gemma*, 81 L. T. Rep. 379; 8 Asp. Mar. Law Cas. 585; (1899) P. 285.

The plaintiffs will probably rely on the case of *The Longford* (60 L. T. Rep. 373; 6 Asp. Mar. Law Cas. 371 (1889); 14 P. Div. 34), which held that the word "action" in 6 & 7 Will. 4, c. c., s. 8 (which enacted that no action for damage to any ship could be brought against the Dublin Steam Packet Company without one month's notice), did not include an action *in rem*. The reason for that decision was that an Admiralty suit *in rem* was not at that time an action; it was a cause. Order I., r. 1, of the Rules of the Supreme Court now makes all suits *in rem* actions. There is no hardship in holding that this action will not lie, for the ships of public authorities are not sent out of the country, and in any case the public authority can always be sued *in personam* and is perfectly solvent.

Laing, K.C. and *Balloch* for the plaintiffs.—All public authorities must not be supposed to be in the position of the London County Council; it is quite conceivable that a ship owned by a public body might be sent out of the country, and the plaintiff would then lose a very real and effective remedy. An action *in rem* is not within the Public Authorities Protection Act 1893 at all. This action is to enforce a maritime lien, "which is a privilege or claim upon a thing to be carried into effect by legal process":

The Bold Buccleugh, 19 L. T. Rep. O. S. 235; 7 Moo. P. C. 267.

A maritime lien attaches to property, and clings to it in spite of the transfer of the property unless displaced by higher liens:

Carver's Carriage by Sea, 3rd edit., s. 698.

The argument of the defendants amounts to this—that by entering an appearance in the action they can change the whole nature of the action and alter the plaintiffs' rights. An action *in rem* may be brought in some cases although the owner is not liable personally:

The Ripon City, 77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226.

The Longford (*ubi sup.*) really governs this case. A claim based on a maritime lien is not within the Statute of Limitations; the only bar to enforcing such a claim is the laches of the plaintiffs:

The Kong Magnus, 65 L. T. Rep. 231; 7 Asp. Mar. Law Cas. 64; (1891) P. 223.

This statute is inapplicable to an action *in rem*. For instance, sub-sect. (*d*) of sect. 1 provides that if in the opinion of the court the plaintiff has not given the defendant a sufficient opportunity of tendering amends before commencing proceedings, he may be ordered to pay solicitor and client costs; that means that, if he arrests at once, he may have to pay such costs. Such a provision takes away the whole utility of an action *in rem*. Again, an insolvent corporation might send their vessel out of the jurisdiction for six months, and it would then be safe from arrest in their hands; but if they sell it, even to an innocent and *bonâ fide* purchaser, the maritime lien could be enforced against the ship, for the purchaser would not be protected by the statute. Further, this action was not brought in respect of an alleged neglect in the execution of a public duty. The council's public duty is to dispose of the sludge, and an action against them for a breach of that duty would be within the statute:

The Ydun, 81 L. T. Rep. 10; 8 Asp. Mar Law Cas. 551; (1899) P. 236.

But the method of disposal is a matter of choice. The negligent act arose in the disposing of it, and where choice is involved the duty ceases to be a public duty, and the statute does not apply. See the observations of Romer, L.J. in

Lyle v. *Southend-on-Sea Corporation*, 92 L. T. Rep. 586, at p. 590; (1905) 2 K. B. 1.

Scrutton, K.C. in reply.—The Public Authorities Protection Act does not lend itself to any distinction being drawn between acts done in direct and indirect execution of a duty. In an action *in rem* the owner is indirectly impleaded, and, where he could not be impleaded directly, the *res* has been allowed to go free:

The Parlement Belge, 42 L. T. Rep. 273; 4 Asp. Mar. Law Cas. 83, 234 (1880); 5 P. Div. 197.

Jan. 22.—Bargrave Deane, J.—I had some doubt whether I should not take time to consider my judgment, because possibly the case may go further, but I have a very strong opinion myself on one point, and therefore I shall not consider my decision further. Here is an Act of Parliament which limits the rights of private individuals against public authorities, and therefore one has to consider that Act of Parliament strictly. The Act of Parliament says in express words this: "No action, prosecution, or other

proceeding . . . against any person." Now, this is an action well recognised in law—an action *in rem*—and I am asked to read into the Act of Parliament after the words "against any person," the words "or any action *in rem*." I do not feel I am justified in reading these words into the section, and therefore my view is that this action *in rem* is not within the Act. I quite see, when one looks at *The Dictator* (*ubi sup.*), it is clear that the opinion of the judge in that case was that if the owners appear in an action *in rem* and contest the suit, by their appearance they become responsible not only for the value of the *res*, but any extra damages which the *res* will not cover. If that be so, and that is good law, then it might be that the county council in this case, by appearing to defend an action *in rem*, would be bringing themselves within this Act, as being a person against whom, by the force of circumstances, the action is brought. I am not going to decide that point now. It may more properly be decided when the action is tried. At present the action is limited to proceedings against the *res*, and it is not an action *in personam* against the owners. Therefore, in my opinion, this action is not within this Act of Parliament, and the provisions of the Act, saying that such an action must be commenced within six months after the date of the accident, do not apply. I must reject this motion, with costs, and I decide the matter strictly on the words of the statute. As this is an important matter I will give leave to appeal.

Scrutton, K.C. and *A. D. Bateson* for the appellants.—The only question raised here is whether an action *in rem* is an action, prosecution, or other proceeding commenced against any person within the meaning of the Public Authorities Protection Act 1893. Actions *in rem* and *in personam* are both actions against persons, for before the vessel is arrested a writ is issued against the owners, and the owners are persons. If the owners do not appear the vessel is sold, and the plaintiff only recovers the value of the *res*, although he recovers judgment for more than its value. See

Williams and Bruce's Admiralty Practice, 3rd edit., pp. 612, 613.

It does not follow that there is a maritime lien because there is a right *in rem* :

The Sara, 61 L. T. Rep. 26 ; 6 Asp. Mar. Law Cas. 413 (1889) ; 14 App. Cas. 209.

In *The Heinrich Bjorn* (55 L. T. Rep. 66; 6 Asp. Mar. Law Cas. 1 (1886); 11 App. Cas. 270, 286) it is said to be established that before the Admiralty Court Act of 1840 the Admiralty Court exercised a jurisdiction *in rem* to enforce a claim against an owner even though there was no maritime lien. The right *in rem* existed really as a means to enforce appearance; originally the defendant was brought before the court by the arrest of himself or his property :

Selden Society's Record, vol. 6, pp. lxxi. and lxxii.

The admiral had in those days power to arrest any property within his jurisdiction. When in an action *in rem* the owners appear, they may be liable for more than the amount of the bail given to release the *res* :

The Dictator (*ubi sup.*).

That is so because the court did not in early times treat the action *in rem* as a specific form of action. In 1770, in an action by a carpenter and second mate for wages against the owner, the owner was taken into custody and gave bail :

The Nancy, Burrell's Admiralty Cases (1648-1840), p. 99, edited by Marsden.

Once an owner gives bail, he renders himself personally liable :

The Dictator (*ubi sup.*).

He is in an action *in rem* indirectly impleaded because the property is not treated as a delinquent person. See the dicta of Brett, L.J. in

The Parlement Belge (*ubi sup.*).

Where the bail given is insufficient, the ship has been again seized under a writ of *fi. fa.*, which shows that the judgment is one against the person :

The Gemma (*ubi sup.*).

The Longford (*ubi sup.*) is distinguishable on the grounds stated in the court below. The writ here is issued against the owners of the *Burns* ; it is therefore a personal action, and comes within the Act.

Laing, K.C. and *Balloch* for the respondents. —An action *in rem* is brought to enforce a maritime lien, and not merely to compel the defendant to appear. The question that arises really is whether when the writ was issued the action was a proceeding against a person. Where there is a maritime lien, the action *in rem* is quite a distinct form of procedure from the action *in personam* :

The Bold Buccleugh (*ubi sup.*) ; approved in *Currie* v. *McKnight*, 75 L. T. Rep. 457; 8 Asp. Mar. Law Cas. 193 (1896) ; (1896) A. C. 97.

The form of the title of the writ would not be good in a personal action. Here the defendants are described as the owners of the *Burns* ; in an action *in personam* they would have to be described by name. The indorsement also shows that it is not a claim *in personam*, for it is against the steamship or vessel *Burns*. [They were stopped by the Court.]

Scrutton, K.C. in reply.

Collins, M.R.—This is an appeal from the decision of Bargrave Deane, J. in a case where proceedings have been taken by the plaintiffs in consequence of a collision between a vessel owned by them and the *Burns*, which is owned by the defendants, and the point that arose from the learned judge's decision was, whether, under the circumstances, and having regard to the cause of action, the provisions of the Public Authorities Protection Act 1893 applied so as to limit the period within which a claim might be put in suit to six months. The section of that Act which deals with the matter is the first. Sect. 1 says : "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." Then comes provision (*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 the case of a continuance of injury or damage, within six months next after the ceasing thereof." The learned judge came to the conclusion that this particular case did not fall within the provisions of the section I have just read, because the learned judge held that the proceeding was a proceeding *in rem*, and that a proceeding *in rem* could not be brought within the words of the section which I have read. In the view I have taken of this case it will not be necessary to criticise the authorities which were so ably placed before us by counsel for the appellants. I think he has established—certainly he has established to my satisfaction—that the proceeding *in rem* does indirectly affect the owner, indirectly affects the persons, but it is only indirectly that it does affect them. The point has been considered in a very analogous case to this case in this court, by which we are bound, and I think it is very undesirable that we should take subtle distinctions between earlier cases decided in this court and the case before us, and it is very desirable that as far as possible we should loyally carry out the principles established by the earlier cases. Therefore I am not inclined, though I could do so if necessary, to dwell on the technical distinctions which might be taken between the case before us and the case which I am about to refer to—that is the case of *The Longford*, decided in this court in 1889. It is reported in 6 Asp. Mar. Law Cas. 371; 14 P. Div., at p. 34. The headnote of this case is this: "By 6 & 7 Will. 4, c. c, s. 8, no action shall be brought in which the City of Dublin Steam Packet Company shall be liable for any damage to any ship against such company, unless one month's notice in writing shall have been given to the company. Held, that the word 'action' in sect. 8 did not apply to an action *in rem*."

Then Butt, J., whose decision was affirmed, says, in the opening of his judgment, "This is an action *in rem* arising out of a collision which occurred on the high seas between the steamers *Dublin* and *Longford*. The defendants have pleaded that this action cannot be maintained unless the plaintiffs give one calendar month's notice of action, and it has not been denied by the plaintiffs that such notice has not been given. The question is, whether this is an action against the company within the meaning of the section which has been referred to in the pleadings and arguments. It is not in name an action against the company, neither is it, in my opinion, in substance an action against the company, because it is clear that, in such an action as this, the claim against the ship may result in a judgment for a smaller amount than might be recovered against the company. Thus, the plaintiffs' vessel might be damaged to the extent of 1000*l*. The defendants' ship might be worth only 500*l*., and so only 500*l*. could be recovered in an action *in rem*. The remedy against the ship is therefore not co-extensive with the remedy against her owners. This is a section that ought to be construed strictly." Then it went up on appeal and Lord Esher gave judgment, and, after referring to one or more cases which have been cited before us to-day, he says: "The first point to be borne in mind is that the Act must be construed as if one were interpreting it the day after it was passed. It has been said that the Judicature Act must be looked to as evidence of what the law was before it was passed; but that Act merely alters the procedure, and neither it nor the existing forms which take their rise from it are evidence of what the procedure was before it became law. We have also been referred to the case of *The Parlement Belge*, but the most that can be collected from that decision in reference to this case is that an action *in rem* is not the same as an action *in personam*, though it may indirectly affect the owners of, or persons interested in, the ship. The word 'action' mentioned in the section in question was not applicable when the Act was passed to the procedure of the Admiralty Court. Admiralty actions were called 'suits' or 'causes'; moreover, the Admiralty Court was not called, and was not, one of His Majesty's courts of law. It originally derived its jurisdiction from the Lord High Admiral, and not from the King. But be that as it may, this is clearly not an action within the meaning of the word 'action' in the section under notice." Then Bowen, L.J. gave judgment to the same effect. He says: "The first question is whether when this Act was passed this section was intended to include within its scope actions *in rem* or only actions *in personam*. If we were to consider that this section intends to prescribe that notice of action must be given one month before any suit *in rem* is brought in the Admiralty Court, two consequences would follow. In the first place we should have to hold that a number of words here, which are perfectly intelligible in their ordinary sense, are used in a distorted and unusual sense. The words are 'no action in any of His Majesty's courts of law to which the company shall be liable.' We should have to apply the word 'action' to a suit in the Admiralty Court and to hold that it—the proper title of which is the High Court of Admiralty—was one of His Majesty's courts of law within the meaning of the section, when it was not a court of law at all. We should have also to hold that an action *in rem*, which really begins by proceedings against the ship, though they no doubt have the result of the citing before the court the owner of the ship in person, is an action in the ordinary meaning of the word, which can be prosecuted against the company; we should thus be doing violence to the language of the Act of Parliament." And then he proceeds to point out the particular mischief which would arise if they gave effect to the provisions in that particular case.

It seems to me that that case in substance decides that there is a real, and not a mere technical, difference between an action *in personam* and an action *in rem*, and decides that in a case where, taking what I may call the mere technical view of the matter, the court defeated a provision which had certainly been made for the benefit of this particular company, the Dublin Steam Packet Company. It seems to me that that being the decision of this court, and really resting upon the very grounds pressed before us in argument here to-day, that we should be going in for a super-subtle distinction if we held that that case did not apply to the case before us. Speaking for myself, I am quite prepared to admit the argument of counsel for the appellants up to this point, that I think the owners are indirectly concerned in the action *in rem*, and if the matter were absolutely *res integra*, having regard to the

purposes of the Act, to protect public authorities, I should have been very much disposed myself to treat them as coming within that protection where their property was affected by the proceedings taken against them, and therefore they themselves indirectly were persons against whom a proceeding was commenced in the United Kingdom. The argument was addressed to them in a very original form, inasmuch as it threatened them with the loss and confiscation of a vessel which belonged to them, and that certainly was a matter which anyone but a lawyer would say affected the persons who owned this thing. Therefore I would certainly say it was a proceeding against the persons whom the Legislature had thought fit to protect, and which might have very well, without any very great straining of the meaning, be construed to embrace proceedings *in rem* against the London County Council, as well as proceedings directed against the persons owning the ship. However, I think the point has really come up for discussion in an Act almost in terms the same as that Act, and I think that the distinction between the two is too subtle to justify us in acting upon it here. Upon these grounds, therefore, I am of opinion that the judgment of Bargrave Deane, J. was right and must be affirmed.

Cozens-Hardy, L.J.—I agree. I have nothing to add.

Moulton, L.J.—I have come to the same conclusion. The very able argument of counsel for the appellants rests upon this contention: that the process of arrest of a vessel in virtue of a maritime line created by the circumstances of a collision is merely a method of enforcing an appearance in an action *in rem*. In other words, that an action *in rem* differs in its nature in no way from an action *in personam*, save that there is attached to it a means by arrest of the vessel of compelling the appearance of the defendant. Now, I do not think that that can be supported. The two cases upon which he has chiefly relied, *The Dictator* (*ubi sup.*) and *The Gemma* (*ubi sup.*), appear to me, when closely examined, to negative and not to support that proposition. They both of them treat the appearance as introducing the characteristics of an action *in personam*. In other words, it is not the institution of the suit that makes an appearance *in personam*, but the appearance of the defendant. And, further, I think the opposite proposition is conclusively established by the case of *The Bold Buccleugh* (*ubi sup.*), supported and approved as it was in the House of Lords in the case of *Currie* v. *McKnight* (*ubi sup.*), and a passage from Lord Watson's judgment in the latter case, at p. 106 of (1897) A. C., enunciates the contrary proposition in the clearest way. He says: "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." So that I am of opinion that the supplemental proposition of the argument of counsel for the appellants fails, and that the action *in rem* under the circumstances is an action against the ship itself. It is an action in which the owners may take part, if they think proper, in defence of their property, but it is a matter for them to decide upon, and if they do not decide to make themselves parties to the suit in order to defend their property, there is no personal liability against them which can be established in that action. It is perfectly true that the action indirectly affects them. So it would if it were an action against a person whom they had indemnified. The decision of that action might affect the London County Council, but it would not make the action an action brought against them within the meaning of the Public Authorities Protection Act. The only possible support, in my opinion, to Mr. Scrutton's proposition is to be found in the language of the writ itself by which this action *in rem* is commenced. I am of opinion that that ought not to weigh with us. If you consult the old form of warrant by which an arrest of a ship used to be made, you do not find the language in any way supports the position taken up by the appellants. On the contrary, it is evident that the process was regarded there as being directed against the ship itself. That old form was abandoned, and a new form of writ was employed, under, I suppose, the charge of those who had to draw up the form under the Judicature Act, and, I think it was in 1883, the rule was passed which directed the present form of writ to be issued in Admiralty actions *in rem*. That, therefore, shows that, whether the language was felicitous or not, it was intended to apply to an Admiralty action *in rem*, and was not intended to have the effect of altering the nature of that action; and when I turn to the form which was at the same time prescribed for a writ of possession in an Admiralty action, where there had been a default of appearance, I find that the language is quite suitable, and shows that the proceeding is against the ship itself. But, in any case, I do not think that we are entitled to suppose that there has been any change in the nature of the action *in rem* merely because the modern language of the writ by which it commences is unsuitable for what I think the authorities establish to be its real nature. Then if you turn to the case which has been cited by the Master of the Rolls—namely, the case of *The Longford* (*ubi sup.*)—you will find that the court, being perfectly aware of all the provisions of the Judicature Act, decided that it has made no difference in the nature of the action. I am, therefore, of opinion that the Public Authorities Protection Act does not apply to an action *in rem* such as the present action, and that the appeal must be dismissed with costs.

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

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

Wednesday, Feb. 27, 1907.

(Before Lord ALVERSTONE, C.J., FARWELL and BUCKLEY, L.JJ.)

DARLING AND SON *v.* RAEBURN AND VEREL. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party — Cargo not exceeding what ship can carry over "tackle, apparel, provisions, and furniture"—Carriage of more bunker coal than necessary for voyage—Implied term that shipowners will not use ship in manner prejudicial to charterers.

A shipowner is not entitled to load to the disadvantage of the charterer more bunker coal than is reasonably necessary for the performance of the voyage.

A charter-party provided that a steamer should load "a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture," and proceed to a certain port and "there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port." The charterers lightened cargo at a port in anticipation of difficulty in getting into the next port. The shipowners then loaded a larger amount of bunker coal than was required for the chartered voyage, necessitating a second lightening outside the port of discharge.

Held, that the charterers were entitled to recover the expenses of the second lightening from the shipowners, to whom the same had been paid under protest.

Decision of Kennedy, J. (10 *Asp. Mar. Law Cas.* 268; 95 *L. T. Rep.* 108) *affirmed.*

A CHARTER-PARTY, dated the 27th Dec. 1904, provided as follows:

Adelaide charter-party for grain cargoes (steam). It is . . . agreed between Maxwell Gavin Anderson, for and on behalf of the owners of the good screw steamer called the *Balmoral*, . . . now in Australian waters, . . . and John Darling and Son, charterers . . . That the said steamer . . . shall . . . proceed to Sydney and for Melbourne and for Geelong—last two counting as one port—and (or) one or two safe ports in South Australia, but not to load in more than two ports in all . . . and there load . . . a full and complete cargo . . . not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture. And, being so loaded shall forthwith proceed to two or three ports in South Africa between Delagoa Bay and Cape Town, both inclusive—first port of discharge to be named on signment of bills of lading—or nearest safe anchorage, and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port, according to its custom, and there deliver the same agreeably to bill of lading and as customary from ship's tackles into any vessel or at any wharf. If the steamer be ordered to load or discharge at more than one port, such ports to be in geographical order from east to west for loading ports and north to south for discharging ports. . . . Freight being payable at and after the rate of twenty-three shillings and ninepence (23*s.* 9*d.*) if the steamer is discharged at two ports, or twenty-five shillings (25*s.*) if the steamer is discharged at three ports. . . . All per ton of 2240lb. net weight delivered at Queen's beam for wheat and (or) flour. . . .

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

The vessel left South Australia and was ordered to Durban as the first port of discharge. There were then about 800 tons of coal on board, the bunker capacity of the vessel being about 1100 tons.

On arrival at Durban there were on board about 90 tons of coal.

The charterers, anticipating difficulty in crossing the bar at East London, the second port of discharge, lightened the vessel to the extent of about 660 tons of cargo.

This reduced the vessel's draught to 21ft. 1in.

At Durban, however, the shipowners took 800 tons of bunker coal on board.

When the vessel left Durban she drew 23ft. forward and 23ft. 1in. aft.

When the vessel reached East London she had to be further lightened.

When the vessel arrived at the wharf the draught was 21ft. 7in. forward and 21ft. aft.

About 120 tons of coal would have been sufficient to take the vessel to Algoa Bay, her port of destination, and on to either Durban or Cape Town.

If 150 tons had been taken on board at Durban the vessel's draught would have been 21ft. 6in., and with that draught the vessel could have reached her wharf at East London without a second lightening.

The shipowners threatening to exercise their lien for the cost of lightening off East London, the charterers under protest paid the expense so incurred, and then brought an action against the shipowners claiming to recover that amount (181*l.* 15*s.*) from the shipowners, alleging that the second lightening at East London was due solely to the shipowners taking an excessive amount of coal on board at Durban; and that there was a breach of an implied term in the charter-party to make the voyage and utilise the vessel for the charterers' purposes, and not to render the proper and economical employment of the vessel by them impossible or onerous. Alternatively, the charterers claimed damages for the breach of the charter-party.

The vessel was to have proceeded to the Plate after she had discharged at Algoa Bay, but a voyage to Australia was substituted.

On the 2nd April 1906 the action came on for trial before Kennedy, J., when his Lordship decided (10 Asp. Mar. Law Cas. 268 (1906); 95 L. T. Rep. 108) that the charterers were entitled to recover the amount so paid from the shipowners, the essence of a contract to carry by sea from one port to another port, or set of ports, being, in the absence of any agreement to the contrary, that the charterers should have the full advantage of the ship, subject only to that which was necessary for the shipowners to perform their part of the contract in keeping the ship seaworthy and keeping such fuel on board as was necessary for the vessel's progress on the voyage and the safety of those on board.

From that decision the shipowners now appealed.

J. A. Hamilton, K.C. and *W. N. Raeburn*, for the appellants, contended that the charterers were not deprived of any space for cargo to which they were entitled; and that there had been no breach of any terms express or implied of the charter-party.

Scrutton, K.C. (with him *A. Adair Roche*), for the respondents, referred to

The Vortigern, 8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140, at p. 152.

[He was stopped by the Court.]

J. A. Hamilton, K.C. replied.

Lord Alverstone, C.J.—I confess, speaking for myself, that if I had been the judge of first instance in this case I think I should have found quite as much difficulty in deciding it as my brother Kennedy, J. did. It seems to me by no means an easy case. One remembers that in the days when one had to deal with charter-parties one certainly did get impressed with the idea that, if the terms of contract contemplated a particular thing and apparently controlled the incidents and duties and obligations, one did not imply other obligations or further rights. But, having had the great advantage of reading Kennedy, J.'s judgment and hearing all the comments made upon it by Mr. Hamilton in his argument, I certainly am not able to displace the reasons which the learned judge has found in his judgment. I will very shortly state the reasons which bring me to the conclusion that that judgment is right. It seems to me that there must be some limit put upon the rights of a shipowner in such a case as the present, unless Mr. Hamilton is in a position to say that the shipowner is entitled to fill his bunkers as he likes provided that he keeps his ship seaworthy. If there had been authority for the proposition that a shipowner has the use of the bunkers for all his trade purposes, subject only to the condition that he shall not hamper the charterer in the use of the holds or shall not diminish or impair the seaworthiness of the ship, then I could have understood Mr. Hamilton's contention. But the result of his argument has been to bring out, to my mind at any rate, that Mr. Hamilton cannot put this case as high as that.

Just let me state the circumstances of this case. We are told that at the port in South Australia, the bunker capacity of this ship being 1100 odd tons, the vessel had about 800 tons on board. If Mr. Hamilton is right in contending that you may look at this from what I call the shipowner's point of view with reference to the future adventure, I see no reason why the shipowner at Durban should not have said: "These are my bunkers; I will load them right up; I am going to use my ship afterwards. The coal is cheap at this place, and I will load it accordingly." But it seems to me that it may be said against the contention of Mr. Hamilton that a shipowner must not use his ship, as regards the bunkers, as a cargo-carrying ship for the purpose of the owner's interest if thereby he increases the burden upon the charterer; and that is what my brother Kennedy has expressed in his judgment—no doubt in better terms. He says (at p. 110 of 95 L. T. Rep. and at p. 270 of 10 Asp. Mar. Law Cas. (1906): "It is admitted that if, with a very fair margin, coal had been taken merely sufficient to complete that voyage, no lightening would have been necessary." Then he says: "I cannot believe that this"—that is to say, Mr. Hamilton's view—"is in accordance with what I think is the contract which is illustrated by the terms that the cargo is to be provided by the charterer 'not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture.' That clause shows to what extent the shipowner is entitled to load." I understand my brother Kennedy to have meant thereby that a shipowner may not use the space which is left to him for a purpose which is inconsistent with the fulfilment of his obligations to the charterer under the charter-party. It is quite clear that very grave questions might arise if this unrestricted right to use the bunkers existed, as, for instance, in the case of a ship going out from England to Cape Town we will say, and all the coal being exhausted and the owners claiming to fill up the bunkers there which might very materially affect her draught when she got to these other ports. Can it be said that the charter-party means, as Mr. Hamilton contended, that however the ship is loaded, whatever there is on board of it, the charterer shall bear the cost of lightening? If the clause is to be read in that way so that every case is included by that clause, then, as Kennedy, J. pointed out, Mr. Hamilton's contention would have been right. I think on consideration, whatever doubts I may have had upon the case, that the reasoning in my brother Kennedy's judgment is right, and that the court must at least say that there must be this limit put upon the rights of the shipowner, that he is not entitled to burden the undertaking or adventure of the charterer of his vessel by using the space therein reserved to himself for a purpose which has no connection whatever with the voyage for which the vessel is engaged. I think, therefore, that this appeal must be dismissed.

Farwell, L.J.—I agree. The conclusion I have come to rests simply on the construction of the charter-party, adding to it nothing more than that warranty which is always implied in a charter-party such as the present, "that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that the vessel shall then be in a fit state as to repairs, equipment, and crew, and in all other respects sufficient to take her under ordinary circumstances to her port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage." I am quoting from Smith L.J.'s judgment in *The Vortigern* (8 Asp. Mar. Law Cas. 523; 80 L. T. Rep. 382; (1899) P. 140, at p. 152). That coals are part of the equipment of a steamship, I cannot doubt. I read that implied warranty into the contract in the present case, which relates to a voyage from South Australia to Delagoa Bay or Cape Town or to any port or ports between those two. Such ports have river bars or otherwise are so geographically situated that a ship has no wharf where she can discharge. Accordingly the contract expressly provides that she is to proceed "and there lighten at receiver's expense as much of the cargo as may be found necessary to allow steamer to enter, at all times of high water, such port, according to its custom, and there deliver the same agreeably to bill of lading and as customary from ship's tackles into any vessel or at any wharf," and so on. Reading that contract so expressed it appears to me that all that the charterers and the shipowners in the present case have contracted is that the charterers shall pay for the unloading into lighters from a vessel which is equipped, in the manner specified in the contract itself, with

sufficient coal to make her seaworthy for the voyage in question. Further, that it is not according to the terms of this particular contract consistent with the fair meaning of it that the charterers shall pay for such lightening in all cases, although for their own purposes—whether it be for the purpose of sale or of enabling them to continue the voyage beyond Cape Town to the Argentine or elsewhere—the shipowners have chosen to fill up the bunkers of the vessel with coal to such an extent that she cannot get over the bar at East London. I do not myself think that the matters subsequently referred to by Mr. Scrutton can be used in any way to construe this contract. I have simply to construe the contract according to my own reading of it from the actual document as it stands with the relevant circumstances at the time of the commencement of the voyage. I think that Kennedy, J. was entirely right; and I rely upon the way in which he distinguished the case of *Carlton Steamship Company* v. *Castle Mail Packets Company* (8 Asp. Mar. Law Cas. 325 (1897); 2 Com. Cas. 173) and the custom that was proved there to show that it has really no application to the present case.

BUCKLEY, L.J.—The point in this case relates to the loss incurred owing to the draught of the vessel. It was owing to the fact that her draught was too great when she got to East London that expense was incurred. In the matter of draught there were two limits which would affect the charterers. The one was the maximum draught which was consistent with seaworthiness; the other was such draught as for the charterers' purposes it was necessary that the vessel should have when she reached a port which had a bar that the vessel had to cross. The second must be less than the first. The shipowners, under the contract, were entitled to load the vessel and thus affect the draught to a certain extent, and the extent to which they could load is governed by these words, "not exceeding what she can reasonably stow and carry over her tackle, apparel, provisions, and furniture." That would include, of course, coal, and the shipowners would be entitled to put on board coal consistently with those words. Over and above those details it was for the charterers to load the vessel. They might load it either up to the first limit which I have mentioned, or the second limit which I have mentioned. If they loaded up to the first limit and the vessel was going to approach a port where the charterers would have to reduce the cargo to the lower limit in order to get into the port, they would have to take care that they discharged some of the cargo in order to lighten the vessel to get into the port. In my opinion that is what the words "and there lighten at receiver's expense as much of the cargo as may be found necessary" refer to. The whole question, therefore, in the present case, to my mind, is what, as a matter of construction, is the meaning of the words "her tackle, apparel, provisions and furniture"? To what extent were the shipowners entitled to affect the draught? In construing those words I think that you are bound to have regard to the fact that the two parties who were contracting were the shipowners, who carried on the necessary business of the ship, and the charterers, who were concerned in carrying as much cargo as they could load into it. You are entitled to say that there must have been in the contemplation of the parties the fact that these were the respective interests of the two parties. But what are the charterers bound to contemplate as being in the contemplation of the shipowners in the matter? Mr. Hamilton wants to say that the charterers are bound to take into account that the shipowners are not only concerned in this voyage, but in any number more. He presses his argument as far as to say that the shipowners are not only entitled to put upon the ship what was wanted for this voyage, and for reasonably completing this voyage, and, if necessary, to carry the vessel to another port where she could reasonably get more coal if she could not get coal at the last port of discharge, but that the shipowners are entitled to load upon this ship coal for a future voyage. I think not. I think upon the true construction the words "tackle, apparel, provisions, and furniture" are limited to such an amount of loading falling within those words as is contemplated by the parties, having regard to the fact that the ship is engaged upon this voyage. In my opinion there must, no doubt, be allowed a margin for certain contingencies in the course of the voyage, and also a margin to provide for the fact, if it be a fact, that when the vessel gets to her ultimate destination she may be left there without coal, and not be able to get any. Subject to those limitations, I do not think that the shipowners had any right to put any more coal upon the vessel than was required for the purposes of the voyage. What happened was the shipowners loaded up the ship at Durban which the charterers had lightened for the purpose of getting into East London, thereby causing the charterers to lighten her again, and thus causing them expense. In my opinion the shipowners ought not to have involved the charterers in that expense. I agree, therefore, with the judgment of Kennedy, J., and I think that this appeal ought to be dismissed with costs.

Appeal dismissed.

Solicitors for the appellants, *Lowless* and *Co.*
Solicitors for the respondents, *Botterell* and *Roche.*

Monday, Feb. 25, 1907.

(Before COLLINS, M.R., COZENS-HARDY and MOULTON, L.JJ.).

JOSEPH THORLEY LIMITED *v.* ORCHIS STEAMSHIP COMPANY LIMITED. (*a*)

APPLICATION FOR A NEW TRIAL.

Bill of lading—Exceptions of shipowners' liability—Effect of deviation.

If a ship deviates without necessity from the voyage contemplated by a bill of lading, the shipowner has failed to perform the bill of lading contract, and such deviation deprives him of the benefit of exceptions contained in the bill of lading for his relief from liability for the negligence of stevedores in the discharging of the ship; and he will be liable for damage caused to the cargo by the negligence of his stevedores in discharging it, although such damage was in no way attributable to the deviation.

APPLICATION by the defendants for judgment or a new trial in an action tried before Channell, J. with a jury.

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

The plaintiffs were manufacturers of foodstuffs for cattle, and in their business they made a large use of locust beans.

The defendants were the owners of the steamship *Orchis*, and when she was lying in the port of Limassol, in the island of Cyprus, she took on board there 897 tons of locust beans under a bill of lading to the following effect:

Shipped in good order and condition by the Eastern and Colonial Association Limited of Limassol in and upon the good steamship called the *Orchis* . . . now lying in the port of Limassol and bound for London, the following: Eight hundred and ninety-seven (897) tons locust beans in bulk . . . and to be delivered in the like good order and condition at the aforesaid port of London (the act of God . . . and all accidents, loss and damage whatsoever from machinery . . . or from any act, neglect, or default whatsoever of the pilot, master, officers, engineers, crew, stevedores, servants or agents of the owners, in the management, loading, stowing, discharging or navigation of the ship or otherwise (*sic*), and the ship not being liable to make good loss arising from any of the causes above) unto the order of . . . , he or they paying freight for the said goods at London.

The plaintiffs were indorsees of this bill of lading.

While the ship was at Cyprus she took on board 70 tons of an earth called terra umber which contained arsenic. Part of the beans were stowed in the same hold as the terra umber, but at the trial of the action the jury found that the terra umber and the beans were both properly stowed and were properly separated.

From Limassol the ship, carrying the terra umber and the beans, proceeded to a port in Asia Minor, from there to a place in the north of Palestine, thence to Malta, where she completed her loading, and so to London.

At London the beans and the terra umber were discharged by stevedores in the defendants' employ, and during the discharge the terra umber got mixed with the plaintiffs' locust beans, so that the beans were damaged.

The plaintiffs brought the present action claiming damages for breach of contract and breach of duty in and about the carriage of the beans.

At the trial of the action before Channell, J. with a jury, the jury found (*inter alia*) that the mixture of the beans and the terra umber was caused during the discharge, and they assessed the damage caused by the mixture at 240*l.*

Channell, J. held, upon the authority of the decision of the Court of Appeal in *Balian and Sons* v. *Joly, Victoria, and Co.* (6 Times L. Rep. 345), that in consequence of the deviation the defendants had lost the benefit of the exception in the bill of lading relieving them from liability for negligence by their stevedores, and he gave judgment for the plaintiffs.

The case is reported (1907) 1 K. B. 243; 12 Com. Cas. 51.

The defendants appealed.

Scrutton, K.C. and *Lewis Noad* for the defendants.—The question is whether the statement in the bill of lading that the vessel lying in the port of Limassol was "bound for London" is such a substantive part of the contract that the failure on the part of the shipowners to carry out the voyage so named deprives them of the right to rely upon the other terms of the bill of lading. The case comes within the principle laid down by Williams, J. in delivering the judgment of the Exchequer Chamber as to the construction of charter-parties with regard to warranties and breaches of agreement which only give rise to claims for damages:

Behn v. *Burness*, 1 Mar. Law Cas. O. S. 178, 329 (1863); 8 L. T. Rep. 207; 3 B. & S. 751.

He said: "With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine, established by principle as well as authority, appears to be, generally speaking, that if such descriptive statement was intended to be a substantive part of the contract, it is to be regarded as a warranty—that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract *in toto*. . . . If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or, to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word—viz., a stipulation by way of agreement, for the breach of which a compensation must be sought in damages." The same principle has been laid down in other cases:

Ellen v. *Topp*, 6 Ex. 424;
Graves v. *Legg*, 9 Ex. 709;
Pust v. *Dowie*, 1 Mar. Law Cas. O. S. 333 (1863); 5 B. & S. 20.

Here, therefore, as the goods were loaded and carried to London, the plaintiffs' only remedy is an action for damages for breach of the agreement as to the voyage, and the jury have found that the injuries to the cargo of beans were not caused by anything that occurred during the actual voyage taken by the vessel, but were due solely to the negligence of the stevedores in unloading at London. This case is distinguishable from those in which the damage complained of has been caused in the course of the deviation and in consequence of the deviation:

Davis v. *Garrett*, 6 Bing. 716;
Leduc and Co. v. *Ward and others*, 6 Asp. Mar. Law Cas. 290 (1888); 58 L. T. Rep. 908; 20 Q. B. Div. 475;
The Dunbeth, 8 Asp. Mar. Law Cas. 284; 76 L. T. Rep. 658; (1897) P. 133.

For the same reason the case is distinguishable from that relied upon by Channell, J.:

Balian and Sons v. *Joly, Victoria, and Co.*, 6 Times L. Rep. 345 (1890).

The remarks in that case which Channell, J. considered as binding upon him were entirely *obiter*. The point which is raised in this appeal, whether the mere fact of deviation renders the shipowner liable to the goods owner for loss that ensues after it, where the loss is not the consequence of the deviation, was expressly left open in the case of

Scaramanga and Co. v. *Stamp*, 4 Asp. Mar. Law Cas. 295 (1880); 42 L. T. Rep. 840; 5 C. P. Div. 295.

The present case is analogous to the term of a contract that the ship is seaworthy. There if the cargo suffers injury the owner of it must show

that the unseaworthiness was the cause of the injury to the cargo:

Havelock v. *Geddes*, (1809) 10 East, 555;
Worms v. *Storey*, (1855) 11 Ex. 427;
Kopitoff v. *Wilson*, 3 Asp. Mar. Law Cas. 163 (1876); 34 L. T. Rep. 677; 1 Q. B. Div. 377;
Collier v. *Valentine*, 11 Missouri, 299;
Hart v. *Allen*, 2 Watts (Pa.), 114.

J. A. Hamilton, K.C. and *Chaytor* for the plaintiffs.—The Court of Appeal in *Balian and Sons* v. *Joly, Victoria, and Co.* (*ubi sup.*) held that such an unjustifiable deviation as this does away with all the exceptions of the shipowners' liability inserted in the bill of lading. The exceptions only applied to the voyage contracted for, not to any other voyage which the shipowners might afterwards for their own convenience choose to take. The law as laid down in the case cited has been accepted by text-writers as correct. It is in accordance with the law laid down in the cases that have been cited on behalf of the defendants, and reference may also be made to

Lilley v. *Doubleday*, 44 L. T. Rep. 814; 7 Q. B. Div. 510;
Carver on Carriage by Sea, 4th edit., sect. 288;
Abbott on Shipping, 13th edit., p. 407;
Arnould on Marine Insurance, 7th edit., sect. 376.

They cited also

Lavabre v. *Wilson*, (1779) 1 Doug. 284;
Phelps, James, and Co. v. *Hill and Co.*, 7 Asp. Mar. Law Cas. 42 (1891); 64 L. T. Rep. 610; (1891) 1 Q. B. 605;
Wilson v. *Owners of the Cargo ex Xantho; The Xantho*, 6 Asp. Mar. Law Cas. 8, 207 (1886); 57 L. T. Rep. 701; 12 App. Cas. 503.

Scrutton, K.C. replied.

Collins, M.R.—This case raises a question of considerable importance; and, as I may say is the case with every appeal from the Commercial Court that comes here, it has been admirably argued. The point is a short one, and arises in this way. The plaintiffs shipped certain perishable cargo—locust beans—on board the defendants' ship under a bill of lading which described her as lying at Limassol and bound for London. The bill of lading contained the usual exceptions, including one for negligence of stevedores. The ship ultimately arrived at her destination in London. In the process of discharge the beans got mixed with certain material which had been taken on board the ship at Limassol as ballast, and which contained arsenic, and therefore had an injurious effect upon the beans. That, we are told, was done through the negligence of the persons who were engaged in discharging the cargo. Under those circumstances, if nothing more had been added, there is no doubt that the negligence, which was the actual cause of the mischief to the cargo, was one of the matters which were covered by the exceptions in the bill of lading. But, in answer to that, the cargo owners contend that the shipowners have lost the right to rely upon the exceptions in the bill of lading in consequence of the deviation of the ship in her voyage from Limassol to London. Instead of going direct from Limassol to London, she embarked upon a coasting voyage to various ports in Asia Minor, afterwards calling at Malta on her way to London. Under those circumstances it cannot be doubted that there was a deviation.

The sole question before us is what is the effect of such deviation in point of law. Channell, J. has held that this deviation has precluded the shipowners from taking advantage of the exceptions contained in the bill of lading. He based his decision almost entirely upon a decision of this court seventeen years ago in the case of *Balian and Sons* v. *Joly, Victoria, and Co.* (*ubi sup.*). That decision appears to me certainly to be directly in point; and, unless for some reason or another we ought not to follow it, I think it covers the question we have to decide. In that case bales of tobacco were shipped at Lagos for carriage to London. The tobacco was carried, I think, to London, but by a different vessel and by a different route. There was a provision in the bill of lading that no damage of more than 5*l.* could be recovered in respect of any bale unless its value had been declared on shipment. It turned out that a considerable quantity of the tobacco was damaged on the voyage. The tobacco was packed in twenty-four cases each of the value of more than 5*l.* No declaration of value had been made, and the shipowners, relying upon that fact, sought to set up the exception in the bill of lading, and contended that no more than 5*l.* could be recovered in respect of each bale. The Court of Appeal, consisting of Lord Esher, M.R. and Fry and Lopes, L.JJ., held that the deviation was a complete answer to the shipowners, and had the effect of displacing that provision in the contract, and precluding the shipowners from relying on the exception in the bill of lading. Now, when the grounds upon which that judgment was given are looked at, it seems to me that it affirms a principle which is applicable to the case before us.

The principle seems to me to be this—that the deviation had the effect of a breach of a condition such as of a warranty of seaworthiness; and the effect of such a condition or warranty not being complied with is to displace the contract altogether. It goes to the root of the contract, and its performance is a condition precedent to the right of the shipowners to put in suit the liability of the other party to the contract. It is true that that condition may be broken, and yet circumstances may have arisen between the shipowners and the holder of the bill of lading which may raise some implied obligations on the part of the bill of lading holder to pay the freight, and, it may be, to perform other provisions such as would be implied out of the mere fact that the cargo had been carried by the shipowners for the benefit of the owner of the goods. But that is quite consistent with the displacement of the special contract expressed in the bill of lading, and in the case cited this court, it seems to me, held that the true principle of the effect of deviation is that the contract in the bill of lading is displaced.

It was not necessary, therefore, in that case to trace the connection of the particular mischief with the deviation, although I do not see how it is possible to assert that the deviation would have anything whatever to do with the fact that the bales were to be treated as worth 5*l.* only in value unless a special declaration was made. The value of the goods remained

the same whether a declaration had been made or not. The court refused to give any effect to the stipulation, although the deviation could not have any possible bearing upon the existence or non-existence of that obligation as to the value of the goods contained in it. It seems to me, therefore, that the only principle on which that case can be explained is that the court regarded the shipowners' failure to comply with the condition precedent as displacing the exception in the bill of lading in that respect altogether, without going into the question of the casualty, or seeing whether the deviation had any bearing upon the particular mischief complained of. If that be the true bearing of the doctrine of deviation in these matters, it applies directly to this case. There is no direct connection between the deviation here and the particular negligence displayed by the stevedores in discharging the cargo; but that is quite immaterial if we adopt the principle which underlies the decision in *Balian and Sons* v. *Joly, Victoria, and Co.* (*ubi sup.*). If the result of the deviation is that the written contract is set aside, the shipowners are not in a position to set up and rely upon the exception which was inserted in the bill of lading solely for their own benefit. I do not know that it is desirable that I should attempt to go through the authorities upon this matter, because the case of *Balian and Sons* v. *Joly, Victoria, and Co.* (*ubi sup.*) seems to me to be entirely consistent with the earlier authorities which have been referred to in detail before us. I entirely agree with the argument which has been addressed to us so ably and compendiously by Mr. Hamilton. I think that the judgment of Channell, J. was not only in conformity with the decision of this court in the case particularly relied upon, but was also in conformity with the doctrine expressed in earlier cases ever since the time of Lord Mansfield. I will only add that I am unable to see any reason why the admitted limitation in a contract of insurance resting upon a warranty of seaworthiness should not apply equally to a contract of affreightment. Seaworthiness is an absolute condition the breach of which displaces the whole contract of insurance. The position is the same here in regard to this contract of affreightment. The special contract is displaced, though some part of it may survive by reason of the conduct of the other party, or may be implied from the new contract which arises out of the old one. On these grounds I think that the judgment appealed against was right, and that the appeal must fail.

Cozens-Hardy, L.J. — I am of the same opinion. It seems to me that the case of *Balian and Sons* v. *Joly, Victoria, and Co.* (*ubi sup.*) really decides the present appeal. I think it is impossible to say that the reasoning of the judgment in that case does not apply to the case now before us. The principle there acted upon goes back at least to the time of Lord Mansfield. In *Lavabre* v. *Wilson* (1 Doug. 284), decided in 1779, Lord Mansfield said: "The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium. It is that the party contracting has voluntarily substituted another voyage for that which has been insured." A shipowner who, by deviating, has thus voluntarily substituted another voyage cannot claim the benefit of the exceptions in the particular contract which were applicable only to the original voyage contemplated.

Moulton, L.J.—I am of the same opinion. It appears to me that the cases show that for a long series of years the courts have held that a deviation is so serious a matter, and changes the character of the voyage so essentially, that the shipowner who has been guilty of a deviation cannot claim to have performed the contract stipulated for by the bill of lading, but has performed a fundamentally different one. It follows from this that he cannot claim the benefit of the terms of the bill of lading. Then in what position is he? He has carried the goods, and he is entitled to something for this service of which the owner of the goods has received a benefit; and the most favourable position which he can ask to have conceded to him is that he has done so as a common carrier for the agreed freight. I do not say that in all cases he would be entitled as of right to be treated even so favourably as this; but in the present case the plaintiffs do not contest that the shipowners should stand in that position. That leaves the shipowners liable for the amount of the verdict in this case, and therefore I agree that the appeal ought to be dismissed with costs.

Application dismissed.

Solicitors for the plaintiffs, *Hollams, Sons, Coward,* and *Hawksley.*

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

Thursday, March 7, 1907.

(Before Lord Alverstone, C.J., Cozens-Hardy, M.R., and Moulton, L.J., sitting with Nautical Assessors.)

The Oravia. (*a*)

Collision — Fog— Moderate speed — Fog signal forward of the beam—Duty of vessel hearing it to stop—Ascertained position—Right of vessel to proceed—Regulations for Preventing Collisions at Sea 1897, *art.* 16.

The steamship O., *which was proceeding at ten knots in weather which was fine, with passing banks of fog, shortly after entering the fog, came into collision with another steamship, the* N., *which had been heard apparently on the starboard bow after the fog was entered. The* N., *which was on an almost opposite course, had first seen the* O. *about three miles off in a position to pass all clear port to port, had watched her broaden on the port bow, and saw her hidden by the fog which came on. The* N. *was travelling at eight knots, and continued to do so. Shortly afterwards those on the* N. *heard a short blast sounded on the whistle of the* O. *The* N. *answered it with a short blast, her helm was ported, and, as the fog was beginning to envelop the* N., *her engines were put to slow, and, on further signals being heard from the* O., *were stopped and then put full speed astern, and shortly afterwards the collision occurred. The* O. *had starboarded, and on the appeal admitted she was to blame.*

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

Held (*affirming the decision of the court below*), *that the* N. *was not to blame for a breach of the regulations nor bad seamanship.*

Judgment of Sir Gorell Barnes, P. (93 *L. T. Rep.* 278; 10 *Asp. Mar. Law Cas.* 100 (1905) *affirmed.*

Appeal by the Pacific Steam Navigation Company, the owners of the steamship *Oravia*, from a judgment of Sir Gorell Barnes, P., by which he held the *Oravia* alone to blame for a collision which occurred between the *Oravia* and the steamship *Nereus* off Lobos Island, at the entrance to the River Plate, about 2 p.m. on the 9th Oct. 1904.

The facts are fully set out in the report of the case in the court below (*ubi sup.*). The following is a summary of them:—

The case made on behalf of the *Oravia* was that she was proceeding from Liverpool to Monte Video. When off Lobos Island, on a course of W. ½ N. magnetic, making about ten knots and sounding her whistle for fog, she heard the fog signal of the *Nereus* on her starboard bow; the starboard engine of the *Oravia* was stopped, the port engine stopped and put full speed astern, and the helm hard-a-starboarded, two short blasts being sounded. Shortly afterwards the *Nereus* came in sight out of a fog bank 300 to 400 yards off, about three points on the starboard bow. The starboard engine of the *Oravia* was then put full speed astern, the two-blast signal was again sounded, and, when both the engines of the *Oravia* were going full speed astern, her whistle was sounded three short blasts, but the collision happened.

The case made on behalf of the *Nereus* was that she was proceeding out of the River Plate on a course of E. by S., making about eight knots, when the *Oravia* was seen about three miles off and a point on the port bow. The *Oravia* was seen to broaden on the port bow, and was made out to be on an opposite course to the *Nereus*, and then fog came down and shut out the *Oravia*. One short blast was then heard from the *Oravia*, and the whistle of the *Nereus* was sounded one short blast in reply and her helm was ported to give the *Oravia* a wider berth, and, as the fog began to envelop the *Nereus*, her engines were put to slow. Almost immediately the *Oravia* sounded two short blasts on her whistle, and the helm of the *Nereus* was put hard-a-port, her engines were stopped, and her whistle was sounded a short blast. That signal was again sounded to another two-blast signal from the *Oravia*, and the engines of the *Nereus* were put full speed astern and her whistle was sounded three short blasts, but the *Oravia* came in sight on the port bow, and the collision occurred.

On the hearing of the appeal the appellants did not contend that the *Oravia* was not to blame, but contended that the *Nereus* was to blame for bad seamanship and a breach of art. 16 of the Collision Regulations, which is as follows:

> Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, 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.

Aspinall, K.C. and *Dunlop* for the appellants.—The *Nereus* had no right to proceed at a speed of eight knots when the fog came on and the *Oravia* was lost to view; that speed is excessive. She is also to blame for not sounding her whistle for the fog as she approached the fog bank, for she had no right to suppose that the *Oravia* had seen her, and did not know with any certainty what course the *Oravia* might be on:

> *The Milanese*, 45 L. T. Rep. 151; 4 Asp. Mar. Law Cas. 318, 438 (1880);
> *The N. Strong*, 67 L. T. Rep. 299; 7 Asp. Mar. Law Cas. 194; (1892) P. 105.

Laing, K.C. and *D. Stephens*, for the respondents, were not called on.

Lord Alverstone, C.J.—This case has been argued with great ability, and junior counsel for the appellants has shown the courage that I always like to see in juniors, of going one better than his leader, and puts the blame even higher than his leader. That is an action strongly to be commended. In this case I am unable to say that the learned judge came to a wrong conclusion of fact, or applied any wrong principle of law. So far from being able to differ from him, I come to the same conclusion after careful consideration of the evidence. I hope I shall say nothing—I have certainly no intention of saying anything—in any way to weaken the force and binding effect of judgments of this court and the House of Lords with regard to the care with which vessels should be navigated when approaching banks of fog. It has for many years been recognised that if you are approaching fog, in which there may be vessels, you are to slacken your speed, so that you may enter the fog at a moderate rate of speed and have your vessel under control. You are to signal before you actually get into the fog, so as to warn vessels which may be there, and if I thought, as junior counsel for the appellants naïvely suggested, that the action of the *Nereus* had contributed to the starboarding of the *Oravia*, I think it would be a very good point against the *Nereus* if established.

In my judgment this case depends entirely upon its peculiar facts, and judged by those facts I can see no reason for differing from the learned judge when he came to the conclusion that nothing wrong was done on board the *Nereus*. The *Nereus* is bound to the East. She has had Lobos Island in view. She has got such a bearing of Lobos Island that she will pass within something like four miles—a very substantial distance from that particular object. The coast is still further to the north. The *Oravia* is bound inwards, to the West, and one incident of this case, which, though it may not be without precedent, really necessitates dealing with the facts, is that shortly before the vessels came near enough to involve risk of collision Lobos Island had been seen—the weather was comparatively speaking clear, and the two vessels had been in sight of one another. The *Nereus*, as the learned judge has found, had seen the *Oravia*, and had observed her manœuvres sufficiently to see that the two vessels were substantially upon opposite courses, and were passing port to port. That is, practically speaking, the effect of the finding of the learned judge, and is the effect of several passages in the judgment where he deals with the navigation of the *Nereus*. Now, it is said that the *Nereus* ought to have assumed that she may not have been seen by the

Oravia, and that the speed at which the *Oravia* was going was the strongest evidence of that. I may perhaps be allowed to say from some experience of these cases that it is by no means the first time in which even on first-class ships a good look-out has not been kept, but I cannot see any reason why it is to be assumed against the *Nereus* that the *Oravia* ought not to have seen her at or about the same time as she saw the *Oravia*. Under those circumstances you have those two vessels in touch with one another, and so approaching that they will go clear, and it is evident from the learned judge's judgment, and really most fairly admitted by counsel for the appellants in his argument, that the officer of the *Nereus* had seen the *Oravia* broadening on his port bow up to something like two points, at a distance which must have been over a mile. Therefore, if there had been no departure from that course by the *Oravia*, the vessels would have gone well clear. Now, it is said, notwithstanding that, because the *Nereus* was approaching a bank of fog—not running through it, but approaching it—she was to blame because she did not give more sound signals than she did give. I doubt very much whether that argument is open to the *Oravia*. It certainly does not, as junior counsel admitted when I pointed it out to him, amount to a breach of any statutory rule. It can only amount to a breach of the rules of good seamanship. When you look at this case, however, it is quite plain that for some reason or other the *Oravia* starboarded, and starboarded considerably, because, having been in a position when she was practically on an opposite course and two points on the port bow of the *Nereus*, she was not on that course when the vessels were some 400 or 500 yards apart. The *Oravia* fouled the *Nereus* on her starboard bow; and when you look at the collision the total alteration was something like eight or nine points. Therefore the *Oravia* must have been coming round under starboard helm, and it seems to me impossible, in the circumstances, to say there was any special obligation upon the *Nereus* to whistle, or to slow for a vessel which she had seen in such a position that if the vessels had not altered they would have gone clear; and, in fact, if the *Nereus* had stopped or altered, except under some necessity, she might have hampered or impeded the manœuvres of the other vessel. I come to the conclusion that in the circumstances of this case as found by the learned judge there was nothing wrong done on the part of the *Nereus*, even assuming they could not see quite so far as they say they could see. This collision was from first to last brought about by the starboarding of the *Oravia*. No point could be made successfully, as it has been made in more than one case in this court, that the *Nereus* ought to have expected the other vessel to starboard—either because the usual course of vessels in that place might be to cross the course of the *Nereus*, or because the *Oravia* might want to starboard for special reasons, or that there was in that part of the sea a reasonable expectation of vessels starboarding down across the course of the *Nereus*. That has been clearly present to the mind of the learned judge, because he has found that in this place vessels would be only going in and out, and that therefore there was no reason for the *Nereus* to expect any vessel would starboard across her course. Therefore I think the learned judge came to a right conclusion that this vessel, the *Nereus*, was prudently and carefully navigated, having regard to the fact that she had seen the *Oravia* in circumstances in which the *Oravia* ought to have seen her, and that we should strain the spirit of the rules if we were to hold that this vessel was bound to go at a slower rate of speed, or to take action at an earlier period than she did. I think, therefore, this appeal must be dismissed. Though there was not any real question before the assessors here, I have the satisfaction of knowing that the view I have expressed is entirely shared by our assessors, who think that from the point of view of good seamanship and navigation the *Nereus* did nothing wrong.

COZENS-HARDY, M.R.—I agree.

MOULTON, L.J.—I also agree.

Solicitors for the appellants, *Parker, Garrett, and Co.*

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

March 11 *and* 12, 1907.

(Before Lord ALVERSTONE, C.J. and MOULTON, L.J., and Nautical Assessors.)

THE CLAN CUMMING. (*a*)

Collision—Suez Canal—Lights—Duty of vessel proceeding to the southward to tie up—Duty on vessel proceeding to the northward to approach with caution—Rules for the Navigation of the Suez Canal—Arts. 3, 7, 8, *sub-ss.* 3, 4, 7, 8, 10, *and signal* 11.

A steamship was proceeding through the Suez Canal from Port Said to Suez. When in the neighbourhood of the seventh mile-post, those on board her sighted the navigation lights of a vessel approaching from the southward. It was admittedly the practice in that part of the canal for steamships navigating to the southward to tie up to permit vessels proceeding to the northward to pass them, and she therefore drew into the bank; her navigating lights were then extinguished, and the lights required by signal 11 *of the Suez Canal rules to show the free side of the channel were exhibited. The vessel was being tied up when she was run into and damaged by the north-going vessel whose navigating lights had been seen. Those on the north-going vessel alleged that they had the right of way, and that the south-going vessel had kept on too long and had proceeded too fast.*

Held, that though the north-going vessel had the right of way, yet there was a duty on her to keep herself under such command that in the event of her coming up to a steamship, which had to tie up for her, sooner than was expected, she could, by stopping or going astern, avoid running into the steamship which had to give way, and that as the south-going steamship was stopped at the time of the collision, she was not to blame.

Judgment of Sir Gorell Barnes, P. (94 *L. T. Rep.* 174; 10 *Asp. Mar. Law Cas.* 189) *affirmed.*

APPEAL by the owners of the steamship *Clan Cumming* against a decision of Sir Gorell Barnes, P., by which he held the owners of the *Clan Cumming* alone to blame for a collision

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

which occurred between the *Clan Cumming* and the steamship *Chatham* in the Suez Canal on the 5th Sept. 1905.

The facts and the Suez Canal regulations are fully set out in the report of the case in the court below: (*The Clan Cumming, ubi sup.*).

By the judgment of the court below the owners of the *Clan Cumming* were found alone to blame, and judgment was given for the owners of the *Chatham*, and the counter-claim of the owners of the *Clan Cumming* was dismissed. From that decision the owners of the *Clan Cumming* appealed, and on the 3rd Feb. delivered a notice of appeal asking that the judgment might be reversed or varied.

J. A. Hamilton, K.C., *Aspinall*, K.C., and *R. H. Balloch* appeared for the appellants, the owners of the *Clan Cumming*.

Laing, K.C., *Scrutton*, K.C., and *H. C. S. Dumas* appeared for the respondents and were not called on.

Lord Alverstone, C.J.—This case is one of very great interest, and has been extremely well argued, but I see no reason whatever for differing from the conclusion which the learned President has arrived at; and as far as I can judge, from merely reading the evidence and following the arguments of counsel, I should have arrived at the same conclusion. The position of the vessels as they approached one another undoubtedly involved mutual duties on the part of both ships, and responsibilities towards the other ship on the part of each ship, and if counsel for the appellants could have made good their argument that this collision was really caused by the *Chatham's* neglecting to tie up soon enough, in view of the fact that a vessel, the *Clan Cumming*, was coming northward, up the canal, they would, in my judgment, be perfectly entitled to say that the *Chatham* was solely to blame for the collision. I recognise to the full that there is for the mutual convenience of vessels using the canal a direction by rule, or a practice recognised by all vessels navigating the canal, that the south-bound ship is to tie up and the north-bound ship is to pass. That means that each is to act reasonably and with proper regard to the danger and risks of navigation in the discharge of its respective duty. If I thought that the facts of this case pointed in the direction that counsel say—that this collision was really caused by there being too much way upon the *Chatham*, due to her not having manœuvred to tie herself up at a sufficiently early period, and that the impact, which was caused undoubtedly by the reverse action of the screw of the *Clan Cumming*, was because the *Clan Cumming* reversed by being put in difficulty by the conduct of the *Chatham*—I should agree to the arguments to which we have listened. Now, the duties of the vessels rest partly upon rule and partly upon practice. So far as the matter is governed by rule, the rules provide that both vessels are to have a searchlight capable of being divided by a sector in the middle, and an electric light called the arc light which will illuminate a distance of 200 metres round the ship. The rules provide that when a ship makes fast, going south, all the lights I have referred to—searchlight, arc light, and navigation lights—are to be put out, and are to be replaced by three lights—one at the bows, one at the stern, and one at the side. It appears to have been recognised by both captains that there is superadded to the rules a custom of extinguishing the searchlight when the way is practically off the ship, and keeping the arc light up till the vessel is finally tied up. It does not, in my judgment, make any substantial difference in this case. I agree with the argument addressed to us by the appellants that the searchlight was put out comparatively speaking a short time before the actual collision. Whether it was when the *Clan Cumming* was at a distance of not more than a quarter of a mile is not very material, because, as I will indicate in a moment or two, I agree with the view taken by the learned judge that the *Clan Cumming* was coming up too fast and was not sufficiently regarding her duty towards the vessel coming south. Now, having dealt with the lights, the learned judge describes the duties of the two ships towards one another. He says the underway lights must be extinguished and the white lights put in their places, and that "that amounts to a signal that the other vessel coming towards her can then safely pass. But I think that in doing that, if she is aware of the approach of another vessel, she must act reasonably. If she is proceeding to the south and meeting a vessel coming to the north, she must act reasonably by slowing down, stopping her engines, and going to the siding at a proper and sufficient time to enable the other vessel approaching her properly to act for her by slowing down and passing when the proper signals have been given. On the other hand, the vessel proceeding to the north must watch what is happening ahead of her, and as long as the navigating lights are up, then she cannot attempt to pass, but must wait till the white lights which I have referred to on page 50 of the rules are exhibited, and therefore she must watch and see that she does not get too near to the other ship, and for that purpose must, if necessary, act reasonably by slackening her speed, so as to have herself properly in hand by the time she approaches the place where the other vessel is about to make fast." No language of mine, in my opinion, could possibly improve upon that statement of the duty of the two ships, and I most willingly adopt it as the basis of my judgment in considering what were the relative duties of the ships and how far they did or did not comply with them. Now, the conduct of the *Chatham* is mainly attacked upon the ground that she was acting too late. Of course, if I had any reason to think that the log-book entries had been prepared in any way, so as not really to represent the facts, I should hesitate to act upon them, but we have this fact, that according to the record in the log-book the *Chatham* had tied up twice before in the course of her passage down the canal, and I agree that the period of time that elapsed between the first manœuvre towards making fast and the actually being made fast was practically twelve minutes. On this occasion, so far as we can gather from the *Chatham's* log, the manœuvring began at 7.34, and ended at 7.43. That is a total period of something like nine minutes. Of course, after the way has been taken off the ship she has to be tied up. I agree that in all probability the boat is lowered while she has speed upon her through the water, and there is a slight run over the land. Having regard to the fact, however, that the boat was in course of going to the land,

I think the condition of things does point to very nearly the end of the manœuvre of tying up. Therefore, I am unable to say that there is any substantial ground for thinking that the position of difficulty was brought about by undue speed on the part of the *Chatham*, or any undue hesitation or neglect to take proper manœuvres to tie up. I am by no means satisfied upon the evidence as it stands that the learned President was wrong in coming to the conclusion that the *Chatham* was not to blame in this matter. That does not, of course, exhaust the matter, because we have to consider the action of the *Clan Cumming*. I think that the fact that both these vessels had been going faster than $5\frac{1}{2}$ knots is not very relevant. On the other hand, speaking generally, I think a vessel which has to tie up is entitled to assume that the vessel coming up is not substantially exceeding that speed at which she is entitled to go in the canal. I do not wish to press that too far, because I do not want to deal with it in any way as being a matter of blame. The abstract fact is that the *Clan Cumming* was going fast; but when I regard the evidence as to distances travelled by one and the other from points which are ascertained and specified in the judgment, I certainly come to the conclusion which the learned President has come to, that the *Clan Cumming* was going much the faster through the water. But, again, I do not think that would have been enough unless the collision had been brought about by such excessive speed or want of care; and the substantial ground upon which I am of the same opinion as that expressed by the learned President is this, that I think, on the cross-examination of her master, the *Clan Cumming* was being allowed to come on at much too great a rate of speed, in ignorance of the distance—the actual distance—between the searchlight ahead of her and herself. I do not wish to read any detailed passages, but perhaps I may be allowed to say, from long experience, that I have seldom read more effective cross-examination of a witness than the cross-examination of one witness by counsel for the respondents—all the more effective because, having made points as he went along, he did not attempt to argue with the witness. The impression made upon my mind was that at the end of that cross-examination of the captain, it had been demonstrated to my mind, and I think to the President, that the captain was coming up too close in ignorance of the distance of the searchlight of the *Chatham* away from him. I come to the conclusion that this collision was in fact caused by the north-going ship keeping too high a rate of speed, neglecting to put herself under sufficient command when approaching a vessel which she had no right to pass until the searchlight and arc light were put out. From that point of view it really becomes immaterial whether the searchlight was put out shortly before the collision or not. It tells rather more against the *Clan Cumming* if it be the fact that the searchlight was put out a short time before the collision. The learned President came to the conclusion that the *Clan Cumming* did not keep herself under proper command. It was her duty not to pass until the lights were extinguished, and she allowed herself to get too close to the ship, which she might easily have avoided, and then at the last moment, as counsel for the appellants truly says, she adopted the drastic measure of reversing full speed astern, and, in fact, still having substantial way upon her, her stem canted to starboard, and she comes into the *Chatham*. In my opinion, the judgment of the President must be upheld, and this appeal must be dismissed.

MOULTON, L.J.—I am of the same opinion, and for the same reasons.

Solicitors for the appellants, *Hollams, Sons*, and *Coward*.

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

Wednesday, March 13, 1907.

(Before Lord ALVERSTONE, C.J. and MOULTON, L.J., and Nautical Assessors.)

THE ANSELM. (*a*)

Collision—Applicability of collision regulations to inland waters—"High seas and in all waters connected therewith"—"Navigable by sea-going vessels" — Duty to sound whistle signals — "Taking any course authorised or required by these rules"—Collision Regulations 1897—*Preliminary and arts.* 28 *and* 30.

The Regulations for the Prevention of Collisions at Sea 1897, *which are made under an Order in Council of the* 27*th Nov.* 1896, *and which by the preliminary article are to be followed by all vessels upon the high seas and in all waters connected therewith navigable by sea-going vessels apply to all harbours, rivers, or inland waters, unless local regulations are made which override them under art.* 30; *and any vessel infringing them will be held to blame for a collision which ensues, unless it can be shown that the infringement could not by any possibility have contributed to the collision.*

The words "authorised course" in art. 28 *are to be given a wide interpretation, and include any course which for the safety of vessels good seamanship requires to be taken with reference to the other vessel in sight.*

The Uskmoor (87 *L. T. Rep.* 55; 9 *Asp. Mar. Law Cas.* 316; (1902) *P.* 250) *approved.*

The Anselm (94 *L. T. Rep.* 257; 10 *Asp. Mar. Law Cas.* 257) *reversed.*

APPEAL by the owners of cargo on the steamship *Cyril* against a decision of Bargrave Deane, J., by which he held that the steamship *Anselm* was not to blame for a collision which occurred between the two vessels in the Para Estuary, river Amazon.

The facts are fully set out in the report of the case below: (*The Anselm, ubi sup.*). The following is a summary of them:—

The vessels were meeting each other end on, and, when about two miles apart, those on the *Anselm*, which was entering the river, ported their helm, but did not sound a port helm signal on their whistle until they saw that the *Cyril*, which was proceeding to sea, was starboarding.

Thereupon those on the *Anselm* sounded a port helm signal, and shortly afterwards, as the *Cyril* sounded a long blast and continued to starboard, the engines of the *Anselm* were stopped and reversed, but a three-blast signal was not sounded on her whistle. The vessels collided, and the

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

owners of the cargo on the *Cyril* instituted the present action for damage to and loss of cargo.

Both vessels were owned by the defendants, and the plaintiffs, the owners of the cargo on the *Cyril*, called no witnesses, but put in the log and scrap log of the *Anselm* and a report made by her master to his owners to prove their case.

The principal charges made against the *Anselm* were that she neglected to slacken her speed or stop or reverse her engines, and failed to indicate by appropriate whistle signals the course she was taking.

The learned judge in the court below held that those on the *Anselm* had broken art. 28 by not sounding whistle signals on first porting and on reversing, but that the breach of the article could not by any possibility have contributed to the collision.

Aspinall, K.C. and *Balloch* for the appellants, the owners of the cargo on the *Cyril*.—It is admitted that the *Cyril* is to blame; the only point to be decided is whether the *Anselm* is not also to blame. Upon the evidence those on the *Anselm* should have reversed their engines sooner than they did, and they are to blame for not doing so. The court below found that those on the *Anselm* had broken art. 28, but held that the infringement could not have contributed to the collision. Those on the *Anselm* should have sounded their whistle on porting and when they reversed their engines, for they were then taking a course authorised by the rules. The word authorised is much wider than required, and includes everything which good seamanship demands should be done with reference to another vessel:

The Uskmoor (*ubi sup.*).

If that case was rightly decided there was in this case a breach of the rule. Further, it is a breach of the rule which in fact contributed to the collision, but it is unnecessary to prove as much as that for there is a statutory sanction to this rule, and the defendants to escape liability must show that the infringement could not by any possibility have contributed to the collision, and they have not done that.

Sir *R. Finlay*, K.C., *Laing*, K.C. and *A. D. Bateson* for the respondents, the owners of the *Anselm*.—The rules relied on by the appellants do not apply to the navigation of these vessels in the Para Estuary of the river Amazon, and therefore there has been no breach of any rule to which a statutory sanction applies. The collision regulations of 1897 are scheduled to an order in council made under sub-sect. 1 of sect. 418 of the Merchant Shipping Act 1894, which gives power to make regulations for preventing collisions at sea, and the heading of the rules is in accordance with that power, but the preliminary article goes beyond the words of the section and are *ultra vires*. These regulations have been held not to apply to the Manchester Ship Canal:

The Hare, 90 L. T. Rep. 323; 9 Asp. Mar. Law Cas. 547; (1904) P. 331.

And the question as to whether the sea rules apply to inland waters arose in the case of *The Carlotta* (80 L. T. Rep. 664; 8 Asp. Mar. Law Cas. 544; (1899) P. 223). [*Aspinall*, K.C.—This point was never taken in the court below.] That is so, but the respondents are entitled to take it now to support a judgment in their favour:

The Tasmania, 63 L. T. Rep. 1; 6 Asp. Mar. Law Cas. 517; 15 App. Cas. 223, at p. 225.

Even if the regulations do apply, the statutory presumption of fault does not follow if the breach could not by any possibility have contributed to the collision:

The Englishman, 37 L. T. Rep. 412; 3 Asp. Mar. Law Cas. 506; 3 P. Div. 18;

China Merchants Steam Navigation Company v. *Bignold*, 47 L. T. Rep. 485; 5 Asp. Mar. Law Cas. 39; 7 App. Cas. 512.

The *Anselm* first ported as a mere precaution, and a whistle signal was, under the circumstances, unnecessary then, and porting put an end to and determined the risk. When the *Cyril* starboarded the whistle signal was properly sounded by the *Anselm* under art. 28 to signify that she was porting. It is alleged that the engines of the *Anselm* were not reversed soon enough, but the court below has found as a fact that they were, and there is evidence to support that finding, and this court will therefore not interfere. Failure to sound the three-blast signal is not a breach of art. 28, for the reversing of the engines is not a course either authorised or required under the rules. Instances of rules which authorise or require a course to be taken are arts. 17, 19, 20, 24, 26. The question here is one of good seamanship, and a distinction is to be drawn between rules, a breach of which incur the statutory penalty, and those which only offend against good seamanship:

The Sanspareil, 82 L. T. Rep. 606; 9 Asp. Mar. Law Cas. 78; (1900) P. 267.

That decision is in conflict with *The Uskmoor* (*ubi sup.*) and is binding on this court. There was therefore no duty on the *Anselm* to sound these three blasts, and even if there was the neglect to sound them could not by any possibility have contributed to the collision.

Aspinall, K.C. in reply.—There is no conflict between *The Sanspareil* (*ubi sup.*) and *The Uskmoor* (*ubi sup.*), they were dealing with different rules; the former of the two cases dealt with arts. 27 and 29, the latter with art. 28. A distinction is to be drawn between the words authorised and required; authorised is much wider than required, and the reversing here was a cause authorised by the rules.

Lord ALVERSTONE, C.J.—In this case there has unexpectedly arisen a number of points, and if I had felt any doubt upon them I should certainly have taken further time to consider some of the points raised by counsel for the respondents; but inasmuch as I think that if any decision as to these regulations being *ultra vires* is going to be given, it must be given by a higher tribunal, if not by the Legislature. And as I think that the course of practice is far too clearly established to justify us in giving effect to the argument of the respondents on that question of law, I think it better to give my judgment at once. It has been argued that these rules do not apply to this river, and it has been suggested they are *ultra vires* if the opening words of the Order in Council are to be given their natural meaning. I have not had the opportunity of looking to see whether those words

were in the earlier regulations, but these are so long-standing that it is not material. If there has been an alteration that would perhaps tell rather more in favour of the view I am expressing. According to the opening words of the Order in Council these rules are to be followed "by all vessels upon the high seas, and in all waters connected therewith navigable by sea-going vessels"; and, as I pointed out when the point was first indicated to us, art. 30, which is correlative to the preamble, provides that "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters." It is impossible to read those words without coming to the conclusion that the opening words were intended to include harbours, rivers, or inland waters, because those are the waters as to which it is contemplated local rules may override general rules. In those circumstances, it seems to me impossible to give the narrower construction or to say that these rules are not applicable to such a river as that in which this collision took place, having regard to the express words of the regulations, unless we do it on the ground that they were *ultra vires*. Without going into history the recognition which has been given to these rules by the greater number, if not all, of the civilised nations of the world, and the fact that they have been constantly applied with regard to harbours and inland waters of various kinds, to my mind make it quite impossible for us at the present day to give effect to such an argument as has been addressed to us; and I think we should be rescinding the practice that has been acted upon over and over again. This, of course, is not my opinion only, because when dealing with the matter in the case of *The Carlotta* (*ubi sup.*) it was pointed out that from the year 1866, in the case of *The Concordia* (2 Mar. Law Cas. O. S. 388; 14 L. T. Rep. 896; L. Rep. 1 A. & E. 93), and many other cases, the regulations were treated as being applicable to the river Thames; and the ground upon which the Manchester Ship Canal was excluded certainly does not in any way show that the President thought any doubt was to be thrown upon the applicability of the rules to such a place as that in which this collision occurred.

That being so, it seems to me that the way in which this case was fought in the court below is the right way in which it has to be dealt with—that is to say, whether or not there has been an infringement of the navigation rules and whether or not the learned judge has come to a right conclusion upon that part of the case in thinking that that infringement could have had no possible effect upon the collision. Upon that particular part of the case another point of law has been taken. It is said that at any rate as to a part of the blame attempted to be thrown upon the *Anselm*—that is to say, not sounding three blasts to indicate she was going astern with her engines—that the neglect to give that signal has not the consequences that neglect to obey a particular direction has. That argument is based upon the proper construction to be given to the word "authorised" in the article which refers to the signals. That article is the 28th and is as follows: "When vessels are in sight of one another, a steam vessel under way in taking any course authorised or required by these rules shall indicate that course by the following signals on her whistle or siren." During the arguments I pointed out that the word "course" there could not mean compass course only, because it is quite plain that helm directions and engine directions are meant to indicate the movements of the vessel for the purpose of avoiding collision or to put an end to any condition of danger existing. Upon the question of the construction of the word "authorised" we have had cited to us the decision of a very distinguished judge, Lord St. Helier, when President of the Admiralty Division, who, of course, had very great experience. He, in *The Uskmoor* (*ubi sup.*), has given a construction of the word "authorised" which certainly commends itself to me, and which I think it is very desirable to uphold, for the reason that it is so extremely necessary that if any course is being taken which is not absolutely required, but is a course which is "authorised" and therefore permitted, notice should be given to the other ship as to the manœuvre that is being undertaken. I only read, in order to adopt it, a passage from Lord St. Helier's judgment. It is as follows:—"The rule does not apply where a vessel, in conducting manœuvres in the ordinary course of navigation quite apart from seeing any other vessel, thinks it right to port or starboard her helm; but the rule is also limited to 'taking any course authorised or required by these rules.'" That observation, with which I entirely agree, is to show that these words, as I have more than once pointed out, are made with reference to vessels approaching so as to involve risk of collision, or which may be so approaching. "It has been sought to put a rather narrow construction upon the rule. Of course the word 'required' is clear enough. There are certain things required by the rules to be done. The word 'authorised' is, however, very much larger, and I am inclined to think that a large interpretation ought to be given to it; and that it includes any course which, for the safety of the vessels, good seamanship requires to be taken with reference to the other vessel then in sight—although it is quite true that there are certain cases where you may say a more distinct authorisation arises. For instance, an overtaking vessel, which has to keep out of the way of the overtaken vessel, would be authorised in going to port or starboard, according as the circumstances of the case might require, and, under the crossing rule, the vessel which has to keep out of the way must be considered authorised to do so by one of several means, as the case may seem to require." What I pointed out during the course of the argument was that if you took a number of rules, beginning with the 18th and ending with the 22nd, you found that when one steamship is directed to keep her course and speed the other vessel which is directed to keep out of the way shall, if the circumstances of the case admit, avoid crossing ahead of the other. That seems to me to include both, or may be said to include both, requirements and authority, because although the ship is told she must avoid crossing ahead, she may do so by taking sometimes one manœuvre and sometimes another. With regard to all these arguments, I have already pointed out that it is very desirable

the other vessel should know what is being done, and I call attention to the last of the sound signals—namely, "Three short blasts to mean, 'my engines are going full speed astern.'" That is only one of the manœuvres that may be taken by the engines of a ship, and yet that particular signal is indicated as one of which notice is to be given if the vessel is taking a course authorised or required by the rules. It is very difficult to see that there is any direct requirement to stop and reverse at all, because it was pointed out that art. 23, which deals with stopping and reversing, says "if necessary." Therefore, it seems to me that the "authorised" mentioned in art. 28 at least includes the case of stopping and reversing the engines where a vessel does so, not being bound to do it, for the purpose of avoiding risk of collision. Then it is said that this view is inconsistent with Romer, L.J.'s judgment in *The Sanspareil* (*ubi sup.*) and that where it is inconsistent we must follow *The Sanspareil* (*ubi sup.*). I do not understand Romer, L.J. to have said anything inconsistent with *The Uskmoor* (*ubi sup.*). Romer, L.J. was pointing out that a vessel which was guilty of bad seamanship, and therefore fell within the blame indicated by rules 27 and 29, did not of necessity infringe the rules within the meaning of the section under which vessels shall be held to blame and be deemed to be in fault. He was not in any way putting any construction upon "authorised or required" in art. 28. It seems to me that the two judgments stand quite together, the one indicating that bad seamanship—or that which would be held to be bad seamanship—need not of necessity be a breach of a statutory rule; the other deciding that what you are authorised or required to do under the rules may impose upon you an obligation to give a sound signal. I think the two decisions were dealing with entirely different subject-matters, and I do not read or find anything in the judgment of Romer, L.J. which conflicts with the opinion of Lord St. Helier in *The Uskmoor* (*ubi sup.*), which, as far as I am entitled to do in this court, I wish to adopt for my own.

I now only have to deal with the particular heads of blame, and the view of the learned judge that the infringement of the rules—to adopt his own words—"had no possible effect upon the collision." I am unable to accept that view, and I think it would be best to indicate why it seems to me, with great deference to Bargrave Deane, J., there was blame upon the *Anselm* in fact, before I deal very briefly with the question whether or not the *Anselm* satisfied the court that the breach of the regulations had no possible effect upon the collision. I think that from the general seamanship point of view there are three matters in which the *Anselm* distinctly is to blame. In the first place, it seems to me that having the *Cyril* upon her port bow, and seeing the *Cyril* starboarding, and she continuing her port helm, it was certainly right for her and necessary for her to indicate what she was doing to the *Cyril*—I might say almost apart from the rules, but I will take it for the purpose of my judgment that in that particular respect she was disobeying the rules. What are the facts? Here is another vessel being navigated down river, and the two vessels are meeting at a combined speed of twenty-two to twenty-three knots, which is a mile in less than three minutes. The *Cyril* starboards at a distance at which she must be likely to interfere with the course of the *Anselm* up the river. It seems almost impossible that that could have been done by a steamer which was end on, as everybody agrees both steamers were, and which had a proper look-out; and, it being her duty, as undoubtedly it was, to port, it is quite impossible to say that the omission of the *Anselm* to signal that she was porting her helm had no effect upon this collision. Then there is the non-signalling that she was reversing. We are advised by our assessors—who have also advised us with regard to the port helm signal—that the non-indicating to this vessel which was rapidly approaching that the *Anselm* was reversing her engines was abstaining from giving her information which might be useful, if only for the purpose of calling her marked attention to what was going on in front of her. That seems to me the essence and pith and marrow of the rule which indicates that these signals are to be given. Then, for a substantial time the *Anselm* neglects to reverse her engines. I have already said the vessels were approaching at a combined speed of twenty-two or twenty-three knots. The *Anselm* sees a mile or a little over a mile off a vessel coming down starboarding her helm, and it seems to me elementary that at that time there was serious risk of collision, and it was the duty of the *Anselm* to take her way off as soon as she possibly could, and so to have avoided or, at any rate, reduced the danger of collision. I therefore come to the conclusion that the *Anselm* was to blame in these three respects, and that as regards two of them—namely, neglect to give sound signals when porting and when reversing—it is quite impossible to come to the conclusion that they had no effect upon the collision.

I have only one other observation to make, which is of a general character, and applies to this case. The case is a peculiar one. Both ships belong to the same owners. The judgment of Bargrave Deane, J. proceeds, to a large extent, as I think was pointed out by Moulton, L.J., upon what would be the effect on those on board the *Cyril*. Where persons are attacked, and it is proved against them that there is a serious breach of statutory rules, I have very grave doubt whether they do fulfil the obligation upon them if they do not satisfy the court by affirmative evidence that the breach of the rules has no possible effect: (*The Fanny M. Carvill*, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565; 13 App. Cas. 455, n.) I cannot believe, where both vessels belong to the same owners, it was sufficient for the defendants to prove what was done on board the *Anselm* and leave the court to draw the inference that in the absence of those signals what was done on the *Anselm* was understood on the *Cyril*. I think, therefore, that the *Anselm* was to blame in the respects I have indicated, and I further think it is quite impossible to come to the conclusion that the breach of the regulations had no possible effect upon this collision. Therefore I think this appeal must be allowed and the *Anselm* also held to blame for the collision.

Moulton, L.J.—I am of the same opinion, and only wish to add a very few words upon one or two of the interesting points arising in this case. First, with regard to the question whether these rules applied to such a place as that in which this

collision occurred. It is, in my opinion, clear that it is a place within the description to be found in the preamble to the regulations, and I can see no trace of *ultra vires* in making the regulations apply so widely; and we are not going away from the decisions of the President of the Admiralty Division in *The Uskmoor* (*ubi sup.*), *The Carlotta* (*ubi sup.*), and *The Hare* (*ubi sup.*). In *The Hare* (*ubi sup.*), which was a case of collision in the Manchester Ship Canal, the President said: "I do not read that preliminary article as intended to extend the word 'sea' beyond its proper meaning, and my view on this subject has already been expressed in the case of *The Carlotta* (*ubi sup.*)." When we turn to his judgment in *The Carlotta* (*ubi sup.*), to find the meaning of the word "sea," we find he says that the sea regulations are intended to apply to tidal waters connected with the high seas navigable by sea-going vessels. Within that definition of the sea the place where this collision took place undoubtedly comes. The next point is the question whether the *Anselm* was immediately before the collision taking a course authorised or required by the regulations, so as to come under the obligation to give a single blast when she ported her helm and three blasts when she reversed her engines. I think that the word "authorised" there is extremely well chosen, and I think it is chosen for the very purpose of including the full meaning given to it in *The Uskmoor* (*ubi sup.*). I am satisfied that each one of the able counsel I see before me, if he had to argue the case of a vessel that under art. 27 had departed from the strict regulations because it was necessary so to do in order to avoid immediate danger, would say that it was taking a course authorised by the regulations. It would be the natural phrase that we should use to say that a ship had the authority of the regulations in so doing. Therefore, I think art. 28 was intended to apply to such a case as this, and if it was intended to apply to such a case, and we are justified in treating the vessel as being under an obligation to give these signals, it is to my mind far more important that they should be given when the course is a deduction from those regulations which has to be made by the individual under the particular circumstances of the case, than if it is a course prescribed by a cut-and-dried regulation, known to all the world I think not only that it is good law that *The Uskmoor* (*ubi sup.*) lays down, but that it is extremely important for the good management of ships that that law should be recognised There are two points in connection with the case that I also want to refer to. The first is the question whether or not the *Anselm* is to blame for not reversing her engines. Now, these were vessels navigating, in opposite directions, a narrow channel. They were both swift vessels, and their combined speed was twenty-two or twenty-three knots, and they were intending to pass at full speed. I do not suggest there was any negligence in that, but the moment one vessel sees the other is departing from the rules it seems to me there is, in the circumstances, thrown upon her at once the idea that they are crossing at full speed; and in such circumstances as we have before us to-day it was obligatory upon the *Anselm* at once to reverse her engines. The next point I wish to touch upon is the failure to give three blasts. It is suggested that that signal was not really necessary, and that it would have made no difference if it had been given. It appears to me that had the *Cyril* heard three blasts given by the approaching vessel—that is to say, had heard that a vessel coming towards her had felt herself bound, in broad daylight and in smooth water, suddenly to reverse her engines and go hard astern—it would have forced itself upon the mind of everybody on the *Cyril* that the *Cyril* had manœuvred the two vessels into a position of difficulty and danger. For what other reason could a vessel in the circumstances of the *Anselm* suddenly deem it necessary to go as hard as she could backwards? Therefore, there is no signal which I can imagine would have conveyed a more powerful warning to the people on the *Cyril* to look to what was happening and to take proper measures to prevent a collision. For this reason, I think it was a grave error not to have given the three blasts, and that the omission to give that signal probably contributed to the collision. For the reasons given by the Lord Chief Justice, I think when we have a case like that before us, and we find people in the possession of evidence which could have explained what passed on board the *Cyril* just as perfectly as they could explain what passed on the *Anselm*, and they leave the court entirely without evidence as to whether this was connected with the collision as a contributory cause, we are bound to come to the conclusion that it did contribute to the collision, and that the *Anselm* is to blame.

Solicitors: for the appellants, *Waltons, Johnson, Bubb*, and *Whatton*; for the respondents, *Pritchard* and *Sons*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.

Friday, March 15, 1907.

(Before Lord ALVERSTONE, C.J., MOULTON and KENNEDY, L.JJ., and Nautical Assessors.)

THE CRUSADER. (*a*)

Salvage—Services by ship's agent—Agreement between master and ship's agents—Duty of ship's agent—Effect on agreement made with master.

C., Y., and Co. acted as ship's agents at Colombo for a steamship. A few days after she had left Colombo, her mate returned there and presented a letter to C., Y., and Co. from her master, stating that she was ashore on the Maldive Islands, asking for a powerful tug, and saying that a salvage boat would be of assistance if procured on a "no cure, no pay," basis. The letter also directed C., Y., and Co. to draw on his owners for their disbursements. C., Y., and Co. chartered a twin screw tug belonging to the Government, at the rate of 60l. a day, and gave an undertaking to return her in safety, and keep her insured for 15,000l. C., Y., and Co. also sent a cable to the owners of the steamship: "Your interests have our attention." The tug left Colombo with a clerk of C., Y., and Co. on board. On arriving at the steamship, the master refused to use the tug, except on the basis of "no cure, no pay," and agreed with C., Y., and Co.'s clerk to pay that firm 4000l. if they succeeded in floating the steamer, and saw her safely into port if required, "no cure, no

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pay." The tug got the steamship off and C., Y., and Co. cabled the owners that the steamship was salved, and that a salvage agreement had been made for 4000l. At that time, although the owners of the steamship knew the terms on which C., Y., and Co. had engaged the tug, they had not expressly assented to them. On hearing of the salvage agreement for 4000l. the steamship owners repudiated it, and said they were ready to pay C., Y., and Co. their disbursements and a reasonable commission. C., Y., and Co. brought a salvage suit against the owners of the steamship, her cargo, and freight to recover 4000l. or such sum as should be just. The action was dismissed, and they appealed.

Held (affirming the decision of the court below), that it was not reasonable for the master to enter into the agreement he did, as the ship's agents had already made an agreement with the owners of the steamship, and, the circumstances not having altered, there was no such absence of reasonable alternative as to necessitate his entering into such an agreement.

Judgment of Sir Gorell Barnes, P. (96 *L. T. Rep.* 126; 10 *Asp. Mar. Law Cas.* 353; (1907) *P.* 15) *affirmed.*

APPEAL by Clarke, Young, and Co. against a decision of Sir Gorell Barnes, President, dismissing an action for salvage brought by Clarke, Young, and Co. against the owners of the steamship *Crusader*, her cargo, and freight.

The claim arose out of services rendered to the *Crusader* when ashore on Gofar Island, in the Maldives, on the 19th and 20th Aug. 1905.

The facts and correspondence between the parties are fully set out in the report of the case below, *The Crusader* (*ubi sup.*). The following is a summary of them:—

Clarke, Young, and Co., the plaintiffs in the action, had coaled the *Crusader* and done the ship's business when she was at Colombo.

After leaving Colombo the *Crusader* was making to Port Said for orders, when on the 7th Aug. 1905 she went ashore on Gofar Island, in the Maldives. Attempts were made to get her off, but they failed, and on the 9th Aug. the mate was sent in a junk to Colombo to get a tug.

On the 15th Aug. he presented a letter from the master to Clarke, Young, and Co. asking for a tug to be sent to work on a no cure, no pay, basis, and directing them to draw on his owners for their disbursements.

Clarke, Young, and Co. then cabled the owners that the owners' interests had their attention, and that they were sending a tug.

The *Goliath*, belonging to the Ceylon Government, was sent by Clarke, Young, and Co. on the 15th Aug., and arrived at the *Crusader* on the 19th Aug.

The *Goliath* had been hired at the rate of 60*l.* a day, and Clarke, Young, and Co. gave an undertaking to insure her and return her safely. These terms were made known to the owners of the *Crusader* by letter, in which the plaintiffs stated that agency fee—*i.e.*, commissions on disbursements—was not included in the charges stated in it.

When the tug with a representative of Clarke, Young, and Co. on board arrived at the *Crusader* the master refused to employ it except on a no cure, no pay, basis, although he had been told the terms on which the tug was hired.

An agreement was then made by Clarke, Young, and Co.'s representative to salve the vessel for 4000*l.* on a no cure, no pay, basis, and the *Crusader* was ultimately got off.

Clarke, Young, and Co. then cabled the owners that a salvage agreement had been made for 4000*l.*, and asked them to confirm it by cable. This the owners refused to do, and, although they had not before assented to the first course adopted by Clarke, Young, and Co., they repudiated the agreement, and said they were ready to pay Clarke, Young, and Co their disbursements and a reasonable commission.

Clarke, Young, and Co. then instituted proceedings for salvage, suing for the 4000*l.* or such a sum as the court might think just.

The defendants contended that the master had no authority to enter into such a salvage agreement; that the agreement was inequitable and ought to be set aside, and was contrary to the duty of the plaintiffs as agents; and that no salvage was due, as the services rendered were exactly contemplated by the agreement under which the tug was hired by the plaintiffs as agents for the owners.

The President adopted those contentions and dismissed the action. From that decision Clarke, Young, and Co. appealed.

Aspinall, K.C. and *C. R. Dunlop* appeared for the appellants.

Laing, K.C. and *Dawson Miller* appeared for the respondents.

The arguments put forward and cases cited were the same as in the court below.

Lord ALVERSTONE, C.J.—This case presents, to my mind, very great difficulties indeed, and I am diffident of my own judgment in the matter. I can well imagine those who have more experience than I, or who are wiser than I, coming to a different conclusion. I confess that if I had been sitting as a judge of first instance I am not sure I should have come to the same conclusion as that which I am about to pronounce in affirming the judgment of the President. I think the only ground upon which this judgment can be affirmed is upon the ground that it was not reasonable for the captain, in the exercise of the full authority, which, for reasons I will state in a moment, I think he has, to enter into the bargain into which he did enter—to put it in another way, that it was not reasonable for a man who could have got under an existing agreement practically all he got under the new agreement, with one exception, to enter into a bargain in the way he did. I notice that in the court below the President appears to have asked the Elder Brethren some questions, which led him to say that the view of the Elder Brethren and of himself was that it was an absolutely outrageous thing for the captain to make such a bargain, having regard to all the circumstances. I very much doubt whether the Elder Brethren ought to have been consulted at all. It seems to me a question of law, and all I have put to our assessors is a question whether a reasonably prudent captain would not have tried what that tug could do under the existing agreement before he thought fit to insist upon any fresh agreement being made. While they do

not in any way take the view that this agreement as an agreement was outrageous or absurd, they do advise us that a reasonably prudent captain might well have tried what the tug could do under the existing arrangement without insisting upon "no cure, no pay." I have very great doubt whether, having regard to the duties, rights, and obligations of the captain, his belief that he was saving the cargo owners as well as the shipowners their joint liability to pay the expense of the tug might not in some cases be sufficient to support an agreement of this kind. What is the position of the master of the ship? He is there as custodian of ship and cargo, and has to do the best he can for the protection and salvation of the whole adventure. He can even jettison cargo in order to secure the safety of the rest, thereby imposing liabilities which are well understood, in regard to general and particular average, as the case may be, upon the owners of cargo and ship. He can pledge the credit of his owners for large sums of money in order that the adventure may be brought to a successful issue. I think it is a very important thing that the authority of the master and the obligation of the master to protect the interests of all concerned, and in so doing to bind his principals, the owners of the ship, and the owners of the cargo, should be thoroughly respected, and I have felt very great reluctance, and I still feel it, even while supporting the judgment of the court below, to hold that a bargain of this kind was unreasonable. It is said it was unreasonable because the person with whom it was made owed certain duties to the shipowner, because he was the representative of the firm that had acted in the shipowner's interests in sending out the tug. I cannot put that higher than a circumstance to be taken into consideration. I cannot take the view that because young Mr. Young had gone out there in the tug which had been sent at the request of the master, the master acting for the whole adventure, therefore there would be anything inequitable in his concurring in an arrangement insisted upon by the captain, if it was a reasonable and proper arrangement for the captain to make, having regard to his authority. It is found as a fact by the President that the master insisted upon a new bargain, and he has not suggested that Mr. Young pressed it or even mentioned it in any shape or form until the captain himself insisted upon it. I think the evidence establishes, and I certainly take the view of the evidence—which in no way differs from what the President has said—that Mr. Young did put before the captain the terms of the bargain he had got—that he put the matter before him on paper and told him he could have the tug at his disposal for so many days, and that the master, in the exercise of his judgment, refused to allow the tug to be employed on those terms. Therefore, I cannot take the view that the person who goes out and has no power of communicating with the people who send him out and does owe a duty in the sense that he ought to do the best in the circumstances, would be entering into an agreement which could not be enforced merely because when he started he had different instructions and different obligations having regard to the original arrangement under which the tug went out. I think if this had been a reasonable agreement—if the master was justified in imposing it in the interest of those whom he represented, having regard to the fact that there had been an original agreement—I do not think it would be right to decide that it was not enforceable. I have to ask myself whether or not I should be justified in reversing the finding of the President that this agreement was an unreasonable agreement. The thing that presses upon my mind is this. I do not quite like the way in which the captain has been attacked. On the other hand, counsel for the respondents has said, very fairly, as he always does, that the captain did not exercise reasonable judgment. What presses upon my mind is that he certainly could have had the services of the tug to do all the work which she actually did do, for from one to four days at 60*l.* a day, and I think it is possible to support the view that the learned President arrived at by considering that it was not reasonable for the captain, representing both the cargo owners and the shipowners, to insist upon an agreement of "no cure, no pay," at such a figure as he agreed to, without in some way seeing what was the value of the services which the tug would be bound to render under the agreement under which she came out. I have not overlooked the fact that circumstances may have altered in those few days, and that the day before she actually began work the engineer reported that there was serious danger to the ship. I have very little doubt that the captain did honestly think he was doing the best for all the people he represented when he made that bargain. I think, however, that is not sufficient if we come to the conclusion that it was, at the figure agreed on, an unreasonable bargain for the owners to be bound by, when their agent was in a position to have got, under the terms under which the tug had been sent out, at his own request, substantially the same work done, or attempted to be done, practically speaking, at a very much smaller outlay and responsibility. I therefore come to the conclusion that I am not able to interfere with the decision of the President, in holding that this was not a reasonable bargain and therefore not one which people who had gone out as agents of the ship only ought to be allowed to enforce against the *res*. The other question remains, as to whether, notwithstanding that, we can give them any extra remuneration as salvage. I think we cannot, for the reason that the services actually rendered were what were contemplated by the original agreement, and I think it may fairly be said that the services were rendered either under the original agreement, or under the subsequent agreement. I am not able to take a view different to that which the learned President has taken as to the non-binding effect of the subsequent agreement, and I think this appeal must be dismissed.

Moulton, L.J.—I come to the same conclusion, and apart from the reasons given by the Lord Chief Justice I am of opinion that this salvage agreement cannot be enforced by reason of the circumstances in which it was made. The facts in this case are not in the least in dispute. When the ship was in trouble on the rocks a letter was sent to the agents for the ship at Colombo, asking them to send assistance. They were shown by the evidence not only to have coaled the ship but to have done anything else that was necessary at Colombo. They wired the news to the owners of the ship as to the calamity

that had happened. As early as the 15th Aug. they wired "Crusader. Your interests have our attention. Will wire again." They then set to work to get a tug to go out to the assistance of the ship, and they made themselves directly responsible both for the hire of it, and the safety of it in the sense that they had to take out a policy of insurance to cover any possible damage to the tug. They then wire to the owners that "a tug will proceed to her assistance to-night." That is on the 15th. On the 16th they write a letter to the owners which in my opinion establishes beyond a doubt that the position they took up was that they were acting on behalf of the owners of the ship, as their agents, attending to their interests. In this letter they set out all the steps that they have taken; they say that their representative has left with the tug; that he will consult with the captain; and "your interests will have our best attention." In the postscript of the letter, which, as is not unusual, is the most important part of the letter, they set out the cost of hiring the tug and the terms of the hiring—the insurance—so as to show the owners of the ship what this assistance will cost. Then they add "agency fee—that is, commission on disbursements—has not been included in the above figures," pointing out that the terms on which they are making the contract on behalf of the ship, and making themselves liable for these disbursements, are the terms of the ordinary commission on disbursements which agents there are accustomed to receive. It is impossible, after that letter, to look upon them as acting otherwise than as agents for the owners of the ship. They, therefore, can have no interest which is rival to the interest of the owners of the ship; and so clear is this on those letters that their counsel, who always assists the court by doing his cases with the utmost frankness, admitted that the representative of the plaintiffs who went out with the tug went out as agents for the owners. The tug, then, was being hired at the expense of and on behalf of the owners, which is the same thing as being hired by the owners. The man who went out with it, Mr. Young, is the agent for those owners. Now, who are the parties at the ship? The parties are the captain, who has certain very wide powers of acting on behalf of the owners of the ship, and of the cargo too, and this Mr. Young, who is agent for the owners. Now, those two parties could not make a bargain, because they represented the same persons. Mr. Young had no right to make any bargain except in the interests of the owners. He could not, therefore, put himself in the position of an independent contracting party, making a contract between the firm of Clarke, Young, and Co. and the captain of the ship, as representing the owners of the ship. Nor do I think that the captain had any authority to make such a contract. He was in no necessity. The help that he wanted, and which was all the help that he was purporting to get by the contract which he entered into, was there ready for him, provided by the owners of the ship; and the consequence was that there was no need for him to make a bargain and no power for him to make such a bargain as would bind the owners of the ship, who had already made an existing bargain, by which the tug was there. However, he did make a bargain. It was a bargain which the President of the Admiralty Court has decided against. What was the position of Clarke, Young, and Co. when the tug came back? Beyond question they had sent Mr. Young out as agent for the owners of the ship. He was only a clerk in their employ, and they were not bound by anything he had done unless they ratified it, so that if this ship had not been salved and the tug had come back after a fruitless attempt they would have been legally entitled to disregard this agreement of "no cure, no pay," and they would have been still in the position of having, as agents of the owners of the ship, contracted for the tug, and must have been reimbursed all the expense they had incurred, together with their agency fee on these disbursements. If, on the other hand, the tug came back having made the salvage, as in the present case, they would claim to be in a position to insist upon receiving 4000*l*. It seems to me that that would put them in a position in which they could say "heads I win, tails you lose." I feel pretty satisfied that they felt the difficulty of that position, because I find that they promptly telegraphed to the owners of the ship asking them for confirmation of this agreement. They must have felt that the captain had a very doubtful right to make any such agreement at all. They got back, naturally, a telegram from the owners of the ship to the effect that they did not confirm the new arrangement, because the tugboat had been hired at their expense, and all they were liable for was the cost of her hire. In my opinion this was not an agreement which the courts can recognise, because it was made by Mr. Young, when agent for the owners of the ship, in interests which were not identical with theirs. I quite agree that the captain also represented the owners of the cargo, but it seems to me that that weakens the case, because here he had a tug, engaged at the cost and upon the responsibility of the owners of the ship, ready to save ship and cargo. If there was anything wrong in that arrangement then the cargo owners would be able to defend their own interests. They had not been parties to hiring the tug, and therefore I cannot see that the fact that he represented cargo as well as ship weakens at all the position of the defendants in this case. For these reasons I think that this salvage agreement cannot be enforced.

KENNEDY, L.J.—I have come to the same conclusion, and substantially upon the ground stated by the Lord Chief Justice. I therefore only wish to add a very few words. I share his feelings of difficulty in supporting the judgment of the President. It seems to me most important, both for the lives and property of persons engaged in mercantile enterprises, that shipowners at home should not be allowed lightly to repudiate agreements entered into honestly by their captains in stress of very trying circumstances, in distant and, comparatively speaking, savage regions. Here there is no doubt that the President does not suggest and does not hold that there was dishonesty on the part either of the captain or of Mr. Young, who, for the plaintiffs, came to the bargain which the plaintiffs seek to uphold. Speaking for myself, I should take the view that Mr. Young was the authorised representative of his firm, and as regards his relations to the owners, as representing that firm, I should, with great submission to Moulton, L.J., take the view that whilst in a sense the plaintiff was acting

originally under a contract with the owners to do his best for them in the particular work of sending out a tug and sending out his representative with it, he was not a regular servant of the owners; nor was he even the regular agent at the port of the owners, and there would have been nothing to prevent his making a bargain for his own advantage with the owners directly, or, if the captain must be taken as a person to whom the co-owners gave authority to make a bargain, with the captain directly. It is true, however, that a salvage agreement must satisfy the requirements mentioned in the judgment of Lord Esher in *The Renpor* (48 L. T. Rep. 887; 5 Asp. Mar. Law Cas. 98; 8 P. Div. 115). It must be made honestly and for the benefit of ship and cargo. There must also be necessity. That must mean, I take it, not the existence of an absolute necessity, but that absence of reasonable alternative which most men mean, I think, when they speak of necessity—the absence of any reasonable alternative. The learned President has found no such necessity—no absence of reasonable alternative. He says he has found, as a judge of first instance, on the contrary, that it was a most outrageous and foolish bargain to have made in the circumstances in which it was made, and I think that as a judge of first instance he has a right to have his view of the facts respected. I am not prepared to dissent from that view, and upon that ground I find myself able to concur in the judgment of the court in dismissing this appeal. I agree that this is not a case in which we could give salvage apart from the agreement because the vessel went out and was sent out by the plaintiffs, and they incurred all the expenses they incurred, with a view to trying to save a vessel which was really in peril at the time. There was no case of changed circumstances.

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

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

Monday, March 18, 1907.

(Before Lord ALVERSTONE, C.J., MOULTON and KENNEDY, L.JJ.)

THE MANOR. (*a*)

Mortgage of ship — Mortgagor in possession — Circumstances impairing security of mortgagee —Right of mortgagee to take possession.

A mortgagee of a ship is entitled to take possession of her, although there has been no actual default under the mortgage, if the mortgagor is working or about to work the ship in such a way as to materially impair the security of the mortgagee.

APPEAL by the Dowgate Steamship Company, the mortgagees of the steamship *Manor*, from a decision of Bargrave Deane, J. in favour of the Manor Steamship Company, the owners of the *Manor*, decreeing that the mortgagees were not entitled to take possession of the *Manor*.

On the 16th May 1904 Mark Snell Catt agreed to purchase the steamship *Dowgate* from the Dowgate Steamship Company, payment to be partly in cash on delivery of the ship, and the remainder in instalments secured by a mortgage on the steamship.

On the 7th June 1904 the Manor Steamship Company Limited was formed with M. S. Catt as manager.

On the 29th June the *Dowgate* was transferred to the Manor Steamship Company Limited, was renamed the *Manor*, and a mortgage in favour of the Dowgate Steamship Company to secure the sum of 10,000*l*., the balance of the purchase, was entered into and registered.

Under the agreement of the 16th May the first instalment of the balance of the purchase money became due on the 30th June 1906.

After the *Manor* came into possession of the Manor Steamship Company Limited she went on a long voyage, and in May 1906 Mr. Catt, acting on behalf of the Manor Steamship Company, informed the Dowgate Steamship Company that the *Manor* was in the Suez Canal with a cargo on board, but that he was unable to raise any money to pay the canal dues on or coal the ship.

Mr. Dillon, the managing director of the Dowgate Steamship Company, thereupon arranged with Moxey, Savon, and Co. to pay the canal dues and coal the vessel, drawing on the Manor Company for the money, the Dowgate Steamship Company guaranteeing the draft.

On the 14th May 1906 the Dowgate Steamship Company gave notice to the Manor Company that they claimed as from that date to be mortgagees in possession, and required the *Manor* to be brought home that they might enforce their security and see that the ship's debts were paid.

The Dowgate Steamship Company at that time knew they would have to meet a Durban draft for coal amounting to 786*l*. 18*s*. 3*d*.; they had paid premiums of insurance amounting to 252*l*. 3*s*. 5*d*., and had guaranteed to meet Moxey, Savon, and Co.'s account, amounting to 990*l*.

On the 13th June 1906 the *Manor* arrived at Cardiff, and on the 14th June Mr. Dillon took possession of the *Manor* on behalf of the Dowgate Steamship Company.

The *Manor* had at that time been arrested by the master in a suit for wages and disbursements.

Mr. Dillon then paid off the crew and dismissed the master, gave bail in the master's action, and formally took possession of the ship.

On the 18th June the Manor Steamship Company issued a writ claiming a declaration that they were entitled to possession of the vessel.

A statement of claim was delivered on the 23rd June and the defence on the 27th June.

The action was tried on the 28th June and the 2nd July 1906.

Aspinall, K.C. and *Dunlop* appeared for the plaintiffs.

Laing, K.C. and *H. C. S. Dumas* appeared for the defendants.

Judgment was delivered on the 11th Aug. 1906.

Aug. 11.—BARGRAVE DEANE, J.—This is an action brought by the Manor Steamship Company Limited to recover possession of the steamship *Manor* from the Dowgate Steamship Company Limited, who took possession of that vessel on the 14th June 1906. The history of the case is shortly this: Mr. Mark Snell Catt entered into an agreement with the Dowgate Steamship Company to buy of them the steamship *Dowgate*, the property of the Dowgate Steamship Company, for

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at Law.

a sum of 17,000*l.*, and that agreement is dated the 16th May 1904. The purchase money was to be paid by 4000*l.* in cash in London against the delivery of the steamer, and, as to a further sum of 3000*l.*, by four acceptances—500*l.* by an acceptance at three months' date from the date of delivery, 500*l.* at six months, 1000*l.* at twelve months, and 1000*l.* at eighteen months; the balance of the 17,000*l.*—namely, a sum of 10,000*l.*—was to be secured by mortgage, the moneys to be paid in the following manner: 2000*l.* twenty-four months after date of delivery; 2000*l.* thirty months after date of delivery; 2000*l.* thirty-six months after date of delivery; 2000*l.* forty months after date of delivery; and 2000*l.* forty-six months after date of delivery. That is the original agreement. That portion of the purchase money, the 10,000*l.*, was to be secured by a first mortgage bearing interest at the rate of 5 per cent., and an assignment of good and approved policies of insurance, and so on. That being the agreement, it was made between Mr. Dillon, the managing director of the Dowgate Steamship Company, and Mr. Mark Snell Catt personally. That agreement was subsequently varied. On the 7th June 1904—I am taking these in order of date—the Manor Steamship Company, the plaintiff company, was formed with a capital of 8000*l.* The amount of the capital was within the knowledge of the defendant company, and also that Mr. Catt was appointed manager of the Manor Steamship Company, and the Manor Steamship Company renamed the vessel, when she was delivered to them later, the *Manor*.

It is with reference to that particular vessel that this action is brought. On the 29th June the steamer was delivered to Mr. Catt. Four thousand pounds was paid in cash; but at the same time a new agreement was entered into by which it was agreed that with regard to the 3000*l.*, a part of the purchase money, the defendant company should receive 600 5*l.* shares, representing 3000*l.*, in part payment, and those shares were to be redeemed by Mr. Catt personally. On the 11th July the Dowgate Steamship Company and Mr. Catt agreed in writing that, instead of the 3000*l.* being paid in that form, 600 5*l.* shares should be given in that steamship to the defendant company, and this recites that: "In consideration of the Dowgate Steamship Company Limited having at the request of the said Mark Snell Catt consented to a modification of the terms of purchase of the *Dowgate* steamship as more fully set forth in the principal agreement, the said Mark Snell Catt hereby agrees with the Dowgate Steamship Company Limited that he will purchase or procure to be purchased at par from the Dowgate Steamship Company Limited the 600 shares in the Manor Steamship Company Limited which have been issued to the Dowgate Steamship Company Limited in pursuance of the principal agreement, and are numbered 526 to 1125, and that such purchase shall be effected in manner and at the times following—that is to say, 100 of such shares shall be purchased not later than three months from the 30th June 1904; 100 not less than six months from the same date; 200 not less than twelve months from the same date; and 200 not less than eighteen months from the same date." Therefore the shares were covenanted by Mr. Catt to be redeemed by himself personally at the price which I have mentioned; and it was agreed, further, that, as these payments were made, shares to the value of the payments should be transferred by the Dowgate Steamship Company to Mr. Catt.

The first question of law arises here. It is said that that agreement was made by Mr. Catt as representing the company. That could not be so in law. A company could not covenant to buy back shares. That has been decided. A company has capital, and that capital has to be invested in certain shares, and, when once those shares have been completely dealt with, it cannot out of other moneys buy back or buy from any other person shares in its own company. The company cannot be a purchaser of shares, and therefore I hold strictly that this is an agreement between the Dowgate Steamship Company and Mr. Catt. On the same date as that agreement which I have just read an agreement was also made between the Manor Steamship Company and the Dowgate Steamship Company, and a mortgage was entered into. The mortgage I have here: "The Manor Steamship Company Limited, having its registered office in 113, Fenchurch-street, is indebted to the Dowgate Steamship Company Limited, whose registered office is at Ethelburga House, Bishopsgate-street, in the sum of 10,000*l.* to be paid at the times and with the interests and under the conditions more fully set out in the agreement bearing date the 16th day of May 1904." That is the agreement with Mr. Catt, and therefore at that time the Manor Steamship Company had accepted the agreement made by Mr. Catt, so far as the agreement for the purchase of that vessel was concerned. "And by the said agreement it was (*inter alia*) provided that the due payment of the said sum of 10,000*l.* and interest and any further sum that would become due to the Dowgate Steamship Company on account current should be secured by a first mortgage of the ship, as above described." That was the state of things on the 11th July 1904, and the ship thereupon became the property, or, rather, was at this time the property, of the Manor Steamship Company, subject to a first mortgage to the Dowgate Steamship Company for the payment of 10,000*l.* as agreed in the original agreement—that is to say, at the times and in the proportions set out in the original agreement, and also to cover any other sums due on account current. The vessel was thereupon insured by the Manor Steamship Company with Messrs. Head and Co., insurance brokers, and there is no complaint made as to the payment of the premiums for the first year. For the second year, 1905-6, the ship was duly insured. I have the policy here up to, I think, the 31st July, or the 30th June—I may be wrong about the exact date—a date subsequent to the material date in this matter, upon which the defendant company took possession. But it is said that, although she was insured, Mr. Catt, as manager of the Manor Steamship Company, did not pay the whole of the amounts to Messrs. Head, the insurance brokers, representing the premiums. The premiums were agreed to by paid by Mr. Catt to the insurance brokers, who had insured the vessel, so that she was insured, by two monthly payments. It was 252*l.* 4*s.* 11*d.* every two months, and he paid to Messrs. Head all the amounts due except the last two months of May and June. Apparently he gave his personal guarantee to pay to Messrs. Head, but he did not

pay. I have to ask myself whether the ship was insured, and I think, if the ship had been lost, that there cannot be the smallest doubt that the insurance company would have had to pay the total insurance value—that is to say, they would be liable to pay whatever insurance was necessary. I think the ship was covered by insurance. There may have been a right of action by Messrs. Head and Co. against Mr. Catt for premiums not paid, but due, but I do not think that affects the question of whether the ship was in fact insured. The vessel apparently went on a long voyage. She was away for twenty months, but during that time she apparently got into debt, and, when she was on her way home and was approaching the Suez Canal, she had to pay in advance the dues for passing through the canal. Mr. Catt, at the time, as representing the company, was unable to find those dues. Mr. Catt also was unable to get bunkers to bring the vessel home from there, and he seems to have gone at once to Mr. Dillon, representing the Dowgate Steamship Company, and at his request Mr. Dillon provided for the dues of the Suez Canal, and also provided for the bunkers to bring the vessel home. That opened an account current, and, as far as I can see, up to that time there had been no account current between Mr. Dillon and the Manor Steamship Company, or Mr. Catt; but at that time, undoubtedly, there was this account current open. The vessel arrived at Cardiff with a cargo of wheat on the 13th June 1906. I have left out a date which I ought to refer to before I go any further. When the vessel was at Suez, Mr. Dillon communicated with the captain, Smith, that he was taking possession of the vessel as mortgagee. When the vessel arrived at Cardiff, Mr. Dillon went down there for the purpose of formally taking possession, but he found that the captain had already issued a writ, which was on the vessel, for necessaries and disbursements which he had supplied, and for money due to him as master of the ship. Mr. Dillon seems to have taken a course which he thought he was justified in taking. He dismissed the master; he paid off the crew; he got rid of the captain's writ, and on the 14th June he himself took possession of the ship formally, and that is the possession which the plaintiffs seek to have removed. It does not appear that up to that time Mr. Dillon had made any request to the Manor Steamship Company for repayment of any of the amounts due to him on account current. It does not appear that, apart from that, there was any money really due from the Manor Steamship Company to the Dowgate Steamship Company. Counsel for Mr. Dillon has said, and one of his points is, that there was a sum of 500*l.* due from the Manor Steamship Company to the Dowgate Steamship Company. That sum of 500*l.* is the last instalment for the repurchase of the shares, and I do not think it is disputed that, with regard to that agreement for the purchase of the shares, Mr. Catt's story is accurate. The first 500*l.* in redemption of the shares which, as I have already pointed out, was an agreement between the Dowgate Steamship Company and Mr. Catt, and not between the Dowgate Steamship Company and the Manor Steamship Company, was payable at three months after the 30th June, the next at six months, and the next at twelve months, so that in all the sum of 2000*l.* had become due and had been paid by Mr. Catt, and the shares had been transferred to him personally, and he was the holder of those shares in the company, and not the company the holders themselves; but in the beginning of April a further sum of 1000*l.* became due, and therefore shares had to be transferred from the Dowgate Steamship Company to Mr. Catt, and that would have concluded the whole business of the 600 shares which had to be redeemed. Mr. Catt has told us that he was unable to redeem the whole at that time. I think he said he had 500*l.*, but there was a further sum of 500*l.* not found by him, and therefore there was a default by him in payment of the amount due of that the last instalment, and there was no possibility of his obtaining the whole of the shares back. He has said, and I do not think it has been disputed, though I cannot find anything in the documents about it, that, instead of 600 shares having been handed over to the Dowgate Steamship Company, 700 shares were handed over, leaving a margin in favour of the Dowgate Steamship Company over and above the amount secured. Mr. Catt says that at that time, although he paid the 500*l.* and redeemed shares to that amount, that would be 100 shares out of 200; he did not get those shares back, but he left them with the Dowgate Steamship Company, so that there would be a sort of cross account there. He was entitled to the 100 shares for the 500*l.*, which he did take, but the balance of 500*l.* he did not pay, and therefore, so far, there was a breach.

I do not think, and I do not find, I have already stated it, that that was a debt due from the Manor Steamship Company. It was a personal covenant between Mr. Catt and the Dowgate Steamship Company, and it was a personal liability by Mr. Catt, and not a liability by the Manor Steamship Company. Therefore I think counsel for the defendants has not established his point that there was a sum of 500*l.* due at that time from the Manor Steamship Company to the Dowgate Steamship Company. That is one of the first matters which I find in this case; and, with regard to the right of possession, in my opinion there was no default, so far as the Manor Steamship Company was concerned, as to that 500*l.*

The next point counsel for the defendants makes is as to the insurance of the vessel. I have already dealt with that. I have found that in fact this vessel was insured; that the property of the mortgagees was not in danger in that respect. As I have said, the vessel was safe, so far as insurance was concerned, although the insurance brokers would have had to sue Mr. Catt himself for the balance of premiums due on his personal guarantee. The result is that there was nothing due to the Dowgate Steamship Company from the Manor Steamship Company, unless it can be said there was something due under the mortgage. That is to say, there had been no default made by the Manor Steamship Company in respect of any agreement.

But then there comes the question of the mortgage. The mortgage was to secure payment of 10,000*l.* to be paid in instalments; the first instalment did not become due until twenty-four months after the date of delivery. That would be the 30th June 1906, and therefore on the

14th June, when Mr. Dillon took possession of this ship, there was nothing due in that respect under the mortgage.

Was there anything due on account current?—and that is the real difficulty I have had in the case. As I have said, at the end of May or the beginning of June there was this difficulty about getting the ship home through the Suez Canal, and getting bunkers for her; and undoubtedly at that time Mr. Catt, representing the Manor Steamship Company, induced Mr. Dillon, representing the Dowgate Steamship Company, to find money, I take it, for the canal dues, and also to guarantee the payment of money for the bunkers. Therefore, as I have said, the account current was open, but the vessel was taken possession of before there was a possibility, as far as I can see, of the company making default if it had been required to make payment on the account current. Several cases have been quoted to show that, where the payment was made by a mortgagee to clear a debt, that debt was at once enforceable without demand. I do not think that is this case. I think that is a special matter which Mr. Dillon ought to have brought before Mr. Catt before he took possession, and the fact that Mr. Dillon took possession of this vessel on the 14th June, before he communicated with Mr. Catt in the matter at all, was premature. In my opinion, therefore, he had no right to take possession of this vessel at the time when he did. That is the whole of the question really raised on the pleadings. There is no claim on behalf of the defendant company. I have only got to say whether or not, in my opinion, Mr. Dillon was justified in taking possession on the 14th June, and, for the reasons I have stated, I do not think he was. I am not asked to find anything about the defendant company. Therefore, as far as that is concerned, the case is at an end, and I so find. Many matters have been brought before the court. It is said that Mr. Dillon was justified in taking possession of the vessel to stop the vessel going on future voyages under charters which had been made by Mr. Catt on behalf of the Manor Steamship Company. I have heard what Mr. Catt has had to say, and he says they were all voyages which would have been of a remunerative character. Mr. Dillon, on the other hand, says that in his opinion they would not have been remunerative, but the contrary; they would have been dangerous and detrimental. I cannot decide this question—it is impossible. I have got one man saying one thing, and another saying the other. I cannot possibly say which is right; I have nothing to guide me. There is no evidence at all which would justify me in saying one way or the other. If I were satisfied that this vessel had been chartered to go undoubtedly bad voyages, voyages which would clearly injure the property of the mortgagees, then undoubtedly there are cases which would justify me in saying that I think Mr. Dillon was right in preventing the charters being carried out. But I do not find so in this case. I cannot find so. Therefore I do not think I ought to say that Mr. Dillon was justified in putting an end to and preventing the vessel from fulfilling those charters. The action he took undoubtedly did prevent the vessel, and has prevented the vessel up till now, from doing anything in respect of those charters. Now, what am I to do? I can only say that the plaintiffs are entitled to a declaration that they were entitled to possession at the date of the writ, and I must direct an inquiry before the registrar and merchants as to damages to see what the real condition of things is. I am unable to say anything about it myself. For these reasons I think judgment should be entered for the plaintiff company.

From that decision the defendant company appealed, the notice of appeal being served on the 22nd Aug. 1906.

March 18.—*Laing*, K.C. and *H. C. S. Dumas* for the appellants.—It is admitted that no actual default has occurred, but the mortgagor in this case is practically insolvent. It may be charters can be arranged for the employment of the vessel, but it is proposed to send her off on a long voyage, and, while she is on that voyage, everything that is needed for her will be ordered by the master and paid for by him by bill. The master would have a maritime lien for such sums, and they would take precedence of any claim under the mortgage, and thus the mortgagee's security would be impaired. The mortgagee is therefore entitled to take possession of the vessel:

> *Law Guarantee and Trust Society* v. *Russian Bank for Foreign Trade*, 92 L. T. Rep. 435; 10 Asp. Mar. Law Cas. 41; (1905) 1 K. B. 815.

A mortgagee may take possession before there is an actual default under the mortgage if his security is imperilled or impaired:

> *The Blanche*, 58 L. T. Rep. 592; 6 Asp. Mar. Law Cas. 272 (1887).

Dunlop (*Aspinall*, K.C. with him).—No actual default had taken place when the mortgagee seized the ship. The ship is at present in a home port. No maritime liens would be created for necessaries supplied to her while in this country. There is no authority for saying that a mortgagee can take possession before default has occurred under the covenants in the mortgage. [Lord ALVERSTONE, C.J.—There is not much authority certainly, but, if the mortgagor is insolvent, ought not the mortgagee to be allowed to take possession?] The difficulties here have all arisen by reason of the mortgagee taking possession and not allowing the mortgagor to employ the ship. The mortgagor had offers of charters at remunerative rates, which would have enabled the ship to have been furnished with coals and necessaries, and would have left a good surplus. [MOULTON, L.J.—The real question is whether the mortgagee's security would be seriously imperilled if the ship was left under the control of the mortgagor.] The only way in which it is suggested that the security is imperilled here is that the master would pay for coals and other necessaries in foreign ports by bill drawn by himself, and that to protect himself from liability on the bill the law gives him a lien on the ship. But there is nothing out of the common in that method of running a ship; it is an ordinary and well-recognised practice:

> *The Ripon City*, 77 L. T. Rep. 98; 8 Asp. Mar. Law Cas. 304; (1897) P. 226.

Lord ALVERSTONE, C.J.—In my opinion this case is not covered by any distinct authority, but it was a class of case mentioned in argument both in *The Heather Bell* (84 L. T. Rep. 794; 9 Asp.

Mar. Law Cas. 206; (1901) P. 272) and in a case which came up to this court by way of appeal from Channell, J., in which case he had decided that certain charter-parties had imperilled the security, or, in other words, it is an illustration of a state of circumstances which may give rise to a certain state of things described by Lord Westbury in *Collins* v. *Lamport* (2 Asp. Mar. Law Cas. O. S. 153 (1864): "As long, therefore, as the dealings of the mortgagor with the ship are consistent with the sufficiency of the mortgagee's security, so long as those dealings do not materially prejudice and detract from or impair the sufficiency of the security of the vessel as comprised in the mortgage, so long as there is Parliamentary authority to act as owner, he has, of necessity, authority to enter into all those contracts touching the disposition of the ship which may be necessary for enabling him to get the full value and the full benefit of his property." And the Lord Chancellor, on a later occasion, said: "His contracts with regard to the ship will be valid and effectual, provided that his dealings do not materially impair the security of the mortgagee." That dictum was distinctly recognised by the House of Lords in *Keith* v. *Burrows* (35 L. T. Rep. 508; 3 Asp. Mar. Law Cas. 280; 2 App. Cas. 636 (1876), as I ventured to point out when I was giving judgment in *The Heather Bell* (*ubi sup.*) and the other case. It seems to me we have here got to decide the question whether or not Bargrave Deane, J. was right in coming to the conclusion that on the facts there was not sufficient impairing of the security to justify the mortgagee in taking possession on either the 14th or 18th June. He has said that if he was satisfied that the vessel had been going on a bad voyage, then Mr. Dillon was right in preventing the vessel going on that voyage. It may be that the real question in this case was not as strictly brought before the learned judge as it has been brought before us, although both learned counsel admit that the point was distinctly raised. There was the question of whether there was a breach of the agreement, which counsel for the defence says he now abandons; there was the question of insurance, as to which, speaking for myself, I should have been in accord with Bargrave Deane, J., and there was this further question which has been the main point raised before us, that under the circumstances which were existing at the time the mortgagee took possession his security was being impaired. I do not wish to found myself on what I may call the dictum or the opinion. In our view of the case, there is only one point—viz., the rights of the mortgagee if he found this vessel was going to be sailed on charter-parties by an impecunious mortgagor and sailed on credit. It may be that that circumstance, taken by itself—although I think that the opinion expressed by Bargrave Deane, J. is extremely good common sense—would require further consideration; but when we really look at the broad facts of the case as they existed when this vessel came to Cardiff, I think it would be straining the rights of the mortgagor to excess if we were to hold that he was entitled to keep the management and chartering of this vessel in defiance of what the rights of the mortgagee were, and to prevent the mortgagee from taking possession. I do not hesitate to say that, although I came to a contrary conclusion, on certain arguments addressed to us in *The Heather Bell* (*ubi sup.*), and my attention having been called to the view which the learned judges, Dr. Lushington and Butt, J., had taken, that the circumstances in such a case as that did not bring the case within the rule that the security was impaired, or, in other words, that the principle in *Collins* v. *Lamport* (*ubi sup.*) in favour of the mortgagee did not apply. I unhesitatingly come to the conclusion that in this case a state of circumstances did exist which did in fact impair the security, and whether you apply the test put by the President when he was discussing the matter in a later case, or whether you take the view of what is the position of the ship when the pressing liabilities of the mortgagee were such as have been called to our attention, we should not do common justice if we were to hold that the mortgagee was to let this ship go and sail away for a period of nine months without taking possession of her. I rather think that Bargrave Deane, J. did not sufficiently consider what would be the effect on such a security. A vessel worth at the least 17,000*l.*, of course, growing old, cannot be run in a most economical way. If money had been got in the way suggested, there would have been no prospect of these expenses being paid when it became due. I think he ought to have held that the mortgagee was entitled to take possession, and I think, for the reasons pointed out by Moulton, L.J. in the argument, that, inasmuch as they really were there determining the rights, no ground can be shown for saying that the judgment ought to be supported on the ground that the mortgagee ought to have taken proceedings before he took possession. I think Bargrave Deane, J., when he decided the question, clearly stated what the rights of the parties ought to be in that respect. I think, therefore, that this judgment should be in favour of the mortgagee, and that the appeal should be allowed.

MOULTON and KENNEDY, L.JJ. concurred.

Solicitors for the appellants, *Ince, Colt,* and *Ince.*

Solicitors for the respondents, *Smith* and *Hudson.*

HIGH COURT OF JUSTICE.

KING'S BENCH DIVISION.

Wednesday, Nov. 28, 1906.

(Before CHANNELL, J.)

SWAN AND CLELAND'S GRAVING DOCK AND SLIPWAY COMPANY *v.* MARITIME INSURANCE COMPANY AND CROSHAW. (*a*)

Marine insurance—Mortgage of ship "together with the policies of insurance effected thereon" —General and particular average losses— —Salvage losses—Salvage losses paid by underwriters without assured's consent—Repairs by mortgagor—Liability of mortgagee—Production of policy—Assignment of moneys due under policy.

E. mortgaged his ship to the defendant C., "together with the policies of insurance effected thereon." E. covenanted to keep the vessel in a good state of repair.

The defendants M. had subscribed a time policy on

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

the vessel. The defendant C. had possession of the policy. During the currency of the policy the vessel suffered general and particular average losses from perils insured against, and incurred salvage losses and charges. The salvage was paid by J. H. and Sons on E.'s behalf.

The plaintiffs C. G. D. and Co. repaired the ship at E.'s request, and, as security for the payment of those repairs and certain debts, E. assigned to them the moneys due under the policy subject to the defendant C.'s claim, if any, and gave notice of the assignment to both defendants. E. was adjudicated bankrupt.

The defendants M. then paid to J. H. and Sons the amount they had paid in respect of the salvage. Payment under the mortgage being in arrears, the defendant C. took possession of and sold the vessel, after which there still remained due to him a balance.

As against the defendant C. the plaintiffs claimed to be entitled (1) *to the production of the policy for the purpose of suing thereon, and* (2) *to the proceeds of the policy without having to hold the same for the defendant C.*

The defendant C. claimed to be entitled (1) *to the proceeds of the policy, although the vessel had been repaired on behalf of E.; and* (2) *to retain the policy. The defendant C. made no claim in respect to the salvage losses and charges.*

As against the defendants M., the plaintiffs claimed the former's proportion of the general and particular average losses and of the salvage losses and charges.

The defendants M. denied the title of the plaintiffs to sue, and said that, as they had indemnified E.'s estate in respect of the salvage losses, they had in respect thereof performed their contract. Their proportion of the general and particular average losses they brought into court, an interpleader summons having been taken out.

Held, the defendant C., the mortgagee, got the policy as security for his debt, and not merely as security for his security—viz., the ship—and was entitled to the money under the policy to his own use, and was not liable to apply it in payment of the cost of the repairs.

E., the mortgagor of the policy, retained an interest in the nature of an equity of redemption, and was entitled to sue upon it, or could require the mortgagee to sue for him so far as he had an interest exceeding that of the mortgagee in the sum to be recovered.

The assignment to the plaintiffs, C. G. D. and Co., by E., was by way of second mortgage, and was valid.

The defendants M. were not entitled to pay J. H. and Sons the amount of the salvage losses and charges without the assured's (E.) authority, and this amount the plaintiffs were entitled to recover from the defendants M.

Semble, *that it is not necessary for a plaintiff before he can claim for a loss under a policy to have the policy in his own possession; it can be obtained, if necessary, by a subpœna to the person who holds it.*

May *v.* Lane (71 *L. T. Rep.* 869) *distinguished.*

COMMERCIAL LIST.

Action tried before Channell, J., sitting without a jury.

In 1902 the property in the steamship *Scotian* became vested in one Elder, subject to a mortgage to the defendant Croshaw. In pursuance of the mortgage Elder insured the steamship *Scotian* and became interested to the full amount in a time policy of marine insurance, dated the 21st Dec. 1903 upon the said vessel, valued at 16,000*l.*, against all risks. The defendants, the Maritime Insurance Company, subscribed the policy to the extent of 2000*l.*

In Dec. 1903, the policy of insurance was delivered by Elder to the defendant Croshaw, who was mortgagee of the vessel. By the terms of the mortgage to Croshaw the vessel was mortgaged "together with the policies of insurances effected or to be effected thereon," and the mortgagor covenanted to keep the vessel fully insured and to pay all premiums, and further covenanted to maintain the steamer in a good state of repair during the continuance of the mortgage. In Nov. 1904 E. was in default in respect of non-payment of interest due under the mortgage.

On the 22nd Nov. 1904 during the currency of the policy the vessel suffered by stranding, being one of the perils insured against, general average and particular average losses to the extent of 969*l.* 14*s.* 4*d.* Of that amount the defendants', the Maritime Insurance Company, proportion was 121*l.* 4*s.* 3*d.* Salvage losses and charges were also incurred to the extent of 753*l.* 11*s.* 2*d.* and the defendants', the Maritime Insurance Company, proportion of that amount was 94*l.* 3*s.* 11*d.*

The vessel was taken into Rotterdam and temporarily repaired. From thence the vessel was taken to Newcastle and repaired by the plaintiffs, Cleland's Graving Dock and Slipway Company, at Elder's request, at a cost of 756*l.* 17*s.* 4*d.*

The salvage was paid on behalf of Elder by John Holman and Sons.

By a document dated the 24th Feb. 1905 Elder assigned to Cleland's Graving Dock and Slipway Company all moneys payable under the policy (subject to the claim, if any, of the mortgagee thereto), including the amounts due from the Maritime Insurance Company in respect to the losses, as security for the payment of certain debts, including the sum of 756*l.* 17*s.* 4*d.* for repairs.

On the 24th Feb. 1905 notice of this assignment was given to defendants the Maritime Insurance Company and to the defendant Croshaw.

On the 13th March 1905 Elder was adjudicated bankrupt.

The plaintiff Swan was appointed trustee in the bankruptcy of Elder.

In May 1905, the payments under the mortgage being in arrear, the defendant Croshaw, the mortgagee, took possession of the vessel.

On the 13th June 1905 the defendants, the Maritime Insurance Company, on receiving an indemnity from John Holman and Sons, paid them the amount paid by them to the salvors.

In July 1905 the defendant Croshaw sold the vessel. After the sale of the vessel there was still due to the defendant Croshaw the sum of 1547*l.* 4*s.* 2*d.*

The plaintiffs claimed against the defendant Croshaw a declaration that they were entitled to have production of the policy for the purpose of suing thereon, and were entitled to the proceeds to be recovered without any obligation to hold the same for Croshaw.

The defendant Croshaw claimed to be entitled to the sums payable under the policy, although

the vessel was released and fully repaired by or on behalf of Elder, and to retain the policy.

The defendant Croshaw alleged that in Nov. 1904 (and since) Elder, under the mortgage owed him a sum in excess of 969*l.* 14*s.* 4*d.*

The defendant Croshaw made no claim to 753*l.* 11*s.* 2*d.* for salvage losses and charges.

The plaintiffs claimed against the Maritime Insurance Company the sums of 121*l.* 4*s.* 3*d.* and 94*l.* 3*s.* 11*d.* with interest.

The defendants the Maritime Insurance Company denied the title of the plaintiffs to sue, and they alleged that they had indemnified Elder's estate against all claims in respect of the salvage losses, and had thereby fully performed their contract of insurance in respect thereof. As to the 121*l.* 4*s.* 3*d.*, these defendants brought that sum into court, an interpleader summons having been taken out.

J. A. Hamilton, K.C. and *Chaytor* for the plaintiffs.—The policy was a contract of indemnity, and its object was to maintain the security, the security being the ship. The mortgagee, Croshaw, cannot keep the moneys payable under the policy, and refuse to pay the cost of the repairs. The policy was assigned to the defendant Croshaw not as security for Elder's debt but as security for the security. Croshaw got the policy to cover any damage which might happen to his security—viz, the ship—and so to preserve his security intact. The defendants the Maritime Insurance Company cannot rely on the payment to John Holman and Sons in respect of salvage losses, as they had no right to settle the assured's business. John Holman and Sons were in the same position as if the advance had been made by Elder's bankers. These defendants have paid the wrong person, and are liable, therefore, on the policy. The plaintiff Swan sues in his own right, and has not merely lent his name to enable the other plaintiffs to sue. The assignment to them (Cleland's Graving Dock and Slipway Company) was, as in the case of a second mortgage, subject to the rights of the first mortgagee.

Scrutton, K.C., *Mackinnon*, and *G. S. Croshaw* for the defendant Croshaw.—This defendant is entitled to the moneys payable under the policy. It does not matter that the plaintiffs, Cleland's Graving Dock and Slipway Company, did the repairs to the vessel at the mortgagor's request. They relied on the personal liability of the mortgagor. The mortgage to Croshaw included both the ship and the policy, the latter being not a mere collateral security.

Bailhache for the defendants the Maritime Insurance Company.—If the plaintiffs do not produce the policy they cannot sue. These defendants have only to pay to the person producing the policy. If the defendant Croshaw is entitled to the possession of the policy neither of the plaintiffs can succeed. The assignment to the plaintiffs, Cleland's Graving Dock and Slipway Company, was bad. An assignment of unliquidated damages on a claim under a policy is bad unless the policy itself is assigned. The claim cannot be detached and assigned apart from the policy. He referred to

May v. *Lane*, 71 L. T. Rep. 869.

The plaintiff Swan, the trustee in Elder's bankruptcy, is not suing in his own right, but is suing merely to try to complete the assignee's title; but since that which was to be assigned is not capable of assignment, the action fails. The payment by these defendants to John Holman and Sons of the amount they had paid the salvors is the same as if the defendants had paid the salvors direct. By such payment Elder's estate has been indemnified, and these defendants cannot be made to pay that amount again:

Pellas and Co. v. *Neptune Marine Insurance Company*, 4 Asp. Mar. Law Cas. 213; 40 L. T. Rep. 428; 5 C. P. Div. 34.

J. A. Hamilton, K.C. in reply.—The claim is a *chose in action* which can be assigned. The production of the policy is only a matter of evidence.

CHANNELL, J.—This case involves several intricate points which arise in consequence of the insolvency of Mr. Elder, the shipowner and mortgagor of the steamship *Scotian*. The fact of that insolvency makes it necessary to look strictly into the rights of all the persons concerned. I will deal first with the dispute in reference to the sum of 969*l.* 14*s.* 4*d.*, of which the defendant underwriters' proportion is 121*l.* 4*s.* 3*d.* As to that sum, I have to deal with the question as between the plaintiff Swan, who was the trustee in the bankruptcy of Elder, and the plaintiffs Cleland's Graving Dock and Slipway Company, the assignees of sums due under the policy, on the one hand, and Mr. Croshaw, who was made a party to the action as a defendant, on the other hand. In view of the order which has been made on an interpleader summons when the defendants the Maritime Insurance Company paid the 121*l.* 4*s.* 3*d.* into court to abide the result of the action, it is unnecessary to decide the question which of the various parties was the proper party to sue the underwriters, and I will treat the question as if the sum had been paid to the broker who effected the insurance, and then there arose a question between the mortgagor and mortgagee as to which of them was entitled to the money. That question was entirely apart from the dispute as to the amount paid in respect of salvage, which I will consider later. The rights between the mortgagor and mortgagee must be determined by the mortgage deed so far as these have not been varied by subsequent agreement. If the money had been recovered from the underwriters before the ship had been repaired, it is quite clear that the money would belong to the mortgagee; and if the mortgagor claimed, as in substance he did claim in the present case, that the money should be applied in payment of the cost of repairs, he would have to get the authority or consent of the mortgagee so to apply it, or he would have to show that such consent had been given in the original contract. In the contract in question I can find nothing which says that the policy money when recovered must be applied in repairs. Such a thing is common in contracts with reference to fire insurance, as between mortgagor and mortgagee or lessor and lessee, but it is not in this contract. The contention of counsel for the plaintiffs depends upon the proposition that the policy was assigned to Mr. Croshaw, not as security for his debt, but as security for his security—that is to say, that he got the policy to

cover any damage which might happen to the ship—the ship being his security—and so to preserve his security intact. But it seems, if the terms of the mortgage are looked at, that the mortgagee got the policy as security for his debt, and not merely as security for his security. That is enough to show that the mortgagee is entitled to the money, and there is nothing which obliged him to consent to its being applied in restoring the ship to its original condition.

I come now to the other points which have been raised by counsel on behalf of the underwriters. It was said, in the first place, that, as the plaintiffs were not the holders of the policy, they could not sue upon it. In my opinion the mortgagor of the policy retained an interest in it in the nature of an equity of redemption, and in consequence was entitled himself to sue upon the policy, or he could require the mortgagee to sue for him so far as he had an interest exceeding that of the mortgagee in the sum to be recovered. In the present case the mortgagee has abandoned, as between himself and the mortgagor, any claim under the policy to more than the sum of 969*l.* 14*s.* 4*d.*, and it follows that the plaintiffs can either sue in their own right, or can require the mortgagee to sue for them, and if he declines to do that he could be made a defendant. That has been done, and, therefore, so far as the question of parties was concerned, the action is in order. I may add that I do not think it is right to say that a plaintiff before he can claim for a loss under a policy must have the policy in his own possession, the production of the policy can be obtained, if necessary, by a subpœna to the person who holds it. Non-production of the policy may be a ground for suspecting that someone else has an interest in it, and it may be, although upon this I am doubtful, sufficient ground for the underwriters refusing to pay because someone else might claim. It would, of course, be a complete answer if it were shown that the underwriters were under no liability to anybody else, and here by the mortgagee abandoning all right on this part of the claim the underwriters are clearly not liable to him, and the difficulty of the policy being in the mortgagee's hands is got over. It was next suggested that the action was really brought only by Cleland's Graving Dock and Slipway Company, and that the trustee in Elder's bankruptcy merely lent his name to carry out the assignment, and that the assignment itself was bad, because it was an assignment of unliquidated damages. There is some authority in the case of *May* v. *Lane* for saying that an assignment of unliquidated damages is not good; but I think that proposition goes too far, and certainly does not seem to be applicable in the case of a policy of insurance, because there is distinct authority for saying that a policy may be assigned after a loss: (*Lloyd* v. *Fleming*, 1 Asp. Mar. Law. Cas. 192; L. Rep. 7 Q. B. 299). The assignment to Cleland's Graving Dock and Slipway Company was to pay that company for the repairs done to the ship; it was a *bonâ fide* transaction, and could not possibly be bad on the ground of maintenance or champerty. The assignment was by way of second mortgage, and, in my opinion, the underwriters are not entitled to refuse payment on the ground of the suggested invalidity of the assignment. There was a third point on behalf of the underwriters. It was said that they paid the salvage claim, and as a policy of insurance was only an indemnity, the assured had been indemnified. That is a taking argument, but, in my opinion, it is not sound. One reason why it is not sound is because it assumes that underwriters have the power to take over into their own hands the management of all matters that arise out of a loss out of the hands of the assured. Underwriters have not that power. Such a power might, of course, be given them, but, apart from agreement, the assured is entitled to settle the loss himself. In this case the underwriters paid the persons who became liable by way of bail to pay, and who did, in fact, pay, the salvors. The payment by the underwriters was not with the authority of the assured. That in itself is a sufficient answer. Further, the bankruptcy and the assignment to Cleland's Graving Dock and Slipway Company are also circumstances which would be an answer to this contention on the part of the underwriters. If the payment were allowed to be good it would defeat the operation of the bankruptcy law as to the equal distribution of the bankrupt's estate among his creditors. Messrs. Holman and Sons can only prove in the bankruptcy in respect of their claim. The assignment to Cleland's Graving Dock and Slipway Company, whose rights have therefore intervened, was also, in my opinion, a bar to the underwriters' contention. On the whole case I come, therefore, to the conclusion that as to the 121*l.* 4*s.* 3*d.*, the defendant company's proportion of the 969*l.* 14*s.* 4*d.*, Mr. Croshaw is entitled to succeed, and that as to the sum in respect of the salvage losses and charges there must be judgment for the plaintiffs as against the Maritime Insurance Company.

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

Solicitors for the defendant Croshaw, *Parker, Garrett, Holman*, and *Howden*.

Solicitors for the defendants the Maritime Insurance Company, *Holman, Birdwood*, and *Co.*

Wednesday, Jan. 16, 1907.

(Before CHANNELL, J.)

YUILL AND CO. LIMITED *v.* SCOTT-ROBSON. (*a*)

Sale of goods—C.i.f. contract—Cattle for export—Insurance to be against "all risks"—Cattle not allowed to land—Government prohibition—Policy containing clause "Warranted free of capture, seizure, and detention"—Loss.

Cattle were bought for export on a c.i.f. contract, and it was provided by the contract that the insurance was to be "against all risks."

The vendor procured a policy against all risks, which contained the clause "warranted free of capture, seizure, and detention, and the consequences thereof."

The cattle were prohibited from landing at Durban by the Government authorities owing to foot and mouth disease breaking out amongst the cattle.

Held, that the policy, with the clause "free of capture, seizure, and detention, and the consequences thereof" included, was not in accord-

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

ance with the contract between the vendor and purchaser, although as between an insurance broker and underwriters the inclusion of the clause was usual in an "all risks" policy, and therefore the defendants were liable for breach of contract.

COMMERCIAL LIST.

Action tried before Channell, J. sitting without a jury.

Claim for damages for breach of contract.

By a contract dated the 4th April 1903, and made in Buenos Ayres, the defendant agreed to sell and the plaintiffs agreed to buy 250 bullocks, 10 per cent. more or less, at 17*l.* a head, cost, freight, and insurance; "insurance to be against all risks," per the steamship *Abbey Holme* to Durban.

The contract was contained in two letters between the plaintiffs' agent (one Miskin) and the defendant.

The defendant shipped 275 bullocks, and the plaintiffs paid the contract price.

The defendant effected an insurance, which was a Lloyd's policy containing the following clause:

Warranted nevertheless free of capture, seizure, and detention, and the consequences thereof, or of any attempt, threat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

Attached to the policy were clauses entitled "'All risks' live stock clauses," which contained (*inter alia*) the following:

To cover mortality, jettison, washing overboard, and risks of every kind from time of arrival at wharf and until delivered to consignees, but free of all claim for particular average and depreciation in respect of animals which walk ashore (or after release from the slings) at destination, unless caused by or in consequence of the vessel, craft, or cargo being stranded, sunk, burnt, or on fire, or by collision or by disablement of steamer.

. . .

During the voyage to Durban foot and mouth disease broke out amongst the cattle, and the authorities at Durban refused to allow the vessel to enter port. Some of the cattle had died on the voyage, and the remainder had to be slaughtered on board, the carcases being sold at 5*l.* each.

The plaintiffs gave notice of abandonment to the underwriters as for a constructive total loss of the bullocks and subsequently sued the underwriters on the policy for 3829*l.* 18*s.* 6*d.*

The underwriters relied upon the exceptions in the policy, and the plaintiffs in consequence were compelled to settle their claim for 990*l.* The plaintiffs alleged that by reason of the defendant, in breach of his contract, not obtaining a policy covering all risks, they had suffered damage to the extent of 2839*l.* 18*s.* 6*d.* being the difference between the 990*l.* and 3829*l.* 18*s.* 6*d.*, the amount which the plaintiffs alleged they would have recovered from the underwriters had the policy been in accordance with the contract.

In addition the plaintiffs alleged that they were entitled to recover the amount of certain costs incurred in the action against the underwriters, and they claimed against the defendant the sum of 2986*l.* 15*s.* 6*d.*

Evidence was called on behalf of the defendant to prove that an "all risks" policy included the free of capture, seizure, and detention clause unless there had been special instructions to the contrary, and that the risk of a prohibition to land cattle was always separately insured.

Scrutton, K.C. and *Mackinnon* for the plaintiffs.—The defendant in breach of his contract did not procure a policy against all risks, in that it excluded loss by capture, seizure, and detention, and the consequences thereof, whereby the plaintiffs suffered damage. In *Miller* v. *Law Accident Insurance Company* (9 Asp. Mar. Law Cas. 386; 88 L. T. Rep. 370; (1903) 1 K. B. 712) the operation of the ordinary municipal law of a country preventing or affecting the entry into the country of diseased cattle was held to be a "restraint of princes or people," and that the warranty in a policy of marine insurance against "capture, seizure, and detention" operated to release the insurers from liability under the words "arrests, restraints, and detainments" of kings, princes, and people in the body of the policy. "All risks" may have a special meaning amongst underwriters, but when a vendor and a purchaser of cattle for export refer to an insurance against all risks, they must mean all risks in the ordinary sense of those words, and must contemplate such a prohibition against landing. *Schloss Brothers* v. *Stevens* (96 L. T. Rep. 205) was cited.

J. A. Hamilton, K.C. and *Lewis Noad* for the defendants.—There has been no breach of contract. The policy was in accordance with the terms of the contract, and the form of it was submitted to and approved by the plaintiffs' agent. It is the usual thing in an "all risks" policy to include the free of capture, seizure, and detention clause, unless there are instructions to the contrary. The plaintiffs must be taken to have known that "all risks" has a mercantile meaning other than the ordinary meaning. "All risks" means all risks covered by the usual form of insurance policy on cattle with the warranty against capture, seizure, and detention. "All risks" do not include prohibition by the Government against landing cattle. Such a risk is separately insured.

CHANNELL, J.—I think there are some points in this case that are not free from doubt. I think that the evidence which I have had from gentlemen of experience, and producing for it what I may call chapter and verse in the shape of resolutions, shows that this clause "free of capture" is, by the practice of underwriters, put into policies, notwithstanding that they have been asked to insure against all risks, and that they so put it in unless they have had their attention drawn to the fact that it is desired to insure without that clause—in substance, to insure war risks or risks of this character. They have shown that, and it is very intelligible business because it is a more or less exceptional clause, which would substantially affect the premium, and it is an obviously convenient business practice that they should have their attention specially called to the matter if they desired to insure that. That is a practice of underwriters and insurance brokers, which would be known to everybody who is conversant with insurance business, at any rate in London, and, so far as one can see, in all probability in other places too. But this is a contract for the purchase of bullocks upon cost freight and insurance terms. The first document,

superseded by the second, but they are pretty much the same, is cost freight and insurance, insured against all risks, and the second one I think is the same—insurance against all risks; so that there is really no difference. Now, as between vendor and purchaser I think that that means all risks. I do not think it is the same question as it would be between the insurance broker and the underwriter. If an insurance broker has issued a slip for all risks, and has got it underwritten, then it is quite clear he can only expect a policy with the free of capture clause in it; but, this case seems to me to be different, and I very much doubt the admissibility of any evidence upon a contract of this sort to cut down "all" to "some." But I am not concerned to say that there may not be some risks which were quite out of the contemplation of the parties, and as to which it might not be necessary to get an insurance. For instance, in time of peace—I do not know that it was actually a time of peace all over the world—but in time of peace so far as this voyage was concerned, I do not know that it would be necessary for one to procure an insurance which would cover the case of war breaking out. That might not be necessary for anything I know, and it does not arise before me. I think that it does cover a right to have an insurance against so obvious a risk to people who were shipping live cattle as the risk of their being prevented landing at the port where they were to be landed by reason of the apprehension of disease. Regulations of that sort are very common all over the world, and, as the one gentleman whom I have had called before me who was experienced in this cattle-dealing business said, it was a very well-known risk and one that they must always have in their contemplation. It seems to me, therefore, that the contract, as between the vendor and purchaser, involves procuring an insurance against that risk. Now, the instructions were given through an insurance broker to insure against all risks. If this were a question of negligence, I think all this evidence would be very material to show that there was no negligence on the defendant's part in procuring the policy which he did, and probably no negligence on his broker's part. But it is not a question of negligence. It is a question of express contract and a question of what the plaintiff was entitled to get by way of insurance.

Without going into the niceties of the cases which have since been decided by Kennedy, J. and Walton, J., he got a policy which, I think, according to the decision of *Miller* v. *Law Accident Insurance Company* (*sup.*), did not cover this particular risk because it contained the clause free of capture and detention, and the word "detention" was held in that case to apply to the same thing as the restraint of princes in the earlier clause of the policy. It seems to me therefore that, as in *Miller's* case, that was cut out of the policy by that warranty, so in this case it is cut out by that warranty, and I do not think that I can reasonably hold that it is put in again by the fact that the clause about all risks is an attached clause and not written in the body of the policy as apparently the more or less corresponding clause in *Miller's* case was. So that I think that the policy is not in accordance with what the plaintiff was entitled to require under this contract. At the same time it was a policy as to which neither party was at all sure whether it did include it or not, the decision of *Miller's* case in the Court of Appeal being almost contemporaneous with this. A thing of that sort gets known possibly amongst insurance brokers pretty soon, but it would take a certain time to get known to merchants generally. So that I may take it that it is a policy which did not, in fact, comply with the contract but which each party to the contract might reasonably think did so. Then this apparently took place. A cablegram came over to Buenos Ayres stating that a policy had been effected. Mr. Miskin, who was the plaintiff's agent, did not thoroughly understand that telegram, and he said, "I should like to see the form of the policy." Some things were evidently in his mind as questions of doubt with regard to it, and he said he would like to see the form of the policy, and it was shown to him, or at least a form was shown to him. Unfortunately we have not got that form. Mr. Scott-Robson, the defendant, was under the impression that that form was the one that he had sent in a particular letter. It is quite clear that he is mistaken about that, and the consequence is that we do not know for certain what has become of that form. It may be that he has left it in his office at Buenos Ayres, it may be he has used it again as a specimen for other cases, or all sorts of things may have happened to it, or he may have lost it. He was under the impression that he had sent it in that letter, but he was wrong and in consequence I have not distinct evidence of what it contained. Mr. Scott-Robson's memory is that it contained this free of capture clause. Whether that is thoroughly reliable or not I do not know, but if it depended on that I might have some doubt about it, because a man's memory when he is asked about a thing of this sort some time afterwards is not so very valuable. The reason I think that it did contain that clause is that it came from an insurance broker with a considerable business, and I think one may depend upon it that his form was sure to have got it in; consequently I think there cannot be any reasonable doubt that the form which was shown to Mr. Miskin had that clause in it. Then he says "Does it cover foot and mouth disease?" and Mr. Scott-Robson says "I think it does," or some words to that effect. And Mr. Miskin says, "Then it will do." Now, I must say at first I was rather struck by Mr. Hamilton's suggestion that if Mr. Miskin had said, "The policy will not do because it has got this warranty in it, and that warranty will have the effect that if there is a law passed that I cannot land my cattle I shall have to put up with the loss"—that if he had said that, then and there, they might have effected another insurance covering that particular risk, and if Mr. Scott-Robson had tendered the policy to Mr. Miskin for the purpose of getting his answer and, having a doubt himself whether it was right, Mr. Miskin had acted upon it by accepting it in that form and not asking for another, I am rather inclined to think there would have been some sort of estoppel or some way or another by which it would have been said the plaintiffs would not have been entitled to get another policy. I think on the whole that that is not so, and that Mr. Scrutton is right in saying that this case is analogous to the case of a latent defect in goods. Each party thought it was all

right. They thought the policy would do, and there is no more than their mutual agreement of opinion to that effect. I do not think any estoppel can arise out of that, and it simply stands that it is not quite the same thing as a delivery of goods, but it is analogous to a delivery of goods in which there is a latent defect. On the whole, therefore, I think that the plaintiffs must be entitled to recover in this case, and I have already fixed an amount of damages on the footing that the damages are the loss to the plaintiffs from not getting this insurance, less the net amount that they got out of the insurance by suing the underwriters and compromising it. I think that their conduct in that was reasonable. I do not quite see what else they could have done. The letter was rather a long one, but the substance of it was to give the defendant plenty of information, and he very naturally said: "It is a difficult matter; you must take your own course." I think it was reasonable to bring the action and get what they could out of it, and I think it was reasonable to compromise it when it had been brought in consequence of the legal difficulties. The result is that the plaintiffs will recover, less the small amount that I took off in consequence of their not being entitled, as I think, to charge in this case, as damages, for their exertions in minimising the damages. The amount will be 2975*l*.

Judgment for plaintiffs.

Solicitors for the plaintiffs, *Parker, Garrett, Holman*, and *Howden*.

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

Wednesday, Feb. 6, 1907.

(Before BIGHAM, J.)

ELSWICK STEAMSHIP COMPANY LIMITED *v.* MONTALDI. (*a*)

Charter-party — Demurrage — Strike clause — "Discharge at average of 500 *tons per day"— Dilatoriness in discharge prior to strike throwing discharge into strike period.*

A charter-party provided for the discharge of cargo "at the average rate of 500 *tons per day . . . Sundays and holidays excepted," and that "strikes . . . which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage." The lay days began on the* 21*st Dec.; at the end of Saturday, the* 31*st Dec., a strike commenced, and continued until the* 15*th Jan. No discharge took place on Sunday, the* 1*st Jan., or Monday, the* 2*nd Jan., but recommenced on the* 3*rd Jan. and finished on the* 15*th Jan. Only half the cargo was discharged by the end of the* 31*st. Dec. —the average rate being about* 250 *tons a day —throwing the vessel into the strike period. Had there been no strike the lay days would have expired by the* 3*rd Jan., and allowing for strike by the* 4*th Jan. In an action for demurrage*

Held, the dilatoriness in discharge rendered it impossible to discharge within the lay days, even if there had been no strike. The excuse of a strike could not be relied on, except in reference to the discharge of the small balance of cargo which, assuming that the rate of discharge had been on the average of 500 *tons per day, would, by reason of the strike, be slightly out of time.*

ACTION tried before Bigham, J. sitting without a jury.

The plaintiffs, who were the owners of the *Elswick Tower*, claimed to recover nine days' demurrage.

The defendant shipped 4864 tons of coal, 151 tons coke, and fifteen tons of manure, a total of 5030 tons, on board the *Elswick Tower* for carriage to Venice, consigned to his order under bills of lading which incorporated the terms of a charter-party made between the defendant and the owners of the said vessel.

By the charter-party, dated the 21st Nov. 1904 it was provided, in respect to the coal, by clause 8:

> Cargo to be taken from alongside by consignees at port of discharge . . . at the average rate of 500 tons per day, weather permitting, Sundays and holidays excepted, provided the steamer can deliver it at this rate; if longer detained consignees to pay steamer demurrage at the rate of 4*d.* per net register ton per running day (or *pro rata* for part thereof). Time to commence when steamer is ready to unload, and written notice given whether in berth or not.

The charterers had the option of shipping up to about 100 tons of goods, and or bricks, at 2*s.* per ton above coal rate, and up to about 200 tons of coke at 2*s.* per ton above coal rate. The goods and (or) coke to be delivered at port of destination as fast as steamer could do the work, independent of the time allowed for coals.

> In case of strikes, lock-outs, civil commotions, or any other causes or accidents beyond the control of the consignees which prevent or delay the discharging, such time is not to count unless the steamer is already on demurrage.

The vessel arrived on the 21st Dec., and notice of readiness to unload was given. The lay days commenced on the 21st Dec., at 2 p.m.

On the 23rd Dec. work was stopped, but under circumstances not amounting to a strike.

A general strike of labourers commenced at the end of Saturday, the 31st Dec., and continued till the 15th Jan.

On Sunday, the 1st Jan., and Monday, the 2nd Jan., no work was done.

On the 3rd Jan. work was recommenced, and continued continuously, Sundays included, until the 15th Jan.

On the 15th Jan., at 3 p.m., the vessel was completely discharged.

At the close of Saturday, the 31st Dec., about 2335½ tons had been discharged, leaving about 2694½ tons undischarged.

The daily average rate of discharge accordingly up to the close of the 31st Dec. was about 250 tons.

If the average rate of discharge provided by the charter-party had been carried out the vessel would have been discharged by the 3rd Jan. about noon if there had been no strike, and on the 4th Jan. allowing for the strike.

J. A. Hamilton, K.C. and *Lewis Noad*, for the plaintiffs.—Owing to the dilatoriness in discharging, the vessel was thrown into the strike period. At the close of the 31st Dec. the defendant was behind the contract average rate of discharge to

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

such an extent that, even had there been no strike, the cargo could not have been discharged within the lay days. Allowing for the strike, the discharge should have been completed on the 4th Jan., and therefore the strike cannot be said to have delayed or prevented the discharge beyond the 4th Jan. The plaintiffs are accordingly entitled to demurrage.

W. W. Wills for the defendant.—There was no contract to discharge 500 tons per day, but merely to discharge at an average rate of 500 tons per day. When the strike commenced at the close of the 31st Dec., the defendant was not in default. If there had been no strike the lay days would have expired on the 3rd Jan., but before that date the strike commenced, at a time when the defendant was not in default, and the clause in the charter-party giving protection against strikes accordingly applies. The plaintiffs are not entitled to demurrage.

BIGHAM, J.—In my opinion, the plaintiffs are entitled to judgment. The action is brought by shipowners to recover demurrage at an agreed rate per day. The *Elswick Tower* sailed to Venice with a cargo of coals, and there was also on board a small quantity of coke and manure. The vessel arrived at Venice on the 21st Dec. 1904, and was ready to discharge at 2 p.m. on that day, from which time the lay days began to run. There were 4864 tons of coals on board, which, according to the terms of the charter-party, ought to have been discharged by the 3rd Jan. There was also 151 tons of coke and fifteen tons of manure, but as to that, according to the terms of the charter-party, there was a special clause—namely, that those goods should be discharged as fast as the steamer could. I hold that half a day would have been sufficient to discharge that portion. The ship ought to have been discharged by the 3rd Jan. The discharge, however, was not completed until the 15th Jan. The question is, whether the defendant is liable for demurrage between the 3rd Jan. and the 15th Jan. The defendant contends that he is not liable, because the strike prevented or delayed the discharge, and that, therefore, he is excused by reason of the protection granted by clause 8 in the charter-party. As a matter of fact, not half of the coals had been discharged on the 31st Dec. The position is, the defendant so conducted himself in the matter of the discharge that he made it physically impossible for him to perform his contract. He could not have got the balance of the cargo out during the lay days, even if there had been no strike. The result was that the balance of the cargo—viz., about 2694½ tons was thereby thrown over into the strike period. I do not think the defendant is therefore entitled to rely on the strike excuse as an answer to the claim for demurrage. As to the defendant's contention that to the extent to which the strike prevented him from discharging the balance of what he ought to have discharged by the 31st Dec. if he had been discharging at the average rate of 500 tons per day, he was entitled to the strike clause, I am of opinion that if the defendant had not put himself in the position, on the 31st Dec., of making it impossible to discharge within the time, he would have been able to discharge the coal by the 4th Jan. The only reason why the defendant did not do so was that he had by his own dilatoriness rendered it impossible to discharge within the lay days. The excuse of a strike does not, therefore, avail the defendant except in reference to the discharge of the small balance which, assuming that the rate of discharge had been on the average of 500 tons per day, would by reason of the strike be slightly out of time. I think the justice of the case will be met if the plaintiffs are allowed seven days demurrage.

Judgment for the plaintiffs for 299*l.* 16*s.* 8*d.*

Solicitors for the plaintiffs, *W. A. Crump* and *Son*, for *Bramwell* and *Bell*, Newcastle-upon-Tyne.

Solicitors for the defendants, *Stibbard, Gibson,* and *Co.*, for *Daggett* and *Grey*, Newcastle-upon-Tyne.

Monday, Feb. 25, 1907.

(Before BRAY, J.)

CAIRN LINE *v.* CORPORATION OF THE TRINITY HOUSE. (*a*)

Light dues — Trinity House—"Deck cargo" — Space occupied by bunker coal on awning deck —"Stores"—"Other goods"—Merchant Shipping Act 1894 (56 *&* 57 *Vict. c.* 60), *s.* 85 (1) — *Merchant Shipping* (*Mercantile Marine Fund*) *Act* 1898 (61 *&* 62 *Vict. c.* 44), *s.* 5 (2), *sched.* 2, *r.* 8.

The space occupied by bunker coal stowed at the commencement of a voyage on the awning deck has to be taken into consideration in arriving at the registered tonnage of a vessel for the purpose of levying light dues, although such coal is consumed during the voyage for the boiler fires.

Bunker coal so carried comes within the meaning of "deck cargo" in sect. 85 *of the Merchant Shipping Act* 1894. *In that section "deck cargo" includes goods that are not freight earning.*

"Stores" includes ship's stores carried for the use of the ship itself.

Ship's stores carried on deck are deck cargo.

"Other goods" include bunker coal, and are not limited to freight earning goods.

COMMERCIAL LIST.

Action tried before Bray, J. sitting without a jury.

Claim to recover 6*s.* 10*d.*, paid under protest, in respect of light dues levied by the defendants.

The plaintiffs' vessel *Cairntorr* left Penarth on a voyage to Buenos Ayres with 4924 tons of coals in the ship's holds shipped by Messrs. Corv Brothers Limited, under bills of lading. The vessel also carried 1291 tons of bunker coal for use on board. Of this quantity 1127 tons was in the bunkers, 64 tons in the poop, and 100 tons on the awning deck.

The defendants claimed light dues in respect of the space occupied by the 100 tons of bunker coal on the awning deck. During the voyage the 100 tons was transferred to the thwartship bunker and consumed in the boiler fires.

The right to levy the dues was based on the following statutes:

Merchant Shipping Act 1894, sect. 85 (1):

If any ship, British or foreign, other than a home trade ship as defined by this Act, carries as deck cargo,

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

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 those goods at the time at which the dues became payable.

The Merchant Shipping (Mercantile Marine Fund) Act 1898, s. 5 (2):

The scale and rules set out in the 2nd schedule to this Act shall have effect for the purpose of the levying of light dues in pursuance of this Act, but Her Majesty may by Order in Council alter either generally or with respect to particular classes of cases, the scales or rules and the exemptions therefrom.

Sched. 2, r. 8, provides:

For the purposes of these rules (*a*) a ship's tonnage shall be reckoned as under the Merchant Shipping Act 1894 for dues payable on a ship's tonnage, with the addition required in sect. 85 of that Act with respect to deck cargo, or in the case of an unregistered vessel in accordance with the Thames measurement adopted by Lloyd's register.

J. A. Hamilton, K.C. and *Maurice Hill* for the plaintiffs.—Dues were not leviable in respect of the space occupied by the bunker coal on the awning deck. "Cargo" refers to goods that are freight-earning which are being carried from one country to another. Bunker coal is not intended for carriage from one country to another, nor is it freight-earning. Bunker coal carried on the awning deck cannot be called "deck cargo." Cargo is that which is carried from one place to another, and does not extend to things used for the purpose of enabling the vessel to reach another country. Bunker coals cannot be assumed to be included in "timber, stores, or other goods." "Stores" do not mean stores for use on the voyage. Stores for use of the ship would not be "cargo":

Richmond Hill Steamship Company v. *Corporation of the Trinity House*, 8 Asp. Mar. Law Cas. 164; 75 L. T. Rep. 8 (per Kay, L.J., at p. 10); (1896) 2 Q. B. 134.

"Other goods" mean goods of a commercial value. The Acts being taxing Acts they have to be construed in favour of the public. The wording of the Act is ambiguous. The onus is on the defendants to prove that the Acts have given them the power to levy the dues.

Pickford, K.C. and *Bateson* for the defendants.—Bunker coal carried on the awning deck is "deck cargo." "Deck cargo" refers merely to the position of the goods carried. It is not essential that that which is carried on deck should be freight earning. "Stores" are not freight-earning, yet they come within the Acts. In principle coal so carried should not be exempt. The Acts give power to levy the light dues levied here. *Richmond Hill Steamship Company* v. *Corporation of the Trinity House* (8 Asp. Mar. Law Cas. 164; 75 L. T. Rep. 8; (1896) 2 Q. B. 134) is distinguishable.

J. A. Hamilton, K.C. in reply.—It is true that there is no mention of bunker coal *eo nomine* being excepted, but if the Legislature meant to include bunker coals those words would have been used, for the Legislature was familiar with the phrase "bunker coals." The principle is that only space occupied by freight-earning things are chargeable for the dues. It was intended to provide reasonable space free for coal, without which the propelling power is not complete. Sect. 79 (*b*) of the Merchant Shipping Act provides that space occupied by sails should also be deducted in ascertaining the registered tonnage. The phrase "that is to say" in sect. 85 is descriptive of the locality. To support the defendant's construction it is necessary to change "deck cargo" into "to carry on deck."

Cur. adv. vult.

Feb. 25.—BRAY, J.—The question in this action is whether a sum of 6*s.* 10*d.* was rightly payable by the plaintiffs to the defendants for light dues on the plaintiffs' steamship *Cairntorr* on a voyage with a cargo of coal from Penarth to Buenos Ayres. The plaintiffs paid the sum of 6*s.* 10*d.* under protest, and seek to recover it back. According to the agreed statement of facts the *Cairntorr*, when she started from Penarth, had 100 tons of coal on the awning deck. This coal was part of 1291 tons bought by the plaintiffs for use on board in the ship's fires. In the course of the outward voyage these 100 tons were transferred into the thwartship bunkers and consumed in the boiler fires. It was in respect of the space occupied by these 100 tons that the 6*s.* 10*d.* was paid. The defendants claim that light dues were payable in respect of this space under the combined effect of rule 8 (sched. 2) of the Merchant Shipping Act of 1898, and sect. 85 of the Merchant Shipping Act of 1894, and the question turns on the true construction of the last-mentioned section. That section, omitting unnecessary words, is as follows: "If any ship 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 these goods at the time at which the dues were payable." The point in dispute is whether this coal was "timber, stores, or other goods." The first duty of the court in construing a statute is to see what is the natural meaning of the words used, and the first word which has to be construed is "deck cargo." The plaintiffs contend that deck cargo means freight-earning cargo carried on deck. Now, the statute here has given a special definition of the word "deck cargo." That, I think, is the natural effect of using the words "that is to say." It first uses a word capable of more than one construction, and then it defines its meaning. I cannot interpret the words, "that is to say" in any other way. I think the word "deck cargo" is large enough to include goods that are not freight-earning, and it seems to me that the definition shows that it is intended to have that larger meaning here. I find that the word "cargo" is not repeated anywhere in the definition. If it had been intended that it should be confined to cargo in the sense of freight-earning cargo, I think the words used would have been something of this kind—"that is to say, as cargo in any uncovered space, &c." Next I think the words, "timber, stores, or other goods" show that it was not to be confined to freight-earning cargo. The word "stores" must, I think, include ship's stores carried for

the use of the ship herself. The word "stores" is frequently used in the statute and in the rules as denoting, or, at all events, as including the ship's own stores. Now, ship's stores carried for the use of the ship herself are no more freight-earning than bunker coals. If this be so, the words "deck cargo" cannot be construed as confined to freight-earning cargo, and there is no reason for limiting the words "other goods" to freight-earning goods. If they are not so limited the words "other goods" are quite wide enough to include bunker coal. The view contended for by the plaintiffs really involves the ignoring or omission of the important words "that is to say." Having arrived, therefore, at what I have considered to be the natural construction of this section, I have to ask myself whether there is any reason why this natural construction should not be taken as the true construction. Why should it not have been intended that bunker coal carried on deck should pay light dues? It is important to see how far bunker coal in the bunkers pays light dues. Is the space occupied by the bunkers reckoned in arriving at the registered tonnage? Sects. 77 to 81 of the Act of 1894 and the rules in the schedule provide for the measurement of the ship and tonnage. The matter seems to stand thus: The space occupied by the bunkers is included in the gross tonnage, but a deduction is made for the space occupied by the propelling power, and in arriving at the latter amount an addition is made to the space actually occupied by the boilers and machinery: (see sect. 78). I think it may be assumed that at all events one of the reasons for making this addition is the fact that space will be required for bunker coal, and that some deduction should be made for that, but it is plain that if the ship is carrying more than what the statute has assumed to be the normal amount of coal required for the boilers and machinery, the extra space so occupied will pay light dues. If a ship has bunkers larger than the normal she has to pay for the extra space. Why should she not pay if she has smaller bunkers, but carries bunker coal on deck to make up the amount required for the voyage? The statute might have provided that all space actually occupied by bunker coal should be deducted. It has not done so. It has thought it better to make an average deduction which involves payment for extra space so occupied, and there is no reason why payment should not be made for that space wherever it is. The shipowner or charterer may put his coal where he likes, he pays for all space occupied, less the statutory deduction. It seems to me, therefore, that if I am to consider what the Legislature is likely to have done my answer must be that it is likely to have made the ship pay for the space occupied by bunker coal on deck, and so also for ship's stores carried on deck. There is no reason, therefore, that I can find, why I should not adopt the construction which I have arrived at as the natural construction. I have now to consider the case of the *Richmond Hill Steamship Company* v. *Corporation of the Trinity House* (*ubi sup.*). I think it must be taken that the language used by all the learned judges in that case implies that they had it in their minds that deck cargo meant freight-earning cargo. It certainly was not necessary to decide that point because the horses and cattle were undoubtedly freight-earning cargo. The dicta were therefore *obiter dicta*, and I am not bound by them unless I can see that they formed the *ratio decidendi*, and I do not consider that they did so. The argument of the counsel for the ship was that "other goods" must be construed as *ejusdem generis* with "timber and stores." The court rejected this and adopted the natural meaning. That was their *ratio decidendi*. Still there remains the fact that the court entertained an opinion contrary to the one I have formed, and if I could see that they adopted this opinion after argument I should think it right to follow it. I cannot find any trace of the point having been argued. I think it is not an unnatural opinion to form on first consideration. I formed the same opinion on hearing Mr. Hamilton's argument, but after hearing Mr. Pickford my opinion changed. I am not convinced that those learned judges would not also have changed their opinion if they had had the advantages I have had. I think the opinion of Kay, L.J. was the most pronounced. He says: "It was argued that 'stores' meant in this section 'ship's stores.' If so it would appear that it must mean stores intended for the fitting out of other ships because stores belonging to the ship itself would not be cargo, but I do not think that the word has the limited meaning which is suggested. It appears to me to mean stores of any kind carried on deck." I am not sure that I understand this passage. If the learned judge means that ship's stores carried by the ship on deck for her own use are not deck cargo within the meaning of the section, I cannot agree with him, and the fact that the ship's stores so carried, are in my opinion, deck cargo helps me, indeed almost forces me, to come to the conclusion that bunker coal is also deck cargo. This case has made me hesitate much before adopting the view which I have taken, but as I am not bound by it I think I must give effect to my opinion which is that bunker coal carried on deck on this ship was "deck cargo" according to the meaning of that word in the section, and therefore that the 6*s.* 10*d.* was rightly payable, and the plaintiffs' action fails.

Judgment for the defendants with costs on the High Court scale.

Solicitors for the plaintiffs, *Bottcrell* and *Roche.*

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

Monday, March 11, 1907.

(Before CHANNELL, J.)

SMITTON *v.* ORIENT STEAM NAVIGATION COMPANY LIMITED. (*a*)

Warranty of seaworthiness — Negligence—Theft from cabin—Conditions on ticket—No declaration of value—"Fault or privity"—Liability —Merchant Shipping Act 1894 (56 *&* 57 *Vict. c.* 60), *s.* 502.

A passenger on a steamer placed his watch, with gold cigar cutter and sovereign purse (containing 5*l.) attached, on retiring for the night in a canvas pocket suspended from a hook over the top bunk which he occupied in a cabin on the*

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

main deck. The pocket was placed where it was under the superintendence of the shipowner's marine superintendent. Above the pocket was a fanlight, which the passenger left open, leading into the ventilating shaft which opened on the spar deck. A small man by putting his head and shoulders into the opening of the ventilating shaft could, by stretching his arm downwards, reach the pocket. The contents of the pocket had disappeared by the following morning. Finger marks were found round the pocket and in the ventilating shaft.

The passenger's ticket contained a condition that "the owners will not be responsible for and shall be exempt from all liability in respect of . . . any loss . . . of . . . any baggage, property, goods, effects, articles, matters, or things belonging to or carried by or with any passenger, whether the same shall arise from or be occasioned by thefts . . . by persons in the employment of the owners, or by others . . . or any other acts, defaults, or negligence of the owners' agents or servants of any kind whatsoever. . . ."

The passenger had not declared the value of the articles.

On an action for damages for negligence or alternatively for breach of warranty of seaworthiness:

Held, that the liability of the carrier as regards articles carried on the person or in the passenger's personal custody was the same as that towards the passenger—viz., to take reasonable care. If the articles by being placed in the cabin pocket ceased to be in the control of the passenger, then the Merchant Shipping Act 1894, *s.* 502, *applied. There was no "fault or privity" of the shipowners. The condition on the ticket protected the shipowners. The shipowners were not liable for the loss.*

COMMERCIAL LIST.

Action tried before Channell, J. sitting without a jury.

Claim for damages for negligence and alternatively for breach of warranty of seaworthiness.

The plaintiff was a first-class passenger on the defendant's Royal Mail steamship *Omrah*, from London to Naples, and occupied a cabin on the main deck.

On the 26th Oct. 1906 the plaintiff, on retiring for the night, placed his watch and chain with a gold cigar cutter and sovereign purse (containing 5*l.*) attached in a canvas watch pocket, which was suspended from a hook placed a few inches above the head of the top bunk.

The plaintiff occupied the top bunk and his wife the lower one. Above the pocket was a fanlight which could be opened to the extent of 6in. Each cabin was provided by the ship, under the superintendence of the marine superintendent, with similar pockets, but only in this cabin and one other was the pocket placed in such a position as to the fanlight.

On the night of the 26th Oct. the plaintiff left the fanlight open. The fanlight led to a ventilating shaft which curved upwards, and opened on to the spar deck. The opening of the shaft was a coaming light in the side of the deck house a few inches above the level of the deck.

During the night the contents of the pocket, valued at 35*l.* 5*s.*, disappeared. Finger marks were seen around the pocket and in the ventilating shaft. A small man could get his head and shoulders into the mouth of the shaft, and by stretching his arm downwards could reach the pocket above the top bunk.

In the cabin was a notice that money and other valuables should be deposited with the purser for safe custody.

The plaintiff in the usual course took a passenger ticket, on the back of which were (*inter alia*) the following conditions:

> Conditions under which this ticket is issued . . . and accepted by . . . the passenger: . . . Packages containing jewellery . . . or other valuables must be specially declared and registered prior to shipment and freight paid thereon. Money, securities, and small articles of value should be handed to the purser, who will give a receipt for same on payment of a small percentage for safe custody. . . . The owners will not be responsible for and shall be exempt from all liability in respect of any detention, loss, damage, or injury whatsoever of or to the person, or of or to any baggage, property, goods, effects, articles, matters, or things belonging to or carried by or with any passenger, whether the same shall arise from or be occasioned by . . . thefts or robberies whether by persons in the employment of the owners or by others . . . or any other acts, defaults, or negligence of the owners' agents or servants of any kind whatsoever. . . .

The Merchant Shipping Act 1894, s. 502, provides:

> The owner of a British seagoing 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—namely . . . (ii.) Where any gold, silver, diamonds, watches, jewels, or precious stones, taken in or put on board his ship, the true nature and value of which have not at the time of shipment been declared by the owner or shipper thereof to the owner or master of the ship in the bills of lading or otherwise in writing, are lost . . . by reason of any robbery . . . making away with, or secreting thereof.

Tobin, K.C. and *Harrison Smitton* for the plaintiff.—The placing of the watch pocket was an invitation to the passenger to place his watch therein. It was not negligence for the plaintiff to keep such articles about him during the voyage. It was negligent under the circumstances to place the pocket where it was placed in that cabin. The terms of the ticket exempting liability for negligence cannot be relied on, as there was an absolute warranty of seaworthiness that the cabin was a fit and proper place for the reception of the passenger and his personal belongings, secure against thieves. There was no fit and proper receptacle for the passengers' belongings, and the vessel was not, therefore, seaworthy at the commencement of the voyage:

> *Upperton* v. *Union Castle Mail Steamship Company*, per Collins, M.R., 9 Asp. Mar. Law Cas. 475; 89 L. T. Rep. 289; 9 Com. Cas. 50.

The defendants did not take reasonable care to make the cabin a fit and safe place. There being a breach of the warranty of seaworthiness at the commencement of the voyage, sect. 502 of the Merchant Shipping Act 1894 does not apply. That section refers to cargo and luggage, and not to articles worn on the person and necessary for the voyage. There was "fault or privity" on

the defendants' part by reason of their marine superintendent placing the pocket where it was placed. There was an invitation to the plaintiff to divest himself of the control of the articles, and there was therefore a warranty that the pocket was absolutely safe. The articles were not stolen from the person. The remarks of Mellor, J. in *Readhead* v. *Midland Railway Company* (16 L. T. Rep. 485; L. Rep. 2 Q. B. 412, at p. 426) are *obiter*. *Acton* v. *Castle Mail Packets Company Limited* (8 Asp. Mar. Law Cas. 73; 73 L. T. Rep. 158; 1 Com. Cas. 135) and *The Warkworth* (5 Asp. Mar. Law Cas. 326; 49 L. T. Rep. 715; 9 P. Div. 20, and at p. 145) are distinguishable. [*Queensland National Bank Limited* v. *Peninsular and Oriental Steam Navigation Company* (78 L. T. Rep. 67; (1898) 1 Q. B. 567), *Hyman* v. *Nye* (44 L. T. Rep. 919; 6 Q. B. Div. 685, per Mathew, J., at p. 690), *Dobell and Co.* v. *Steamship Rossmore Company Limited* (8 Asp. Mar. Law. Cas. 33; 73 L. T. Rep. 74; (1895) 2 Q. B. 408) were cited.]

Scrutton, K.C. and *Maurice Hill* for the defendants.—If the goods were lost through the negligence of the defendants or their servant the marine superintendent, which is denied, the conditions on the ticket protect the defendants. The articles were not lost through the fault or privity of the defendants, nor was their value declared: (sect. 502 of the Merchant Shipping Act 1894). *Acton* v. *Castle Mail Packets Company Limited* (8 Asp. Mar. Law Cas. 73; 73 L. T. Rep. 158; 1 Com. Cas. 135) is in point. There is no warranty of seaworthiness in respect to such articles. Carriers by sea are not insurers of passengers:

Readhead v. *Midland Railway Company*, 16 L. T. Rep. 485; L. Rep. 2 Q. B. 412, at p. 426.

Articles carried on the person of a passenger must be treated in like manner as the passenger himself:

Richards v. *London, Brighton, and South Coast Railway Company*, 18 L. J. 251 C. P.

Upperton v. *Union Castle Mail Steamship Company* (9 Asp. Mar. Law Cas. 475; 89 L. T. Rep. 289; 9 Com. Cas. 50) is distinguishable. If these articles are not to be treated in like manner as the passenger, then they come within the words of sect. 502 of the Merchant Shipping Act 1894, "gold . . . watches . . . taken in or put on board." That section is a good defence, there being no declaration of value and no loss through the "fault or privity" of the defendants. [*Brown* v. *Stapyleton and others* (4 Bing. 119, per Park, J.); *The Warkworth* (5 Asp. Mar. Law Cas. 326; 49 L. T. Rep. 715; 9 P. Div. 20, at p. 145) were cited.]

Tobin, K.C. replied.

CHANNELL, J.—This case raises questions of some difficulty. The governing factor is the ticket. The plaintiff had read the ticket, and that ticket is the contract in pursuance of which he went on board taking with him his goods both those that he had control over and those that he had not. The ticket contains this condition: "The owners will not be responsible for and shall be exempt from all liability in respect of any detention, loss, or injury whatsoever of or to the person, or of or to any baggage, property, goods, effects, articles, matters, or things belonging to or carried by or with any passenger, whether the same shall arise from or be occasioned by . . . Thefts or robberies whether by persons in the employment of the owners or by others . . . or any other acts, defaults, or negligence of the owners, agents, or servants of any kind whatsoever. . . ." The claim was originally founded on negligence, and as an answer the defendants set up this condition on the ticket and sect. 502 of the Merchant Shipping Act 1894. In reply the plaintiff say that there was a breach of warranty. I must treat the claim as one for (1) negligence and (2) for breach of warranty. So far as the claim rests on negligence I am judge of facts, and, in my opinion, I think that a jury might have found negligence on the defendants' part for the passenger could not have known what was on the other side of the fanlight, and that there was no negligence in placing the watch in the pocket, and also that the owners ought to have foreseen the possibility of a man putting his hand through. But I am not certain that the jury would have been right. It is not clear that the defendants ought to have anticipated the happening of this event. It is, however, not really necessary to decide that because the negligence point is clearly answered by the terms of the ticket. It is therefore not necessary for me to decide if there was negligence on the part of the marine superintendent, who placed pockets in the same position in all the cabins. Negligence is covered by the very general words of the condition I have read, and it is therefore impossible to maintain the claim on the ground of negligence.

As to the breach of warranty, the law as regards carriage of goods by sea is that the carrier warrants the fitness of the vessel for the particular purpose of the particular carriage. As regards the carriage of passengers by land or sea, the warranty is not an absolute warranty, but it is only to exercise reasonable care for the passengers' safe carriage. As to the passengers' luggage, except that in his personal control, the carriers' liability generally is the larger liability—namely, that in relation to goods. As to articles in the custody of the passenger, I am of opinion that it is the liability of a carrier as in respect to a passenger. The liability as to goods in the passenger's pocket, in his personal custody, is the liability as to the passenger himself. It is said here that it is true that in the daytime the passenger had the personal custody of the articles, but that at night time he placed them in the pocket that had been purposely placed there for their reception. Do the goods in the latter event then become goods to which the carriers' extended liability applies? I do not think so. I do not think that the shipowner then became an insurer, nor did he warrant their safety at night and not in the day. There is one obligation in respect to the articles for the whole voyage. If that is not so, if they cease to come under the category of those things in respect of which the carrier's liability was the same as the liability in respect of a passenger merely, then the Merchant Shipping Act would apply. Though I should hesitate to say that "gold, silver, watches, jewels, &c.," included a sovereign or half a crown in the pocket, yet if there is a change of liability and a change in the category of the articles when taken from

the person and put in the canvas pocket then it follows that they would be articles "taken in or put on board" on the ship. If the articles come within the section, can it be said that the loss of the watch and other articles did not happen "without . . . actual fault or privity" of the defendants, because the marine superintendent of the defendant company placed the canvas pocket in the particular place he did? Though a different section was there dealt with, the effect of the decision in *The Warkworth* (*sup.*) is that this would not be the actual fault of the defendant company. The marine superintendent was the company's agent for some purposes, but was not a person to whom the company had deputed all their duties in reference to the matter. I am of opinion that in the case of a corporation the fault of the managing authority of the directors would be the actual fault of the company within the meaning of the section, but not so the fault of a servant who has not general managing duties. There must be judgment for the defendants on the ground that the terms of the ticket apply. If the conditions of the ticket do not apply, the case falls within sect. 502 of the Merchant Shipping Act 1894. If the defendants are not protected by the terms of the ticket, they are protected by the section. There must be judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff, *Pritchard, Englefield,* and *Co.*

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

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Monday, Feb. 4, 1907.

(Before BARGRAVE DEANE, J.

THE BIRNAM. (*a*)

Salvage—Apportionment—Rating of navigating officers and engineers.

When navigating officers on board a vessel are rated at a lower rating than the engineer officers and salvage is awarded them according to their ratings, the practice is now settled that the navigating officers are to receive their share of the salvage as though rated at the same rating as the engineer officers of the same grade.

The Italia (95 *L. T. Rep.* 398; 10 *Asp. Mar. Law Cas.* 284 (1906) *followed.*

The Bremen (94 *L. T. Rep.* 381; 10 *Asp. Mar. Law Cas.* 229 (1906) *not followed.*

MOTION for apportionment of salvage.

On the 6th Oct. 1906 the *Birnam*, a steamship of 2472 tons gross register, manned by a crew of thirty hands all told, was, whilst on a voyage from Barry to Port Said, eighteen miles north-east of Cape Villano, when her main steampipe burst, and she was unable to proceed.

Those on the *Birnam* signalled for assistance, and the steamship *Scoresby*, a vessel of 998 tons gross register, manned by a crew of sixteen hands, bound from Newport, Monmouth, to Oporto with coal, came up and brought her safely into Ferrol.

The weather during the towage was fine. The distance towed was about forty miles, and the time occupied was twenty-eight hours.

The owners, master, and crew of the *Scoresby* agreed to accept 800*l.* as salvage for the services rendered to the *Birnam*.

The owners of the *Scoresby* incurred expenses in rendering the salvage amounting to 113*l.* 15*s.*

Dawson Miller in support of the motion.

BARGRAVE DEANE, J.—As the owners have incurred some expense, I think a fair apportionment in this case will be to the owners 625*l.*, to the master 50*l.*, and to the crew 125*l.*, to be divided among them according to their ratings. I think it is now an established rule that if the navigating and engineer officers of a like grade are not carried at the same rating, and, as is often the case, the engineer officers are on a higher rating, the navigating officers are to receive their share of the salvage as though rated at the same rating as the engineer officers of a like grade. Whenever I give an award I mean that practice to be followed.

Solicitors: *Downing, Handcock, Middleton,* and *Lewis.*

(*a*) Reported by L. F. C. DARBY Esq., Barrister-at-Law.

Feb. 4 *and* 11, 1907.

(Before BARGRAVE DEANE, J.)

THE SEA SPRAY. (*a*)

Collision—Vessel sunk—Vessel raised by Thames Conservancy—Action in rem *to enforce damage lien—Arrest of wreck—Recovery of cost of raising wreck—Priority of claim—Thames Conservancy Act* 1894 (57 & 58 *Vict. c. clxxvii.*), *s.* 77.

A steamship collided with a barque in Gravesend Reach. The steamship was sunk. The Conservators of the River Thames took possession of her and raised her. Before she was raised the owners of the barque instituted proceedings in rem *to enforce their maritime lien for the damage they had sustained, and after being raised she was arrested by the Admiralty marshal. The conservators intervened in the damage action and moved the court to order the release of the vessel on the ground that the statutory right given to the conservators by sect.* 77 *of the Thames Conservancy Act* 1894 *to sell the vessel and reimburse themselves for the expenses incurred had priority over the damage lien.*

Held, that as the conservators had preserved the res *their statutory right took precedence of the damage lien, and that the steamship and her cargo should be sold by the conservators, the proceeds of sale of each being kept separate, the expenses and costs of the conservators being first satisfied out of the proceeds of cargo, then out of the proceeds of the steamship, and that the conservators should bring the balance of the amount realised, if any, into court.*

MOTION for release of a vessel.

The steamship *Sea Spray* and the barque *Cæsar* came into collision in Gravesend Reach, river Thames, on the 8th Jan. 1907. The *Sea Spray*, which was laden with a cargo of pitch, sank.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

On the 9th Jan. the Thames Conservators took possession of her, and on the 15th Jan. raised and beached her on the foreshore. The cost of doing so amounted to 700*l*.

On the 14th Jan. the owners of the *Cæsar* instituted proceedings *in rem* to enforce their maritime lien against the steamship and recover the damage they had sustained by reason of the collision.

On the 16th Jan. a warrant of arrest was issued, and on the 17th Jan. the Admiralty marshal arrested the *Sea Spray* in the damage action.

On the 28th Jan. the owners of the *Sea Spray* gave notice to the conservators that they abandoned her.

The Thames Conservators intervened in the damage suit, and by motion asked for an order directing the vessel to be released.

The Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii.), s. 77, is as follows:

> Whenever any vessel is sunk or stranded in the Thames, the conservators shall cause such vessel to be raised, or to be blown up or otherwise destroyed, so as to clear the Thames therefrom, and shall cause any such vessel and the furniture, tackle, and apparel thereof, or any part thereof respectively which shall be raised or saved, and also all or any part of the goods, chattels, and effects which may be raised or saved from any such vessel, to be sold in such manner as they think fit, and out of the proceeds of such sale shall reimburse themselves for the expenses incurred by them under this section, and any expense incurred by them in watching or controlling such vessel, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto, and, in case such proceeds shall be insufficient to reimburse the conservators such expenses, the deficiency shall be paid to the conservators by the owner of such vessel upon demand, and in default of payment may be recovered in the same manner as any penalty imposed by this Act may be recovered, or may be recovered as a debt in any court of competent jurisdiction.

D. Stephens in support of the motion.—The arrest by the marshal makes it impossible for the conservators to sell the vessel and her cargo, and so reimburse themselves for the expense to which they have been put. Unless they sell, they will be unable to recover their expenses in this country, for the owners of the *Sea Spray* are domiciled in Scotland. Their statutory right takes precedence of the damage lien, just as the dock company's right took precedence of the claim for wages in

The Emilie Millon, 93 L. T. Rep. 692; 10 Asp. Mar. Law Cas. 162; (1905) 2 K. B. 817.

A. D. Bateson.—*The Emilie Millon* (*ubi sup.*) is not in point. In that case the dock company were given by their private Act a possessory lien; they had a right to "cause such a vessel to be detained" until the dock rates were paid. The conservancy here have no statutory lien; the Act only provides that they shall reimburse themselves out of the proceeds. *The Bold Buccleugh* (1851) 7 Moo. P. C. 267) shows that damage creates a lien on the ship causing a collision, and that this maritime lien attaches to the property in whosesoever hands it may be. When the vessel was raised the damage lien was attaching to her, and the conservators had to take her as they found her with the lien attaching, and they can only reimburse themselves out of what they raised, which was a vessel with a lien attaching to her. The right course is for the vessel to be sold free of all liens by the marshal, and for the proceeds to be brought into court. The interveners can then claim against the proceeds, but their claim would rank after the plaintiffs' claim in this action, for that is based on a maritime lien, and the conservators have no lien at all. The arrest should not be removed, for the conservators have a right against the ship and cargo, and the plaintiffs have only an action against the ship. Once the ship is released, the plaintiffs would lose their right.

D. Stephens in reply.—If the sale is made by the marshal, the order should be without prejudice to the present rights of the conservancy.

BARGRAVE DEANE, J.—The question in this case is whether the interveners, the conservators of the river Thames, have a right to recover the expenses which they have incurred in raising the steamship *Sea Spray* in priority to the right of the plaintiffs as owners of the barque *Cæsar*, her cargo and freight, in respect of a maritime lien for damage caused by a collision between the *Sea Spray* and the *Cæsar*. The conservators under the Thames Conservancy Act 1894 are entitled, having raised the *Sea Spray*, to sell her and her cargo for the purpose of indemnifying themselves or reimbursing themselves for the costs of raising her, and the whole question is whether those costs take priority of the lien of the plaintiffs. It was argued on behalf of the plaintiffs that inasmuch as the lien which they had upon the *Sea Spray* took effect immediately after the collision, that it took priority over the right of the conservators.

I have to decide this simple question, and in my opinion the conservators have the priority. Supposing that this vessel had sunk in deep water, where she could not have been recovered, and not in the river Thames, the lien would have been of no use to the plaintiffs. There would have been no *res* which could be seized by the marshal, and upon which a claim could have been founded. But for the action of the conservators, the *res* would not have been in existence, or, rather, if in existence it would have been in such a place that it could not have been touched by the marshal.

The short point upon which my judgment is based is that, inasmuch as the property was conserved by the conservators they have a right in priority to the plaintiffs to the proceeds of the vessel when sold. The conservancy must sell the *Sea Spray* and her cargo and keep separate the amounts received. They must reimburse themselves their costs and expenses of raising out of the proceeds, first exhausting the proceeds of sale of the cargo, and the balance of the proceeds they must bring into court. The costs of the plaintiffs will be treated as costs in the cause.

Solicitor for the conservators, *Walter S. Bunting.*

Solicitors for the *Sea Spray*, *Stokes* and *Stokes.*

HOUSE OF LORDS.

March 4, 5, *and May* 29, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, MACNAGHTEN, ROBERTSON, and ATKINSON.)

MERSEY DOCKS AND HARBOUR BOARD *v.* OWNERS OF STEAMSHIP MARPESSA; THE MARPESSA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision — Injury to dredger — Demurrage — Method of computing—Small errors in accounts.

A sand dredger, the property of the appellants, which earned nothing, but was necessary for the purpose of keeping open the channels of their harbour, was injured by a collision with a steamship, the property of the respondents, and was disabled for nine days. The respondents admitted their liability, and the appellants claimed damages for the loss of the use of the dredger during the time that the dredger was disabled.

Held, that, no vessel having been hired to take the place of the disabled dredger, the damages were rightly calculated on the daily cost of maintaining and working the dredger, with an allowance for depreciation, but with no allowance for owners' profit.

Judgment of the court below affirmed.

The House of Lords will not interpose to correct small mistakes on both sides of an account.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Romer and Cozens-Hardy, L.JJ.), reported 10 Asp. Mar. Law Cas. 232; 94 L. T. Rep. 428; (1906) P. 95, who had affirmed a judgment of Sir J. Gorell Barnes, President of the Probate Division, reported 10 Asp. Mar. Law Cas. 197; 94 L. T. Rep. 168; (1906) P. 14.

The appellants were the owners of a suction dredger which was built in 1895 at a cost of 56,700*l.*, and was designed for and employed in dredging operations at the bar and sea channels at the mouth of the Mersey, and was worked continuously day and night throughout the year except on Sundays and holidays, unless prevented from working by bad weather. Dredging operations were necessary in order to deepen the channels, and keep them from silting up.

On the 6th Oct. 1904 the dredger was injured by a collision with the respondents' steamship *Marpessa*. The respondents admitted their liability, and it was agreed that the damage should be assessed by the registrar and merchants. The dredger was disabled for nine days, and the appellants claimed damages for that period of time at the rate of 102*l.* 5*s.* 9*d.* a day. The registrar allowed damages at the rate of 35*l.* a day. The appellants contended that the damages had been assessed upon an erroneous principle. This was the only matter in dispute between the parties, all the other heads of damage being agreed upon. The registrar arrived at the amount which he awarded by a calculation of the working expenses of the dredger *per diem*, with an allowance for depreciation. The paragraphs of his report relating to the point are set out in the report of the case when it was before Sir J. Gorell Barnes, P.

No vessel had been hired to take the place of the dredger while it was disabled, and the appellants' engineer admitted that he could not point to any definite injury or inconvenience caused by the loss of the services for that time.

The learned President confirmed the report of the registrar, and his judgment was affirmed by the Court of Appeal, as above mentioned.

Sir *R. Finlay*, K.C., *Butler Aspinall*, K.C., and *Leslie Scott* appeared for the appellants, and contended that the registrar had assessed the damages upon a wrong principle. He professed to be following the decision of this House in *The Greta Holme* (8 Asp. Mar. Law Cas. 317; 77 L. T. Rep. 231; (1897) A. C. 596), but has not done so. See also *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113). The damage sustained by the loss of the use of the vessel may be estimated by what would be a reasonable sum to pay for the hire of a substitute in its place, though in this case no exactly similar dredger was to be obtained.

Pickford, K.C., and *Greer* supported the judgment of the Court of Appeal.

Sir *R. Finlay*, K.C. was heard in reply.

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

May 29.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: The only question raised on this appeal is whether the damages awarded to the appellants are rightly measured. It was a case of collision, in which the steamship *Marpessa* ran down the sand pump dredger *G. B. Crow*, and disabled her for nine days. This dredger is used by the Mersey Docks and Harbour Board in the necessary work of dredging the bar outside Liverpool. She earns nothing in money and costs a good deal, but she does indispensable service in clearing away the sand. Negligence on the part of the steamship *Marpessa* being admitted, the case came before the registrar to ascertain damages. No dispute was raised by defendants as to any of the items claimed except one—viz., the claim for demurrage for nine days at 104*l.* per day, afterwards reduced to 102*l.* The registrar found that 35*l.* per day sufficed, and his report was confirmed by the President and also by the Court of Appeal. I need hardly say that your Lordships are not likely to interfere, unless it is made clear that a wrong principle was adopted for the ascertainment of these damages. Now, until the case of *The Greta Holme* (*ubi sup.*), the view appears to have prevailed that no damages beyond the actual loss in repairs, loss of wages, and so forth, could be recovered where an injured vessel made no money for its owners and merely rendered services in dredging. That case corrected the error, and decided that in such case general damages might be recovered as well as the cost of procuring another vessel to do the work; but it did not, and could not, lay down a rule of universal application for the ascertainment of the damages in each particular case. For the damages depend upon the facts and upon the actual loss sustained by the owner, which will vary in different cases. It seems to me that the loss sustained in the present case under the claim of demurrage is the value

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

of the work which would have been done by the dredger during those days, had she not been disabled. So many tons of sand would have been removed, which it is the duty and interest of the plaintiffs to remove, and by reason of the defendants' negligence they were not removed. If the plaintiffs had hired another vessel to do this work they could have recovered the cost of doing it. They have not done so, no other vessel being available at so short a notice, and, perhaps, not being available at all; for the construction is peculiar. Failing that evidence, the plaintiffs were entitled to put their case in another way. They might say the cost to us of maintaining and working this dredger, while it is working, amounts to so much per day, and its depreciation daily amounts to so much more. We take the total daily sum which it costs us as a fair measure of the value of its daily services to us. Those services are at least worth what we are habitually paying for them year after year, including what we sacrifice in depreciation. In fact the plaintiffs put in a mixed claim, made up mainly on the basis of what the dredger's services cost them; but they added an item for owners' profit, which was appropriate enough if they had paid it to the owner of a vessel which they hired, but had no place in a claim based on the cost to themselves of the services rendered by the dredger. The registrar allowed them something on this head to which they were not entitled. He also deprived them of something to which they were entitled, when he gave only the daily supplies requisite in dock instead of the daily supplies requisite when the dredger was working. There is a confusion in the registrar's award in these respects, and also in regard to general damage in the circumstances of this particular case, but the original confusion was in the claim as stated by the plaintiffs. I certainly am not disposed to disturb the findings of three tribunals on such a point, when the difference between what was found and what in rigorous logic ought to have been found is trifling. And so with the complaint that the percentage allowed for depreciation was taken not on the original but on the reduced value of the dredger. I cannot say that in point of law the depreciation must be taken on the original value, nor am I prepared to exact mathematical precision in matters such as this. In my opinion, though there is error in the registrar's report, there is no case for the interposition of this House. We cannot correct every minute mistake. And if we think, as I think, that after correcting the errors on both sides the registrar might quite well arrive at substantially the same figure as he has already found, we ought to dismiss the appeal.

Lord ASHBOURNE, Lord MACNAGHTEN, Lord ROBERTSON, and Lord ATKINSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Rawle* and *Co.*, for *Thorne* and *Co.* Liverpool.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Hill, Dickinson,* and *Co.*, Liverpool.

May 15, 16, *and July* 4, 1907.

(Before the LORD CHANCELLOR (Loreburn), the Earl of Halsbury, Lords JAMES OF HEREFORD and ATKINSON.)

KRÜGER AND CO. *v.* MOEL TRYVAN SHIP COMPANY. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Bill of lading—"All other conditions as per charter-party"—Negligence clause in charter-party omitted from bills of lading—Loss by negligence—Liability of owners to indorsees of bills of lading—Liability of charterers to indemnify shipowners.

The respondents chartered a ship to the appellants by a charter-party which contained an exception from liability from accidents of navigation even when occasioned by negligence. It also provided that the master should sign clean bills of lading at any rate of freight without prejudice to the charter-party.

The ship loaded a cargo in a foreign port, and the charterers' agents presented for signature to the master bills of lading which did not contain the negligence clause, but contained a clause "freight . . . and all other conditions as per charter-party."

The master signed bills of lading in this form, and in the course of the voyage the ship was totally lost through the negligence of the master. The owners thereupon became liable to the indorsees of the bills of lading, and brought an action against the charterers for breach of duty, and on an implied contract to indemnify them.

Held (affirming the judgment of the court below), that the charterers had committed a breach of contract in presenting for signature bills of lading which imposed a greater liability on the shipowners than that imposed by the charter-party, and that they were liable to indemnify the shipowners for the loss which they had thereby incurred.

APPEAL from a judgment of the Court of Appeal (Sir J. Gorell Barnes, P., Farwell and Buckley, L.JJ.), reported 10 Asp. Mar. Law Cas. 416; 96 L. T. Rep. 429; (1907) 1 K. B. 809), which had affirmed a judgment of Phillimore, J. in an action tried before him in the Commercial Court without a jury, and reported 10 Asp. Mar. Law Cas. 310; 95 L. T. Rep. 614; (1906) 2 K. B. 792.

The respondents were the owners of the sailing ship *Invermore*, which, by a charter-party dated the 22nd April 1903, they chartered to the appellants.

The charter-party contained a "negligence" clause, which provided for the immunity of the owners from liability in the events therein mentioned. These were:

The act of God, perils of the sea, fire, barratry of the master and crew, the King's enemies, pirates, arrests and restraints of princes, rulers, and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default, or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

The *Invermore* loaded a cargo of rice at Rangoon, and in the bills of lading, of which Messrs. Norton, Megaw, and Co. Limited were the holders, there was no express reference to the

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

negligence clause, but they contained the words "And all other conditions as per charter-party."

The bills of lading were presented by the appellants, the charterers, to the master, by whom they were signed.

Both the charterers and the master were under the impression that the effect of these words was to incorporate the negligence clause into the bills of lading; but there are decided cases to the effect that these words have no such effect: (*Serraino* v. *Campbell*, 7 Asp. Mar. Law Cas. 48 (1890); 64 L. T. Rep. 615; (1891) 1 Q. B. 283; *Diederichsen* v. *Farquharson*, 8 Asp. Mar. Law Cas. 333 (1897); 77 L. T. Rep. 543; (1898) 1 Q. B. 150).

The *Invermore* was wrecked on a voyage to Rio de Janeiro, and was totally lost, with her cargo, off the coast of Brazil on the 12th Oct. 1903. The loss of the ship was found to have been due to the negligence of the master.

The cargo owners sued the respondents, as owners, and recovered damages, which, after limitation of liability, amounted to upwards of 12,000*l*.

The present action was brought by the owners, the respondents, against the charterers to recover these damages.

The courts below decided in favour of the plaintiffs, the respondents in this House.

Sir *R. Finlay*, K.C., *J. A. Hamilton*, K.C., *M. Lush*, K.C., and *Chaytor*, for the appellants, argued that the appellants were not the agents of the owners, and were not bound to indemnify the owners against the consequences of a common mistake of law made by all parties. The bills of lading contained the words "all other conditions as per charter-party," which have been held not to be enough to cover negligence, though neither the charterers nor the master were aware of this. See

Russell v. *Niemann*, 2 Mar. Law Cas. O. S. 72 (1864); 10 L. T. Rep. 786; 17 C. B. N. S. 163;
Serraino v. *Campbell*, 7 Asp. Mar. Law Cas. 48 (1890); 64 L. T. Rep. 615; (1891) 1 Q. B. 283;
Diederichsen v. *Farquharson*, 8 Asp. Mar. Law Cas. 333 (1897); 77 L. T. Rep. 543; (1894) 1 Q. B. 150.

The cases of *Corporation of Sheffield* v. *Barclay* (93 L. T. Rep. 83; (1905) A. C. 392) and *Birmingham Land Company* v. *London and North-Western Railway Company* (1886, 55 L. T. Rep. 699; 34 Ch. Div. 261), which were cited in the court below, deal with the question of indemnities in general, but have not much bearing on this case. As to the duty of a master to his owners, see per Lord Watson in *Stumore* v. *Breen* (12 App. Cas. 698). As to signing bills of lading, see *Turner* v. *Haji Goolam* (9 Asp. Mar. Law Cas. 588; 91 L. T. Rep. 216; (1904) A. C. 826). The broad doctrine is laid down in *Houriet* v. *Morris* (3 Camp. 302). *Hansen* v. *Harrold* (7 Asp. Mar. Law Cas. 464; 70 L. T. Rep. 475; (1894) 1 Q. B. 612), which was relied on in the court below, is distinguishable, as it turned on the particular facts of the case, and *Oriental Steamship Company* v. *Tylor* (7 Asp. Mar. Law Cas. 377; 69 L. T. Rep. 577; (1893) 2 Q. B. 518) does not justify the inference drawn from it against the appellants. See per Lord Esher, M.R. in *Rodoconachi* v. *Milburn* (6 Asp. Mar. Law Cas. 100 (1886); 56 L. T. Rep. 594; 18 Q. B. Div. 67), citing the judgment of Lord Bramwell in *Sewell* v. *Burdick* (5 Asp. Mar. Law Cas. 79, 298, 376 (1884); 52 L. T. Rep. 445; 10 App. Cas. 74), and per Pollock, C.B. in *Shand* v. *Sanderson* (4 H. & N. 381; 28 L. J. 278, Ex.). The charterer does not warrant that the bill of lading does not go beyond the charter-party. As to the authority of the master, see per Jervis, C.J. in *Grant* v. *Norway* (10 C. B. 665). He was not acting within the scope of his authority in signing bills of lading in this form.

Scrutton, K.C. and *Bailhache*, for the respondents, maintained that the clause was always protected in the interests of the owner by the words "without prejudice to this charter." It does not affect the owner while the bill of lading is in the hands of the charterer, as it is then only a receipt, but it does affect him in the hands of a *bonâ fide* holder for value, it being within the general authority of the master to sign bills of lading. It is the duty of the charterer to prepare and present them, but he has no right to ask the master to sign bills of lading which vary the contract in the charter unless there is authority to do so in the charter itself. If he does so, it is a breach of his contract with the owner, and it is no answer that neither he nor the master were aware that it was a breach. In *Hansen* v. *Harrold* (*ubi sup.*) the Court of Appeal rejected the same arguments as have been urged on behalf of the appellants in this case. Whatever bills of lading are signed, the relations between the owners and the charterers remain the same, and, if the bills of lading get into the hands of a third party, the charterer is liable to indemnify the owner: (see *Shand* v. *Sanderson*, *ubi sup.*). This case falls exactly within the principle of *Birmingham Land Company* v. *London and North-Western Railway Company* (*ubi sup.*) and *Corporation of Sheffield* v. *Barclay* (*ubi sup.*). See also *Dugdale* v. *Lovering* (1875, 32 L. T. Rep. 155; L. Rep. 10 C. P. 196). Requesting the master to sign bills of lading which varied the charter-party was a breach of contract, or, if not, it was a request to do an act for the benefit of the charterer from which a covenant to indemnify is implied if damage results. The owners' position was altered for the worse, and the damage is not too remote:

Milburn v. *Jamaica Fruit Importing Company*, 9 Asp. Mar. Law Cas. 122; 83 L. T. Rep. 321; (1900) 2 Q. B. 540.

Sir *R. Finlay*, K.C. in reply.—The shipowner has been made liable to the indorsees by a common mistake for which he is responsible, as it was the act of his servant, the master. He was in fault in not having given proper instructions to the master as to seeing that the negligence clause was incorporated in the bills of lading. Both parties are in fault, so neither can recover from the other. It is admitted that there was no duty on the master to sign a bill of lading in this form, and that is fatal to the respondents' case. *Sheffield Corporation* v. *Barclay* (*ubi sup.*) no longer applies. In *Turner* v. *Haji Goolam* (*ubi sup.*) Lord Lindley rejected the interpretation of the words "without prejudice to this charter" now put forward by the respondents. *Hansen* v. *Harrold* (*ubi sup.*) has not the effect contended for by the respondents.

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 (Loreburn).—My Lords: This case raises a novel point. Shipowners, the respondents, chartered their vessel under a charter-party which relieved them from liability for negligence of the master and with the following clause: "The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading." The vessel was, under the terms of the charter-party, to proceed to Rangoon and there load from the charterers a cargo of rice, and thence proceed to Rio. She went to Rangoon and loaded the rice. Charterers' agents then presented bills of lading to the master. These bills of lading contained the words "freight for the said goods, and all other conditions as per charter-party," but did not incorporate the exception contained in the charter-party exempting the shipowners from liability for negligence of the master. Accordingly, under these bills of lading, the owner was in law liable to whosoever might have the right to sue on them for the consequences of this negligence. The agents did not realise this, nor did the master, who duly signed the bills. Both were mistaken in law, and both acted in good faith. Unfortunately the cargo was lost through the negligence of the master, and the owners were compelled to pay the value of the cargo in an action brought by the indorsees of those bills of lading. Having paid it, they brought this action against the charterers, claiming a right to be indemnified.

In my view the cardinal fact which ought to govern our decision is that under this charter-party the shipowners are not to be liable for losses caused by the master's negligence in navigating the vessel. When bills of lading are given they may give rise to rights in persons other than the charterers, and on conditions other than those contained in the charter-party; and therefore it is the duty of the latter, who have to present them, to provide that they shall not expose the shipowners to risks from which by their contract they are to be exempt. Nothing has occurred that disentitles the shipowners to this protection. The master who signed the bills of lading under an excusable error of law did not waive his principals' right to be so protected, nor did his principals waive it. It is not a case of warranty. It is a case in which, by contract, the shipowners undertook to carry a cargo on the footing that they were not to be liable for the master's negligent navigation, and the charterers have made them so liable by the bills of lading. Hence arises a duty to give adequate indemnity. Accordingly, I move your Lordships to dismiss this appeal.

The Earl of HALSBURY.—My Lords: In this case it is common ground that the ship chartered by the defendants was lost by the negligence of the master. In the charter it is provided that the right of action which the common law would have given to the cargo owners is as a matter of contract between the shipowner and the merchant taken away, and as between themselves no liability could be insisted on. But the merchants who in the charter were to present bills of lading, and to present bills of lading which were to conform to the charter-party, did in fact present bills of lading which were supposed to preserve the indemnity of the shipowners, but as matter of law did not do so. The master, in answer to the question "Do you mean that you have never seen a negligence clause incorporated in a bill of lading before this voyage?" replied, "It is included in the charter-party always." And it is clear that he supposed that the 37th clause of the charter-party included the 6th, which is the negligence clause, whereas for a considerable number of years it has been decided that it did not. The result has been that the shipowner has been compelled to pay between 12,000*l.* and 13,000*l.*, a sum which would indeed have been some thousands more but for the provision as to the limitation of liability. I cannot doubt that the cause of this loss was the signing by the master of a bill of lading which did not incorporate the indemnity against the master's negligence. The bill of lading was tendered by the defendants and signed by the master in ignorance of its true legal effect. I agree with the President of the Admiralty Court that the defendants were bound by their contract to tender a bill of lading if they thought proper to do so, and that such bill of lading ought to have incorporated in terms what has been called the negligence clause. I think that it is their breach of contract that has occasioned the loss. I think that there was a contract by them that if the master signed a bill of lading at their request it should not be in the form of a contract which would strike out the negligence clause. As different reasons have been discussed and assigned for the ground upon which the charterers ought to be made liable, I wish to say, inasmuch as I do not concur in some of the reasons given, that I am of opinion that the liability is imposed by the contractual relations between the shipowners and the charterers, and I desire to express my concurrence in what all the three members of the Court of Appeal said on this subject. I mean on the one point as to whether or not this is a matter of contract between the parties. The President of the Probate and Admiralty Division said: "The contract is that the bills of lading shall be in accordance with the contract contained in the charter," and later on he says, "the charterers having been bound in my opinion to present bills of lading which carried out the charter-party, they have committed a breach of their contract, and they have done that which, although they were quite mistaken about the matter, and did it without any improper intention, in fact, cast a greater obligation upon the shipowner than he ought to have had cast upon him, and to my mind the damages flow as a matter of course from that position in this case, having regard to the circumstances under which the loss occurred and the action was afterwards brought." Farwell, L.J. says: "There is an express contract to tender for execution a proper bill of lading in conformity with and so as not to prejudice the actual charter." Buckley, L.J. says: "The charterer ought to have tendered to the master for signature bills of lading such as would be consistent with the charter-party; if he tendered to him other bills of lading not consistent with

the charter-party then the charterer committed a breach of contract in so doing." With those judgments, and especially with that part of them which lays the obligation which has been so described upon the charterers, I heartily concur. The bill of lading cannot control what has been agreed upon before between the shipowner and the merchant and has been expressed in a written instrument which is the final and concluded agreement between the parties. It is in truth a bill of lading—it is somewhat inaccurately described as a contract in the Bills of Lading Act—but Bramwell, L.J. said in *Wagstaff* v. *Anderson* (4 Asp. Mar. Law Cas. 163, 290 (1880); 42 L. T. Rep. 720; 5 C. P. Div. 171) that "to say it is a contract adding to or varying the former contract under the charter-party is a proposition to which I never can consent."

When it is said that the master must sign any bill of lading submitted to him, I cannot agree. If the bill of lading tendered is manifestly inconsistent with the charter-party, I think that it would be his duty to refuse; but if there is nothing to excite his suspicion it is, of course, his duty to sign the bill of lading tendered to him. And in this case I do not quite follow the observations which have been made to the effect that it was the common mistake of both the charterers' agent and the master which led to the catastrophe. Both of them may have been ignorant of the state of the law, although it has been settled as long ago as 1864 by a judgment delivered by Willes, Byles, and Keating, JJ. (*Russell* v. *Niemann, ubi sup.*). It may be true as a fact that both the charterers' agent and the master were ignorant of the state of the law, but, if so, it is an irrelevant fact. The truth of the matter I take to be this—the contract is that if the merchant desires for the purpose of selling his goods or for any other reason to have the bill of lading signed, it is the charterers' duty both to prepare and to present for signature the bill of lading, but then he must present such a bill of lading to the master as is not inconsistent with and not to the prejudice of the charter-party. For these reasons I am of opinion that the appeal ought to be dismissed.

Lord JAMES OF HEREFORD.—My Lords: The facts of this case are either admitted or clearly proved. The respondents being shipowners chartered a vessel, the *Invermore*, to the appellants to load a cargo of rice at Rangoon for carriage to Rio. By clauses 6 and 7 of the charter-party the shipowners were exempted from liability for collisions, stranding, and other accidents of navigation, even when occasioned by the negligence of the master, and the master was to sign clean bills of lading without prejudice to the charter. After the execution of the charter-party the charterers sold the intended cargo to merchants. That cargo was loaded in the vessel at Rangoon, and the charterers thereupon drew and presented the bills of lading to the master for signature. The bills of lading contained the words, "and all other conditions as per charter-party," but the exemption from liability clause was not referred to. Perfect good faith existed on both sides. Doubtless those who drew the bills of lading intended to make them agree with the charter-party, and the master probably trusted to the view which they took of the matter. The mistake was caused in consequence of everybody being ignorant that legal authority had decided that words similar to those in the bills of lading did not introduce into them the exemption clause in the charter-party. The bills of lading were duly indorsed to the purchasing merchant. On the voyage the vessel was lost through the negligence of the master. An action being brought by the indorsees of the bills of lading against the shipowners on account of such negligence, a sum of 12,571*l.* was recovered. The present action is brought by the shipowners seeking to be recouped by the charterers in respect of these damages, on the ground that their liability as between them, the shipowners, and the charterers ought to be governed by the terms of the charter-party only, and although they, the shipowners, are liable to the indorsees of the bills of lading on those documents as signed by their agent, the master of the ship, yet the rights of the original contractors were governed by other considerations. In support of this view the shipowners say, it is true that the master is our agent, but he is our agent to act within the charter-party and according to its terms. You, the charterers, had imposed upon you the duty of framing the bills of lading. Innocently you drew them in a wrong form and presented them to the master, who equally in ignorance carried out your action and signed the bills; when he did so he was not acting within his authority. I think it clear that as between the charterers and shipowners, the terms of their contract must be found in the charter-party. That the bills of lading came into existence for the convenience and business purposes of the charterers is also clear. Shipowners have only to carry. They care not for whom, and have nothing to do with the terms upon which the charterers deal with their goods. But to the charterers it is all important that they should obtain bills of lading which they can indorse over, and so transfer the property in the cargo. Of the terms of such transfer the shipowner knows nothing, and thus from the nature of things and from the course of business the charterers prepare the bills of lading and tender them to the master of the vessel for signature. And so it comes to pass that the charterers, who are controlled by the charter-party and acting under it, have cast upon them the primary duty of tendering to the master bills of lading in accordance with the terms of that document. They had no right to ask the master to sign a bill of lading in any way deviating from the charter-party. In this case the charterers prepared the bills of lading with the intention of conforming with the charter-party. The mistake was innocently made in ignorance of legal decisions. And so with the master, he in like ignorance honoured the request of the charterers, thinking that both he and they were acting within the authority of the charter-party. Now, the effect of the mistake is obvious. If the bills of lading had been properly framed the shipowners would have been free from any liability for the negligence of the master. The mistake in the drawing of the bills of lading renders them so liable. The point to be determined is a narrow one, and argument on either side can be found, but my view is that the weight of argument lies with the respondents, and that they are entitled to your Lordships' judg-

ment. By contract and by course of business the charterers undertook that the bills of lading which they presented to the master should be in accordance with the charter-party. They failed in this respect, and by that failure the respondents were rendered liable for the loss occasioned by the negligence of the master. It is true that the master of the vessel accepted and signed these bills of lading, but he had no authority to sign bills of lading in the form presented to him. The charterers, the appellants, knew what the master's authority was, and I do not think that they can rely upon his unwitting acquiescence in their mistake so as to escape from liability. I therefore think that the appeal must be dismissed with costs.

Lord ATKINSON.—My Lords: I agree in the conclusion which has been arrived at, and in the reasons given for arriving at it. I wish to guard myself against being supposed to acquiesce in all the conclusions that have been arrived at by the Court of Appeal or the reasoning of the respective Lords Justices. Especially do I desire to guard myself against being supposed to concur in their observations to the effect that the act of the captain in signing the bill of lading is purely ministerial. I think that he is entitled to exercise his judgment, and, if it appears to him that the bill of lading does not conform to the charter-party, to refuse to sign it, even at the peril of his employment.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Hollams, Sons, Coward,* and *Hawksley.*

Solicitors for the respondents, *Holman, Birdwood,* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Jan. 23 *and* 24, 1907.

(Before Sir GORELL BARNES, P., FARWELL and BUCKLEY, L.JJ.)

BIDDLE *v.* HART. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Employer and workman—Stevedore—Unloading ship—Defect in ship's tackle—Injury to workman—Liability of stevedore—Duty of employer to take reasonable care—Employers' Liability Act 1880 (43 *&* 44 *Vict. c.* 42), *s.* 1, *sub-s.* 1; *s.* 2, *sub-s.* 1.

A stevedore contracted to unload a ship, and, according to the usual custom, a part of the tackle used for the unloading was provided by the owner of the ship. In consequence of a defect in that tackle one of the stevedore's workmen was injured. The ship's tackle had been put in position by the mate of the ship.

The workman brought an action against the stevedore for compensation under the Employers' Liability Act 1880, *and the County Court judge withdrew the case from the jury on the ground that the stevedore was not liable for a defect in the ship's tackle, and his decision was affirmed by the Divisional Court.*

Held, that, although the tackle did not belong to the defendant, it was his duty to take reasonable care to see that it was not defective and was fit for the purpose for which it was used, and the action must be sent back for a new trial to determine whether this duty had been discharged.

APPEAL from a decision of a Divisional Court, affirming by a majority the decision of the judge at Southwark County Court.

The action was brought by a workman under the Employers' Liability Act 1880 against the defendant, who was a master stevedore, claiming compensation for personal injuries.

The defendant had contracted to unload the steamship *Narcissus,* and on the 11th April 1905 the plaintiff and others were carrying out the work. At the trial the plaintiff deposed that they were discharging with a derrick; that a heavy iron chain was used, fastened at one end to the mast and at the other end to the derrick; that the pin holding the chain at the end fastened to the mast fell out while one of the sets of bags, consisting of six bags, was being hoisted, and the bags fell on him and injured him. Evidence was also given that there ought to be a nut fixed on the end of the pin to keep it in position, and to prevent it working out, but the thread end of the pin was worn, and it was therefore unfit for use.

It also appeared that the chain was fixed to the mast about 30ft. from the deck, and it was impossible to see whether anything was wrong with the screw until the pin was taken out.

The defendant deposed that he provided ropes, slings, and chains to put round the sets to bring the cargo up; that the rest of the gear—viz., the derrick, shackles, and pins—was provided by the shipowner according to the usual practice with stevedores, and he had nothing to do with them; that the mate of the ship at his request had the derrick put up; and that it was not the stevedore's business to examine the ship's tackle, and that he had no reason until the accident to suspect anything wrong; and that he had loaded and unloaded the ships of this owner for several years under a contract made six years ago.

On this evidence the County Court judge withdrew the case from the jury and found for the defendant upon objection taken on behalf of the defendant that the stevedore was not liable for a defect in the ship's tackle.

The plaintiff appealed, and the Divisional Court (Lord Alverstone, C.J., Darling and Ridley, JJ.) affirmed the decision of the County Court judge, Ridley, J. dissenting, and from that decision the plaintiff appealed.

Ruegg, K.C. and *Hinde* for the plaintiff.—This case depends on the construction of sect. 1, sub-sect. 1, and sect. 2, sub-sect. 1, of the Employers' Liability Act 1880. The defendant used the ship's tackle as part of his tackle, and it became tackle "used in the business" within sect. 1, sub-sect. 1; and, the injury having arisen in consequence of a defect in that tackle, he cannot escape liability on the ground that the tackle was not his. [They were stopped.]

C. A. Russell, K.C. and *F. Mellor* for the defendant.—This tackle was provided by, and put up by, the shipowner according to the usual practice

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

in such cases. It was never under the control of the stevedore, and he had no opportunity of examining it. He had no reason to doubt the care and competency of the shipowner, for whom he had acted for six years. Therefore it would be unreasonable to require the stevedore to examine the tackle. The duty of the employer is to take reasonable care in seeing the plant used is not defective. Here he was dealing with a competent person whose duty it was to supply proper plant, and he had no notice that he had ever failed to do so, and no reason to suspect it was defective in this case. The plaintiff must prove that there was negligence on the part of the employer. Here there was no duty on the employer to inspect this tackle, and no negligence on his part with regard to it.

Sir GORELL BARNES, P.—This is an appeal from a decision of the Divisional Court affirming by a majority the decision of the County Court judge. [His Lordship stated the facts, and continued:] It is necessary to state the effect of the judgments of the majority. As I read his judgment, Darling, J. held that because the part of the tackle which was broken was the ship's tackle, there was no duty on the part of the defendant towards the plaintiff in relation to it. That appears to me to be also the effect of the judgment of the Lord Chief Justice, because he says: "That being the evidence, does this case afford an illustration of a third class of cases which has to be considered—viz., where there is no relation between the defendant, the employer sued, and the plant which breaks away which is not the subject of any supervision of his, and which is not for this purpose controlled or supplied under any contract? For the purpose of this case, if there had been any contract showing that the supervision had been left to the ship, then Mr. Mellor would have relied on *Kiddle and Son* v. *Lovett* (16 Q. B Div. 605) as being an exact authority. Mr. Hinde says because there is no contract, and because the plant was in fact being used, the ownership of the plant in question does not make any difference. So stated, I think he is probably right, but it seems to me the argument overlooks the fact that you have to draw the line at some point, and it seems to me that where the evidence is uncontradicted that the thing supplied forms part of the gear of the ship, and that, although put up for the job, it is put up by the ship's people, not the servants of the employer, and it is not tackle over which the employer has any control, the view taken by my brother Darling is right that there is no evidence that the defect arose from or had not been discovered or remedied owing to the negligence of Hart, or of some person in the service of Hart and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

My reading of that is substantially the same as my reading of the judgment of Darling, J., that because the plant which was broken in this case was not the plant of the defendant, but was supplied by the ship, the defendant owed no duty whatever to the plaintiff in relation to it. Ridley, J. took a different view, and therefore it is not necessary to read his judgment.

The question turns upon two short provisions of the Employers' Liability Act 1880. Sect. 1 provides that where personal injury is caused to a workman (1) by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of nor in the service of the employer, nor engaged in his work. That puts the workman in the position of an independent person, and gets rid of the defence of common employment, and so forth, which might otherwise have been available to the employer. Then sect. 2 says that a workman shall not be entitled under this Act to any right of compensation or remedy against the employer "(1) under sub-section one of section one unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition."

That being so, the decision at present is that on the facts presented to the court, it being clearly established that the tackle which was broken though used by the employer was not his tackle, he had no duty whatever in relation to it.

In my opinion, that is not the true view of the law. He may have discharged that duty, and whether he has discharged that duty or not is another question. In this case there can be little doubt that most of the arguments addressed to us on behalf of the respondent ought to have been the subject of an address to the jury on the question whether the respondent had discharged that duty. In my opinion, if the employer uses plant which is not his own for the purpose of doing something which he has undertaken to do, it cannot possibly be said that he has no duty whatever in relation to that plant. If that were so, he would be able to take anything that came from anybody, and to use anything in his work without any inquiry at all, and then say, in the event of any workman being injured, that he had nothing to do with it, and so escape liability. That, to my mind, is unreasonable, and is not consistent with sect. 2 of the Act. I take the meaning of that section to be that if the employer uses plant which does not belong to him, he may have a duty in regard to the persons employed to take reasonable care to see that it is proper for the purpose for which it is used. It may be that in a case of this character, though the employer had that duty, yet, if he had dealt with these shipowners before and had never any cause for complaint, the jury might think that he had reasonably discharged that duty. On the other hand, when you have evidence that the plant was old and had been in use for a long time, the jury might say they were not satisfied that reasonable care had been taken to see that it was in a proper condition. Once establish the duty, the question is, What would the jury consider a discharge of that duty? In other words, the case must go to the jury. Some confusion appears to have arisen in this case between the purely legal question whether the duty exists and the question of fact whether it has been discharged. It cannot

be said in this case that there was no evidence on which the case could go to the jury. I therefore think that the judgment of the Divisional Court was wrong, and that this case must be sent back for a new trial. The appeal will be allowed.

Farwell, L.J.—I am of the same opinion. I do not see how the respondent can succeed on this appeal unless he can induce us to affirm the proposition that anyone who uses tackle which is not his own, in the sense that it has neither been purchased nor hired by him, but is gratuitously let to him, is not bound to take reasonable care to see that that tackle is in proper condition. The Act of 1880 was a mode of depriving the employer of particular defences which were open to him at common law, such as common employment and the like. That is pointed out by Smith, J. in *Howe* v. *Mark Finch and Co.* (17 Q. B. Div. 187). The case must therefore be considered as if this plaintiff were an ordinary person employed to use the tackle by the defendant for the purpose and for the profit of the defendant. In such a case the defendant has to take reasonable care that the tackle, whether his own or hired or lent, is reasonably fit for the purpose for which he employed the plaintiff to use it. I see nothing to take this case out of sect. 1. There is no question but that the ship's tackle was used for the purpose of the stevedore's business. The next question arises upon the construction of sub-sect. 1 of sect. 2, which gives the workman no right against the employer for a defect in the condition of the plant "unless the defect arose from or had not been discovered or remedied owing to the negligence of the employer." The word "remedied" there is distinct from "discovered," and it is plain that the Act applies to cases where the employer might have no power to remedy the defect, for the shipowner might forbid him to touch the ship's tackle; but the employer certainly would not thereby escape liability, because the section also says "had not been discovered." I feel no doubt that the County Court judge decided the present case on the ground that there was no duty imposed on the employer, for he says in terms that the employer had nothing to do with the ship's tackle, and I think that was also the view taken in the Divisional Court. In my opinion there was, in the present case, some evidence of negligence to go to the jury, and this case must therefore be sent back to the County Court.

Buckley, L.J.—I am of the same opinion. With deference to the Lord Chief Justice and Darling, J., they appear to me to have confused the existence of a duty and negligence in the performance of the duty. The form of the question to be answered is determined by the Act of Parliament. Was the plant connected with or used in the business of the employer? The Lord Chief Justice, after discussing the cases, is reported to have said: "There is no case which says that where the plant is outside the region of the plant for which the employer would be responsible under sect. 2 there is no liability. That is the question we have to consider here." Sect. 2 must be a clerical error for sect. 1, for sect. 1 creates the responsibility and sect. 2 limits it; and the word "no" before liability must, I think, have crept in by mistake. But that sentence implies that in this case there is to be found plant which is outside the region for which the employer would be responsible. I agree with that, if the plant was not connected with or used in the business of the employer, but that is not the question to which the Lord Chief Justice was addressing himself. He was addressing himself to negligence in the discharge of the duty, because later on he says: "You have to draw the line at some point, and it seems to me, where the evidence is uncontradicted that the thing supplied forms part of the gear of the ship, and that, although put up for the job, it is put up by the ship's people, not the servants of the employer, and is not tackle over which the employer has any control, the view taken by my brother Darling is right that there is no evidence that the defect arose from or had not been discovered or remedied owing to the negligence of Hart."

In my opinion there is no question, having regard to the statute and the evidence, that there was a duty here on the employer because this was plant connected with or used in his business. Then arises the question whether the employer has discharged himself by showing that the plaintiff had failed to satisfy the conditions of sect. 2, sub-sect. 1, which require him to prove "that the defect had not been discovered or remedied owing to the negligence of the employer." Under that sub-section the plaintiff has to prove the negligence, but that was a question for the jury, and the County Court judge did not decide it on that point, but held that the employer was not liable, because it was the ship's tackle which broke. Nor, in my opinion, can the judgment of the Divisional Court be upheld on the ground that there was no evidence of negligence to go to the jury. I think that there was *primâ facie* evidence of negligence to go to the jury, and that there ought to be a new trial, and that the appeal must be allowed.

Solicitors: *Liddle* and *Liddle*; *William Hurd* and *Son*.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION

Thursday, Feb. 28, 1907.

(Before Bray, J.)

Whittall and Co. *v.* Rahtken's Shipping Company Limited. (a)

Charter-party—Construction—"Charterers paying all port charges"—Pilotage expenses—Lay days—"Sundays and holidays excepted"—Work done on Sunday and holiday.

A charter-party provided that a vessel should "proceed to Smyrna and there load. (8) *Charterers to have the option of using one or two additional neighbouring loading ports or places in Smyrna district, paying all port charges, and time shifting ports to count as lay days.* (9) *Thirteen running days, Sundays and holidays excepted, are to be allowed . . . for loading the cargo . . . to commence when the steamer is moored and ready, having received pratique, and so reported by the master, and the time so employed, part days to count as part days to be agreed by*

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

the master and the charterers, or their agents," and that the demurrage should be at the rate of 35l. per day. The vessel arrived at Smyrna and was ordered by the authorities into the quarantine station. The vessel was ordered to proceed to a neighbouring port when the quarantine was finished. On receiving free pratique, the vessel proceeded as ordered. The charterers' agents requested loading to be done on a Sunday. Such work was done up to 2 p.m. From 2 p.m. till 9 a.m. on the next morning (Monday) was occupied in shifting back to Smyrna.

Held, that the time occupied in shifting from Smyrna to the neighbouring port and back again counted in the lay days.

Where a request to work on a Sunday or holiday, such days being excluded from the lay days by the charter-party, is made by the charterer and consented to by the captain the inference is that the parties agreed to treat such a day as a lay day.

Where there is no indication as to the intention of the parties beyond the fact merely that by the consent of both work was done on a Sunday or holiday, excepted by the charter-party from the lay days, the inference is that they intended to treat such days worked on as lay days.

Branckelow Steamship Company *v.* Lamport and Holt(*a*) *and* James Nelson and Sons Limited *v.* Nelson Line (Liverpool) Limited (No. 3,(*b*) *followed.*

COMMERCIAL LIST.

Action tried before Bray, J. sitting without a jury.

(*a*) *Wednesday, Feb.* 17, 1897.

(Before Lord RUSSELL OF KILLOWEN, C.J.)

BRANCKELOW STEAMSHIP COMPANY LIMITED *v.* LAMPORT AND HOLT.

THE owners of the *Highfield* claimed to recover five days' demurrage from the charterers.

By the charter agreement it was provided (*inter alia*), "the steamer is to be loaded at the rate of 175 tons per weather working day, Sundays and holidays excepted."

The vessel proceeded to the river Parana, and part of her cargo at Rosario was loaded on a Sunday. The vessel then went to La Plata and completed her cargo.

Joseph Walton, Q.C. and *Lewis Noad* for the plaintiffs.

Pickford, Q.C. and *Carver* for the defendants.

Lord RUSSELL OF KILLOWEN, C.J., in his judgment, said:—Taking, therefore, the total weight . . . and dividing that by 175 tons per day that would make the number of days properly available for loading the entire cargo 16.7 weather working days. In other words, as the learned counsel for the plaintiffs stated, and as he pleaded it, seventeen working days. . . . The defendants contend in this case that although the ship arrived at Rosario, in the sense of arriving at the port of Rosario, and in a position also to receive cargo, at 2 30 p.m. on Sunday, the 8th March, yet, according to their contention, the loading days did not begin to run until the following Tuesday. . . . I think the defendants are wrong in that contention. What took place was this. When the ship arrived on the Sunday it was found that the convenience of the charterers would be suited, as one must suppose by what happened, by the captain and crew being ready then and there on that Sunday to take in cargo. The captain was not bound to take in cargo on Sunday at all, and, by the terms . . . holidays and Sundays were to be excluded. The charterers . . asked him to take in cargo on that Sunday night. He proceeded to do so, not for a very long time, but he did take in some quantity of cargo on that Sunday night, but he stipulated that if he did, for the convenience of the charterers, take in cargo on that Sunday night, the lay days would begin on the following Monday morning. I think that the representative of the charterers agreed to that course, and therefore, I think, that the first day to be counted against the defendants is Monday, the 9th March. [Having dealt with days which were partly worked on, the learned judge continued:] Then as to Sunday, the 22nd. Clearly, according to the charter-party, that day was not to be computed—that is to say, the ship on the one hand was not bound to receive cargo and on the other hand the charterers were not bound to put cargo on board; but in this case, in fact, the whole of Sunday was, at the instance of the charterers, used by them for putting cargo on board, and the captain and crew were working when they were not bound to work on that day, and the cargo was put on board during the ordinary working hours of an ordinary working day. Is not that day to be taken into account upon the ground that the charter-party says that Sundays and holidays are to be excluded? I think it is to be counted against the charterers, because, in my opinion, when a full day is occupied in loading by the charterers on the one hand, who were not bound to load, and in receipt of cargo by the ship, which was not bound to receive, the fair inference is that both parties agreed to treat that as a working day . . . It is admitted that Wednesday, the 25th March, was a holiday according to the custom of the place at which the ship then was—namely, La Plata. It is said that a number of people worked, and perhaps more worked than did not work; but still it was admitted to be a recognised holiday of the place, and in fact the charterers or the charterer's men did not work. If they had, the observations I have made as to the Sunday would apply to this day, but as a fact they exercised the right they had of not treating it as a working day within the meaning of the charter.

Judgment for plaintiffs.

Solicitors for plaintiffs, *W. A. Crump* and *Son*.
Solicitors for defendants, *Field, Roscoe*, and *Co.*

(*b*) *Tuesday, Jan.* 15, 1907.

(Before CHANNELL, J.)

JAMES NELSON AND SONS LIMITED *v.* NELSON LINE (LIVERPOOL) LIMITED (No. 3).

THE plaintiffs, who were the charterers of the defendants' steamship the *Highland Heather* and other ships claimed the return of 182l. 10s. paid under protest in respect of demurrage claimed by the defendants.

The defendants counter-claimed for demurrage.

By an agreement, dated the 18th June 1904, the defendants agreed to carry frozen meat of the plaintiffs from the River Plate to Liverpool.

The agreement provided (*inter alia*):

Clause 1. "That the owners (the defendants) engage as from the date when their respective vessels arrive in the River Plate and are ready to load outwards to place the vessels of the line . . . from time to time sailing in the lines herein specified . . . or other vessels of equal capacity at the disposal of the charterers for the carriage from the River Plate . . . of . . . frozen meat. . . ." (2) ". . . The service of the lines hereunder is subject as hereinafter provided to be a two-weekly one to the port of Liverpool . . . having the sailings at intervals of fourteen days . . . and to last for one year from the 1st Jan. 1904, and to be subject to continuance as hereinafter provided." (6) "On arrival of each steamer at the loading berth in the River Plate notice shall be given to the

The plaintiffs claimed to recover 74*l.* 7*s.* 6*d.* paid under protest for demurrage.

The plaintiffs were the charterers of the steamship *Friederike*, of which the defendants were the owners.

By a charter-party, dated the 11th Sept. 1906, it was provided that the vessel was to proceed to Smyrna and there load, and clause 8 provided that:

Charterers to have the option of using one or two

charterers or their agents in writing of her readiness to load; such notice shall not be given until the temperature of the insulated chambers for frozen meat . . . shall have been reduced to at least 22 degrees Fahr. and the temperature shall be maintained thereat, or lower up to the time of shipment commencing. . . . The aforesaid notice of readiness shall be left at the office or place of business of the charterers in the River Plate between the hours of 10 a.m. and 4 p.m. Twelve hours after the receipt of such notice the lay days of the steamer shall commence provided the aforesaid temperature of 22 degrees Fahr. shall have been maintained in the insulated chambers set apart for frozen meat . . . since the beginning of such notice or as soon thereafter as the temperature may have been maintained at that temperature for a period of twelve hours. Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* (forty pounds) per day and so in proportion for any part of a day, payable day by day. For each clear day saved in loading the charterers shall be paid, or allowed by the owners, the sum of 20*l.* The charterers shall be at liberty to send the meat alongside and the vessels of the line shall receive it by night if required by the charterers to do so, they (the charterers) paying all extra expenses caused to the owners through so doing. . . ."

The *Highland Heather* arrived at the plaintiffs' factory at Las Palmas, in the River Plate, and notice of readiness to load was given on the 5th March, at 2 p.m. On the 7th, 8th, 9th, 10th, 12th, and 13th March loading took place, and finished at 8.30 a.m. on the 14th March. No loading took place on the 11th March, which was a Sunday. The 13th and 14th March were public holidays. On those two days loading was done, but there was no evidence to show at whose suggestion, nor whether there was any agreement in relation thereto.

Rufus Isaacs, K.C., *J. R. Atkin*, K.C., and *Leslie Scott*, for the plaintiffs, cited *Houlder* v. *Weir* (*ubi sup.*).

Pickford, K.C. and *Maurice Hill*, for the defendants, cited *Holman and Sons* v. *Peruvian Nitrate Company* (1878, 5 Ct. of Sess. Cas., 4th series, p. 657); Carver's Carriage by Sea, 4th edit., p. 729, note (*l*); *Houlder* v. *Weir* (*sup.*); *The Katy* (7 Asp. Mar. Law Cas. 510, 527; (1895) P. 56); *Commercial Steamship Company* v. *Boulton* (33 L. T. Rep. 707; 3 Asp. Mar. Law Cas. 111 (1875); *Branckelow Steamship Company* v. *Lamport and Holt* (*sup.*); *Crookewit* v. *Fletcher* (1857, 1 H. & N. 893); *Smith* v. *Dart* (5 Asp. Mar. Law Cas. 360 (1884); 52 L. T. Rep. 218; 14 Q. B. Div. 105).

CHANNELL, J. held that on the construction of the agreement that where, substantially, a two-weekly service was maintained, the fact that one vessel arrived late did not thereby postpone the times at which the succeeding vessels ought to arrive and consequently did not relieve the charterers from the obligation of beginning to load such succeeding vessels on their arrival at or near their proper dates, and continued:—The next point is about the holidays. That is a point I have very considerable difficulty in dealing with, and I am afraid the difficulty is partly created by my own decision in *Houlder* v. *Weir* (*sup.*), a case which involved several points. I am not sure that I then appreciated this point as fully as I do now, and it may be that I rather saved myself the trouble of deciding a point that was raised about the authority of the master by giving the decision which I did—namely, that in that case there was an agreement in fact that the Sunday worked upon was not to be counted as a lay day, and I considered it unnecessary to decide whether that agreement was authorised, because I was inclined to think that the result would have been the same without that agreement. I do not know that that is as satisfactory as it might be, but I quite adhere to my decision on the facts of that case. I think it is accepted by everybody that in such a contract as this neither party is bound to work on a Sunday or holiday, and neither party is entitled to work on those days unless with the consent of the other. Therefore the real point which I have to find out is, if they did work, upon what terms did they work? If there is any agreement on the subject that clearly must bind, and looking at it now I confess I cannot see any real ground for the suggested difficulty in *Houlder* v. *Weir* (*sup.*) about the authority of the master to make that agreement, for such an agreement, if it is to be made at all, has to be made on the spot, and there is nobody else, as a general rule, except the master who can possibly make it. The real point to be considered, therefore, is, what inference can be drawn in the absence of such an agreement as to the terms upon which one party is asked by the other to work? In this case there is really nothing to guide one on the point. I do not even know which side proposed that work should be done on those days. It seems to me almost equally likely that it was done as much for the benefit of one party as for the other. These steamers were to go on to other ports in the River Plate and to take other people's cargoes, and it is very obvious that it might be extremely important for the steamer to get on to the next place, and there are very clear reasons, apart from the saving of demurrage, why the charterers might desire to work on the days they were not obliged to work. But, of course, the saving of demurrage is a thing of considerable importance to the charterers. The prior cases, none of which are quite conclusive, but which have a bearing upon the point—viz., *The Katy* (*sup.*) and *Branckelow Steamship Company* v. *Lamport and Holt* (*sup.*), the unreported case before Lord Russell, show that, where the time is to be counted by something which in the contract is called working days if the parties agree to work on a particular day when neither of them was bound to work, the inference is that they agreed to treat that day as one of the working days mentioned in the contract. The only difficulty in the present case is by reason of the express exception of "Sundays and holidays" following upon the words "seven weather working days." If the charter-party had said "seven working days Sundays and holidays excepted" the mention of Sundays and holidays would have been unnecessary, as those days would not have been working days, and therefore must have been put in for some reason, and that might have given rise to the argument that it was intended that those days were to be excepted whether they were used as working days or not. Here the words used are "seven weather working days," which practically means seven fine days. Where such an expression as that is used there may be an ambiguity, and therefore a careful person might put in, as has been put in here, "Sundays and holidays excepted." It might be said that "seven weather working days" by themselves included fine Sundays, and therefore it was necessary to make an exception as to the Sundays. This seems to me, therefore, to be a contract that the charterers are to have seven working days, and if so,

additional neighbouring loading ports, or places, in Smyrna district, paying all port charges, and time shifting ports to count as lay days.

And clause 9 that:

Thirteen running days, Sundays and holidays excepted, are to be allowed the said merchant (if the steamer is not sooner dispatched) for loading the cargo as above, to commence when the steamer is moored and ready, having received pratique, and so reported by the master, and the time so employed, part days counting as part days, to be agreed by the master and charterers, or their agents.

It was also provided that the demurrage was to be at the rate of 35*l.* per day.

On Sept. 18 1906 the vessel arrived at Smyrna and was ordered by the authorities into the quarantine station. The quarantine was completed on the 19th Sept. at 11.30 a.m.

While the vessel was in quarantine the plaintiffs ordered her, on completion of quarantine, to Chulukioi, as an additional loading port, to which place, having obtained free pratique about 2 p.m. on the 19th Sept., she proceeded, arriving on the 20th Sept.

Loading commenced on the 20th Sept. at 8.40 a.m. The plaintiff's agent required cargo to be loaded on Sunday the 23rd Sept., and work was accordingly done up to 2 p.m. From that time until 9 a.m. the next day, the 24th Sept., the vessel was shifting back to Smyrna. Loading commenced at Smyrna on Monday, the 24th Sept. and continued with the exception of Sunday the 30th Sept., but including the 4th Oct., which was a holiday at Smyrna, and was finished on the 5th Oct. at 5 p.m.

If the vessel had not proceeded to Chulukioi she would have been ready to load on the 19th Sept. at 2 p.m. The lay days, the defendants claimed, began at 2 p.m. on the 19th Sept., or that the time from 2 p.m. on the 19th Sept. until the morning of the 20th Sept. was time occupied in shifting ports. The defendants claimed to count Sunday, the 23rd Sept., and the 4th Oct., the holiday, as lay days, and claimed two days and three hours demurrage. The plaintiffs, under protest, paid 74*l.* 7*s.* 6*d.* in respect of that demurrage. The plaintiffs in the action claimed to recover that sum. The defendants counter-claimed 10*l.*, for pilotage, as extra port charges which had been incurred by the vessel proceeding to Chulukioi.

Leck for the plaintiffs.—(1) The time occupied in shifting to Chulukioi and back cannot be counted as lay days, for the lay days do not commence until certain events provided for by clause 9 have happened. Under the charter-party the lay days do not begin to run until "the steamer is moored and ready, having received pratique, and so reported by the master"; therefore, at any rate, they do not commence until the vessel was at Chulukioi, when those events happened—viz, on the 20th Sept. (2) Sundays and holidays are expressly excluded from being counted in the lay days, so Sunday, the 23rd Sept., and the 4th Oct., the holiday, cannot be counted. In *Houlder* v. *Weir* (10 Asp. Mar. Law Cas. 81 (1905); 92 L. T. Rep. 861; (1905) 2 K. B. 267; 10 Com. Cas., at p. 235) the learned judge says: "In my opinion, when there was work done on Sundays with the permission of

in the absence of anything to guide me to a contrary conclusion, I think I ought to follow what has been said by other judges—namely, that the agreement to work on those days must be construed as an agreement to treat those days as working days. Therefore where the Sunday or the holiday is really used as a working day it seems to me, in the absence of anything else to go by, the proper inference to draw is that the parties meant to treat the Sunday or holiday as a working day. In this case I have nothing to lead me to take a contrary view. Such little things as might perhaps be taken into account rather tend to corroborate that view, because it appears that the parties did in fact make out their accounts at the time in that way, treating the holidays as working days, although undoubtedly there was at the beginning of this contract a good deal of dispute. On this second point, therefore, I hold that the holidays which were worked upon must count amongst the seven days. There is an additional reason for coming to that conclusion as regards the holidays which were of such an ambiguous character that a good many people did seem to know that they were holidays at all, at any rate not until they were half over. The next question depends upon the exact words of this contract; it is whether the days here are ordinary days, which may be defined as working hours of a day, or whether they are periods of twenty-four hours beginning at a broken time. This point was dealt with in *Houlder* v. *Weir* (*sup.*) and in *Yeoman* v. *Rex* (1904) 2 K. B. 429). I think the rule is that the days are ordinary days unless there is anything in the contract to indicate that hours are meant and not days. I find, however, in this contract references made in two or three places to lost time. Supposing the time so lost amounts to three or four hours, how is one to deal with that unless the contract refers to hours throughout? Then again the notice is a notice of readiness to take effect after twelve hours, and the period of twelve hours is given for the purpose, apparently, of seeing that the temperature of these insulated chambers is right. When a notice has to be given and there is no definite number of hours in this way after the notice at the expiration of which loading is to begin, the ordinary rule is that you begin on the next day after the notice has expired. You are not bound to begin on a broken day on which the notice expires; if you do so begin it is a question again—as was held in *The Katy* (*sup.*)—of what the terms were upon which you agreed and what inference is to be drawn if there is no express agreement as to the terms. Here there is to be a notice of twelve hours, and on the expiration of that time the lay days are to begin, which seems somewhat inconsistent with their beginning next morning. The stipulation that the charterers should pay demurrage at the rate of 40*l.* per day, and so in proportion for any part of a day, payable day by day, is by itself not sufficient, the rule being that if a charterer loading breaks into a day and uses any portion of it—being a day, of course, beyond his time—he has to pay for the whole of that day. That being so, this provision "and so in proportion for any part of a day" may have been put in merely to provide for that case and to protect the charterers from having to pay for a whole day when they had only used a comparatively small part of a day. It is, however, an important thing to take into consideration. This contract must be construed as referring to periods of hours and not days, and that the lay days are to commence at the expiration of twelve hours after giving the notice provided the temperature is all right.

Judgment for defendants on claim and for plaintiffs on counter-claim.

Solicitors for the plaintiffs, *Charles Russell* and *Co.*, for *Lightbound, Owen*, and *MacIver*, Liverpool.

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

the master, the answer to the question depends upon the terms (if any) upon which the permission was given. In the present case the arbitrator has found that the terms upon which the permission was given was that the Sundays upon which work was done were not to be counted as lay days, but the charterers were to pay any extra expense, which they did. I incline to think that the result would be the same if there had been no agreement." (3) Even if the time on the Sunday and the holiday used for loading is to be counted in the lay days, the time occupied on the Sunday in shifting from Chulukioi to Smyrna cannot be so counted. The lay days, therefore, did not expire till the 6th Oct. No demurrage is due. (4) Pilotage expenses are not "port charges." The former are expenses of navigation; the latter are paid to the port authorities as such:

Newman and Dale v. *Lamport and Holt* [This appears in 8 Asp. Mar. Law Cas. 76 (1895) under the name *Neman and Dale, &c.*], 73 L. T. Rep. 475; (1896) 1 Q. B. 20.

The two are quite distinct:

Carver's Carriage by Sea, 4th edit., p. 891.

The plaintiffs are not liable for the pilotage dues.

D. Stephens for the defendants.—(1) Under the charter-party it is provided that "time shifting ports to be counted as lay days," and it makes no difference whether the shifting is before the lay days mentioned in clause 9 have commenced to run or not, or on a Sunday or week day. Clauses 8 and 9 refer to different matters, and the conditions and exceptions of the latter cannot be read into the former. (2) Work being done on a Sunday and a holiday the fair inference is that those days were intended to count as lay days. Channell, J.'s statement in *Houlder* v. *Weir* (10 Com. Cas., at p. 236; Asp., *ubi sup.*) was *obiter*, and in deciding that case the earlier decision of Lord Russell of Killowen, C.J. in *Branckelow Steamship Company* v. *Lamport and Holt*, which was unreported on this point, was not brought to his notice. In the case of *James Nelson and Sons Limited* v. *Nelson Line* (*Liverpool*) *Limited*, *No.* 3), decided on the 15th Jan. 1907, by Channell, J., following the decision of *Branckelow Steamship Company* v. *Lamport and Holt* (*sup.*), it was held that where work was done on a Sunday or holiday so excepted by the charter-party the proper inference to be drawn was, apart from any evidence to the contrary, that the parties meant to treat such days as working and lay days. The lay days, therefore, ended on the 3rd Oct., at 2 p.m.:

The Katy, 7 Asp. Mar. Law Cas. 510, 527 (1894); 71 L. T. Rep. 60; (1895) P. 56.

[Carver's Carriage by Sea (1905, 4th edit., p. 729, s. 613, note (*l.*), citing *Holman and Sons* v. *Peruvian Nitrate Company* (1878, 5 Ct. of Sess. Cas., 4th series, p. 657), were referred to.] (3) Port charges do not only refer to charges paid to the port:

Newman and Dale v. *Lamport and Holt* (*sup.*).

Pilotage is a charge incidental to getting into port, and is reasonably necessary for the ship and cargo to get into port. If it is a reasonable and a necessary expense paid for getting into the port, it is covered by the words, in the charter-party, "Charterers . . . paying all port charges." The shipowners therefore made a just claim for demurrage, and in addition are entitled to the pilotage expenses incurred.

Leck replied.—If work is done by permission of the captain, and no conditions are attached to that permission, on a Sunday or a holiday, those days being excluded by the charter-party, that does not make such day a lay day, the work being in the nature of overtime work:

Houlder v. *Weir*, 10 Asp. Mar. Law Cas. 81; 92 L. T. Rep. 861, at p. 863; (1905) 2 K. B. 267, at p. 271; 10 Com. Cas. 228, at p. 236.

James Nelson and Sons Limited v. *Nelson Line* (*Liverpool*) *Limited* (*No.* 3) is distinguishable.

BRAY, J.—I have to decide (i.) whether, under the circumstances, the time occupied in shifting from Smyrna to Chulukioi is to be counted as part of the lay days; (ii.) whether, as work and shifting was done on Sunday, the 23rd Sept., that day is to be counted as a lay day; (iii.) whether, as work was done on the 4th Oct., which was a holiday, that day is to be counted as a lay day; and (iv.) whether the defendants can succeed on the counter-claim. The first point depends upon the construction of the charter-party. Clauses 8 and 9 of the charter-party, in my opinion, deal with entirely separate matters. Clause 8 deals with the time occupied in shifting from one loading port to another. Clause 9 with the time occupied in loading. I do not think that I ought to read the exception contained in clause 9 into clause 8. The words of clause 8 must be taken as meaning what they say—that time taken in shifting ports is to count as lay days—and I have no right either to except Sundays or holidays from the lay days so constituted, or to consider whether the lay days specified in clause 9 had begun to run or not. I must therefore hold that the time occupied in shifting between Smyrna and Chulukioi and back again must be counted as part of the lay days. The point as to counting the Sunday and holiday as part of the lay days depends upon the true construction of a common clause in the charter-party, upon which there are several authorities. There is a case, not reported upon this point, decided by the late Lord Russell of Killowen, L.C.J.—namely, *Branckelow Steamship Company* v. *Lamport and Holt* (*sup.*). That case, as read to me from the shorthand transcript, seems to decide the point in terms. In that case there was nothing to show that there were any special facts distinguishing that case from the present in favour of the charterers; there was only the fact that the parties assented to work being done on a Sunday.

It was held that the right inference to draw was that the parties agreed to treat that day as a working day. The facts in this case are somewhat more in favour of the shipowners, because in the present case it was at the request of the charterers that the work was done by the ship on Sunday, the 23rd Sept. I feel bound to draw the inference from the fact that the captain assented to that request that the parties agreed to treat the Sunday as a lay day. The next case on the point is that of *Houlder* v. *Weir* (*ubi sup*), where Channell, J. expressed the opinion that if there was no agreement as to how the days are to be counted between the parties the exception still applied, and that the Sunday or holiday, though

worked on, was not to be counted as a lay day. The question, however, came up again before Channell, J. recently in the case of *James Nelson and Sons* v. *The Nelson Line (Liverpool) Limited* (*No.* 3) (*sup.*). His attention having been called to the decision of Lord Russell of Killowen, L.C.J. in *Branckelow Steamship Company* v. *Lamport and Holt* (*sup.*), he decided that if there was no indication as to the intention of the parties beyond the fact that by the assent of both parties work was done on a Sunday or holiday, the day was to be treated as a lay day, though such a day was excepted by the terms of the charter-party from the lay days. I am bound by those decisions to treat the Sunday and holiday in this case as lay days.

Inasmuch as the shifting time is to be counted and also the Sunday and the holiday, the captain was right in making the demand he did. The next question is that as to the port charges, the counter-claim being in respect of a charge for pilotage. The captain thought it reasonably necessary to employ a pilot, and he accordingly made a contract with a pilot. Such a charge, however, in my opinion, does not fall within the ordinary meaning of the term "port charges." That term means some charge by an outside authority, and does not mean a special contract or expense which the captain, under the circumstances, thought it right to incur. The result is that the plaintiffs fail in their claim, which must be dismissed with costs, and the defendants fail on their counter-claim, which must be dismissed with costs.

Judgment for the defendants on the claim; judgment for the plaintiffs on the counter-claim.

Solicitors for the plaintiffs, *Robert Greening.*
Solicitors for the defendants, *Holman, Birdwood,* and *Co.*

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

Jan. 28 *and March* 4, 1907.

(Before BARGRAVE DEANE, J.)

THE WALLSEND. (*a*)

Collision—Vessel sunk—Cost of raising wreck—Action by Thames Conservancy — Right of Thames Conservancy to recover—Thames Conservancy Act 1894 (57 & 58 *Vict. c. clxxxvii.*), *s.* 77—*Action by owners of sunken vessel—Measure of damages—Recovery of costs as damages.*

A steamship ran down and sank a fishing vessel in the river Thames. The owners of the steamship admitted liability subject to the claim of the owners of the fishing vessel being referred to the registrar and merchants.

At the reference the owners of the fishing vessel claimed 355*l.*, *the sum which the Thames Conservancy were claiming from them as the cost of raising the vessel.*

The registrar rejected the claim on the ground that the owners of the fishing vessel had abandoned their vessel or ought to have abandoned her, in which case the Thames Conservancy would have had no right to recover the cost of raising the wreck from them.

The Thames Conservancy sued the owners of the fishing vessel in the King's Bench Division, and recovered the expense of raising the wreck and costs.

The owners of the fishing vessel appealed from the decision of the Admiralty registrar.

Held, reversing the decision of the registrar, that the Thames Conservancy had under sect. 77 *of the Thames Conservancy Act* 1894 *a right to recover from the owners of the vessel sunk the cost of raising the wreck whether it had been abandoned or not, and that the owners of the fishing vessel were entitled to recover that sum from the owners of the steamship.*

Held, further, that the owners of the fishing vessel were not entitled to recover from the owners of the steamship the costs paid to the Conservancy in the King's Bench action, as the owners of that steamship had had no opportunity of saying whether that action should be defended or not.

MOTION in objection to report of the registrar.

On the 2nd Dec. 1905 the steamship *Wallsend* collided with the fishing vessel *Lena* in Sea Reach, river Thames. The *Lena* was sunk. The owners of the *Wallsend* admitted liability for the damage caused the owners of the *Lena*, subject to the claim being referred to the registrar and merchants for the amount of the damage to be assessed.

At the hearing of the reference all the items of the claim put forward by the owners of the *Lena* were agreed with the exception of one for 355*l.*, the amount of the claim made by the Conservancy against the owners of the *Lena* for raising the wreck.

The Thames Conservancy had sued the owners of the *Lena* for that sum, and had recovered judgment in the King's Bench Division for that amount with costs.

The registrar held that the owners of the *Lena* had abandoned their vessel, and that therefore the conservancy had no right to recover the cost of raising the wreck from the owners, and further held that if they had not abandoned her they ought to have done so, as it was unreasonable to expend 355*l.* in raising a vessel which when raised was sold for 30*s.*

The owners of the *Lena* appealed from the decision of the registrar.

The Thames Conservancy Act 1894 (57 & 58 Vict. c. clxxxvii., s. 77, is as follows:

Whenever any vessel is sunk or stranded in the Thames the Conservators shall cause such vessel to be raised or to be blown up or otherwise destroyed so as to clear the Thames therefrom, and shall cause any such vessel and the furniture, tackle, and apparel thereof, or any part thereof respectively which shall be raised or saved, and also all or any part of the goods, chattels, and effects which may be raised or saved from any such vessel, to be sold in such manner as they think fit, and out of the proceeds of such sale shall reimburse themselves for the expenses incurred by them under this section, and any expense incurred by them in watching or controlling such vessel, and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto, and in case such proceeds shall be insufficient to reimburse the Conservators such expenses, the deficiency shall be paid to the conservators by the owner of such vessel upon demand, and in default of payment may be recovered in the same manner as any

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

penalty imposed by this Act may be recovered, or may be recovered as a debt in any court of competent jurisdiction.

Aspinall, K.C. and *A. E. Nelson* for the owners of the *Lena*.—On the reference the owners of the *Wallsend* agreed all the items of the claim put forward by the *Lena* except this claim for the cost of raising the wreck. Counsel for the *Wallsend* during the reference elicited the fact that the owner had abandoned his vessel. The learned registrar then held that the owners of the *Lena* could not recover any sum from the owners of the *Wallsend*, on the ground that as they had abandoned the vessel the Conservancy could recover nothing from them in respect of the raising. The Conservancy did not take that view, and sued the owners of the *Lena* in the King's Bench Division and recovered 355*l*. At the reference it was suggested that the learned registrar should hold his hand until after the decision in the King's Bench case, but that suggestion was not followed. It does not matter whether the owner abandoned or not, for under sect. 77 of the Thames Conservancy Act 1894 the Conservancy are entitled to recover the cost of raising the wreck from the owner of the vessel, not the owner of the wreck; that distinguishes this case from that of *The Crystal* (71 L. T. Rep. 346; 7 Asp. Mar. Law Cas. 513; (1894) A. C. 508), which turned on sect. 56 of the Harbours, Docks, and Piers Clauses Act 1847 (10 & 11 Vict. c. 27). Where the master or owner of the ship sunk is under a liability to pay for the raising, the fact that the vessel is abandoned does not put an end to that liability:

Smith v. *Wilson*, 75 L. T. Rep. 81; 8 Asp. Mar. Law Cas. 197; (1896) A. C. 579.

The Crystal (*ubi sup.*) was followed in *Barraclough* v. *Brown* (76 L. T. Rep. 797; 8 Asp. Mar. Law. Cas. 290; (1897) A. C. 615), for in that case the local Act enabled the harbour authority to recover from the owner of the vessel.

Laing, K.C. and *D. Stephens* for the owners of the *Wallsend*.—Before the owners of the *Lena* can recover this sum they must prove that they were under a legal liability to pay it. The further question then arises whether they were right in incurring that liability. The owner said he had abandoned his vessel, and the registrar so held he is therefore under no liability with regard to the cost of raising it. Even if he had not abandoned it he ought to have done so, for no reasonable owner would incur an expense of 355*l*. to raise a vessel which sold for 30*s*. The owner of the vessel can only be made to pay for the removal of the wreck if the Act casts on him an obligation to remove it. In the Thames Conservancy Act the obligation to remove it is put on the Conservancy and not on the owner. *The Snark* (82 L. T. Rep. 42; 9 Asp. Mar. Law Cas. 51; (1900) P. 105) is a case in which the owners of a vessel sunk in the Thames were held responsible for the damage done by her, the reason being that that they had not abandoned possession of their vessel.

Aspinall, K.C. in reply.

Jan. 28.—BARGRAVE DEANE, J.—This case comes before the court in the form of a motion in objection to the registrar's report, and I agree with counsel for the *Lena* when he says that the report of the registrar is not an order of the court, but is simply a report to the court. It appears that the *Lena* was a fishing vessel and was sunk in the river Thames by the *Wallsend*. The owners of the *Wallsend* admitted that they were responsible for the damage ensuing from the collision. The *Lena* seems to have been a vessel partly insured, but not wholly insured, and she was a total loss. There being no dispute as to the liability of the *Wallsend*, the matter was referred to the registrar, assisted by merchants, to inquire and report to this court as to the amount of damages. The parties have agreed, as I understand, the damages, with the exception of one item, and that item was an amount, which apparently was not at the time ascertained, but which represented the costs of the Thames Conservancy in raising the *Lena*. When before the registrar the representative of the *Lena* stated that they had abandoned the *Lena*. Upon that, it being apparent that the Thames Conservancy would make a claim against the owners of the *Lena* for raising the vessel, it was submitted to the registrar that it would be advisable he should postpone his report, especially so far as that item was concerned, until it was ascertained whether or not the Thames Conservancy would bring an action and recover, or would apply in this court to recover, any amount in respect of that raising of the *Lena*. The amount is the sum of 355*l*. 14*s*. 10*d*. Before the registrar the cases of *The Crystal* (*ubi sup.*) and *Barraclough* v. *Brown* (*ubi sup.*) were cited, and the whole point of this case does not really depend, in my opinion, upon the question of whether there has been an abandonment of the *Lena* by her owners.

Now, the difficulty which I have about the matter is this, that the question of aye or no, are the owners of the *Lena* responsible to the Thames Conservancy for the cost of raising the vessel has been decided, not in this court, but in the King's Bench Division, in an action brought by the Thames Conservancy against the owners of the *Lena* for this sum of 355*l*. It has been held there, apparently, that the owners of the *Lena* are responsible. The question of whether or not the owners of the *Lena* abandoned the vessel may or may not have been decided, but I have no evidence to show me whether that issue was ever raised before the learned judge and jury. Therefore I am left to deal with the case without that assistance, and I have to look to the section of the Thames Conservancy Act 1894, which deals with this question of the Thames Conservancy's rights as against the owners of vessels which they raise. Cases other than *The Crystal* (*ubi sup.*) and *Barraclough* v. *Brown* (*ubi sup.*) have been quoted to me, including *Howard Smith* v. *Wilson* (*ubi sup.*); but those are cases which arose under different Acts of Parliament and different conditions; and, although they may be referred to by way of illustration, they do not really help me in deciding the question upon this particular section. What is the section? It is sect. 77, and is as follows: "Whenever any vessel is sunk or stranded in the Thames the Conservators shall cause such vessel to be raised or blown up, or otherwise destroyed, so as to clear the Thames therefrom"—now, that is a clear mandatory order upon the Thames Conservancy to do certain things. When a vessel has sunk she must be

raised or destroyed—"and shall cause any such vessel and the furniture, tackle, and apparel thereof . . which shall be raised or saved . . . to be sold in such manner as they think fit, and out of the proceeds of such sale shall reimburse themselves any expenses incurred by them under this section . . . and shall hold the surplus, if any, of such proceeds in trust for the persons entitled thereto." The words are remarkable—not in trust for the owners of the vessel, but "in trust for the persons entitled thereto." That might mean underwriters, or the owners of the cargo, or the owners and the crew representing their effects, or any person who, as a passenger, might have had property on board. The section concludes: "And in case such proceeds shall be insufficient to reimburse the conservators such expenses, the deficiency shall be paid to the conservators by the owners of such vessel." It does not specify the owners at any particular time, but says that the owners of a vessel sunk or stranded in the Thames shall be liable to pay to the Thames Conservators any extra expense of raising the vessel beyond that which they could obtain by the sale of the vessel or the proceeds of the sale of the cargo or property or effects on board that vessel.

Why should I read into that section of the Act of Parliament the words "provided that she has not been abandoned by the owner"? That is what I am asked to do. As the section stands, it says that when a vessel has sunk, the owners of such vessel shall pay. It does not say, and I do not think I am entitled to read into it, "the owners of such vessel at the time such expenses are incurred, or at the time that such demand is made." It is plain, simple language: "The owners of such vessel" so sunk. It is the owners at the time she is sunk, and it seems to me I can only draw one inference, and that is that the Thames Conservators are to have this means of recouping themselves the cost of raising a vessel by recourse to the owners of the vessel so sunk, and, as I read it, to the owners of the vessel at the time she was so sunk. I do not think the owners of a vessel can get rid of their vessel under this section by quietly saying "I abandon." I do not think an owner is allowed to do that under this section. It would be so simple for the Thames Conservancy to be left in the lurch if that were to be read into the section. In my opinion, this liability is a liability which attaches by law, and that is the decision which I come to in this case, quite regardless of any decision which might have been given in the King's Bench Division. Now, of course, as far as I understand, the owners of the *Wallsend* were not represented in the King's Bench Division, and therefore that is another reason why I should, so far as that decision is concerned, hold that I cannot use it as against the owners of the *Wallsend*. There is one other matter relating to this motion which I have to deal with. It is said that the registrar has already decided this point, and by saying that in his opinion the fact of the abandonment of the vessel by the owners was established. I do not think so. The registrar has not come to a decision. He has only reported upon what happened before him, and he has reported practically that it was proved—that is to say, that it was given in evidence before him by Mr. Daniell, who represented the owners of the *Lena*. It is quite true that when pressed Mr. Daniell said, "I abandoned her," but I do not think that the report of the registrar is binding upon me, and I am not at all prepared to say upon the facts as contained in the shorthand-writer's notes of the evidence that I should be satisfied Mr. Daniell had abandoned the vessel. As I say, I am not bound by the registrar's decision; I am not satisfied there was an abandonment, and even if the master says, "I did abandon her," I do not think it comes within the Act of Parliament. I think the Act refers to the ownership of the vessel at the time she was so sunk in the river, and for these reasons I think the report must be varied by including in the amount to be recovered from the owners of the *Wallsend* this sum of 355*l*.

Laing, K.C. for the owner of the *Wallsend*.—The owners of the *Wallsend* were in no sense parties to the action brought by the Thames Conservancy against the owners of the *Lena* in the King's Bench Division, so the owners of the *Lena* ought not to be allowed to recover costs paid in that action as damages in this. The point as to the abandonment was quite immaterial, and the owners of the *Lena* had no right to inflame their damages by fighting the action in the King's Bench Division.

March 4.—BARGRAVE DEANE, J.—This was a motion in objection to the report of the registrar in assessing the damages recoverable by the Whitstable Fishing Company, the owners of the *Lena*, in respect of a collision between that vessel and the steamship *Wallsend*. After I had decided the point raised upon the motion, a question arose as to costs, and I think counsel for the *Wallsend* suggested that in allowing the plaintiffs the costs of the motion I ought not to include the costs of a common law action which was brought by the Thames Conservancy against the plaintiffs to recover the expenses of raising the *Lena*, which had been sunk by the collision. The question arose in this way: The *Lena* having been sunk, notice was given to the Thames Conservancy, who proceeded at once to raise her. Before the account came in the plaintiffs had commenced their inquiry before the registrar and merchants as to the damage occasioned to them by the collision. On learning the amount claimed against them for raising the *Lena* they applied to the registrar for leave to include in those damages a sum of 355*l*., the amount of the claim made against them. The registrar was asked to include that, and he said if the Thames Conservancy elected to come in and have their claim dealt with on the reference he would deal with it. They preferred, however, to bring a common law action, and that action was brought. The plaintiffs defended it, and lost it, and the costs of that action were claimed by the plaintiffs against the defendants, the owners of the *Wallsend*, the wrongdoing ship.

The question is one of discretion. It is a question of discretion, but at the same time I must be guided by certain principles. I find the principles are well set out in Mayne on Damage, 2nd edit., p. 96: "No person has a right to inflame his own account against another by incurring additional expenses in the unrighteous resistance to an action which he cannot defend. The question in these cases is whether the plaintiff in defending the action did

what a reasonable man would do under similar circumstances, where he had no other judgment but his own to resort to; and accordingly, where the plaintiff's ship had been run down by the defendant, and the plaintiff had been forced to employ a steam-tug, the owners of which claimed as salvage 150*l.*, and commenced a suit in the Admiralty Court; the plaintiff paid in 20*l.*, and was adjudged to pay 45*l.* more; held, that he could not recover the costs of this suit against the defendants; and Parke, B. said it was like the case of repairs, in which it has been held that if the party chooses to stand the consequences of an action by the tradesman for the value of the repairs, he cannot charge the expenses of that upon the party who did the original wrong which made the repairs necessary." Then there is another case, where a coal merchant of Dover sold certain coal to a steamship as good steam coal, he having purchased it from a coalowner with a certain warranty. The coal was found to be defective, and the shipowners brought an action against the coal merchant. The coal merchant asked the coalowner whether he ought to defend it. He did not get any answer, and to that extent did not get any authority from the coalowner; but he got a great deal of assistance in defending the action; and it was held in that case that, inasmuch as the coalowner who sold the coal to the merchant at Dover did assist in defending the action there was, as it were, an authority from him to defend—that the coal merchant was doing it with the connivance and assent of the original seller. The principle is that you must not defend an action on behalf of somebody else without that person's consent. In this case I do not find that any application was made to the defendants when the Thames Conservancy brought their action. If the plaintiffs had gone to the defendants and said, "We have this action brought against us by the Thames Conservancy; do you wish us to defend it?" then they would have known where they stood. The plaintiffs, however, took upon themselves to defend the action and lost it, and I think they acted within the meaning of this statement I have read: "No person has a right to inflame his own account against another by incurring additional expense in the unrighteous resistance of an action which he cannot defend." I do not think you can incur expenses of this sort, which you hope to recover subsequently from somebody else, without that person being cognisant of your action. For these reasons I think these costs must fall upon the plaintiffs.

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

Solicitors for the defendants, *Botterell and Roche.*

Feb. 18 *and March* 4, 1907.

(Before BARGRAVE DEANE, J.)

THE BODLEWELL. (*a*)

Collision—Vessel run at a loss—Damages for deprivation—Loss of use of vessel during repairs—Expectation of future profit—Remoteness of damage.

A vessel injured in collision was detained for repairs. At the time of the collision she was with other steamers in a line being run at a loss with the object of ultimately getting into a shipping ring when she would have made remunerative voyages. Before being employed in this line she had been employed in a remunerative trade and might still have been profitably employed, but her owners had seen fit to attempt to start the line in competition with others. There was no dearth of cargo, the loss being caused by rate cutting. On a reference to the registrar and merchants to assess the damage caused by the collision the owners claimed general damages for the loss of the use of their vessel during the repairs in addition to their out-of-pocket expenses on the ground that the time when they would have made a profit had been delayed.

Held, that the possibility of a future profit was too remote to be taken into consideration in assessing the damage, and that they were entitled to nothing more than their actual out-of-pocket expenses.

MOTION in objection to the report of the registrar assessing the damage in a collision case.

On the 1st Jan. 1906, the *Bodlewell*, a steamship of 3420 tons gross register, collided with the steamship *Nile*. Both vessels sustained damage. The owners of both vessels admitted liability subject to a reference to assess the damage, and the claims were referred to the registrar and merchants. It appeared that the *Bodlewell* was one of the five vessels owned by Tyzack and Branfoot, who had shortly before started a line running from Middlesbrough to Calcutta and back.

From Oct. 1904 to Sept. 1905 the *Bodlewell* had been engaged in a profitable trade, and had earned a net profit of 3599*l.*, and she might have continued in that trade earning a profit.

Her owners being anxious to open up an East Indian trade in competition with other lines, had taken her away from her former work, and with other of their vessels had started her to run in the East Indian trade. She was at the time of the collision running on one of these voyages, and was running at a loss. Her owners did not expect to make a profit on the initial voyages, for although there was cargo enough to fill the vessels they had to carry it at unremunerative rates until they were included in a shipping ring which controlled the freight market.

In consequence of the collision the *Bodlewell* was detained at Bizerta for seventy-eight days, undergoing temporary repairs, and a further period of thirty-five days at Sunderland.

Her owners claimed their out-of-pocket expenses, which were admittedly due to them, and general damages for the deprivation of the use of their vessel.

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

One of the owners gave evidence showing that the cargo intended for the *Bodlewell* could not be put on other vessels for want of room, and that it had to be carried at a later date by the *Bodlewell*.

The registrar rejected the claim, and in his report gave the following reasons:—

The two vessels having by agreement admitted liability for a collision which occurred on the 1st Jan. 1906, a question arose as to the item for damages for loss of time by the *Bodlewell* in consequence of the collision. This vessel, when the collision occurred, was on a voyage between the East and the United Kingdom, and formed one of an experimental line of steamers. It was admitted that at the time of the collision the *Bodlewell* was not making any profit—indeed, was trading at a loss—nor had she, it was also admitted, done better since the collision. The hope of the owners of this vessel and of the other vessels trading in this new line was that at some future day profits would result from their present speculation. It was argued on their behalf that on the authority of *The Mediana* (9 Asp. Mar. Law Cas. 41; 82 L. T. Rep. 95; (1900) A. C. 113) they were entitled to damages for loss of the use of their vessel, even if she was losing money, in addition to out-of-pocket expenses, such as wages, victualling, &c. It is obvious that if this contention is sound the principle of *restitutio in integrum* in actions of damage by collision no longer exists, because the claimants, if awarded damages in respect of profits when there was an actual loss, would be in a better pecuniary position in consequence of the collision; for the problematical profits, if any, in some distant future are clearly too remote to be taken into consideration as an element of damages. In my opinion the case of *The Mediana* must be regarded in relation to its particular facts, the basis of which was that a public and non-trading body in place of their injured vessel substituted another vessel kept for emergencies. No doubt some general observations were made as regards the general principle of damages, but they were, I think, all made having regard to the facts of the case under discussion. In the present case it was not denied by counsel for the *Nile* that the owners of the *Bodlewell* were entitled to the actual expenses incurred while deprived of the use of their vessel. If the case had been tried by a jury they would have given a single sum as damages, without going into particulars, and the principles referred to in *The Mediana* would have been acted on by them if no sum whatever in such award had been given in respect of profits but only for out-of-pocket expenses, for the claimants would have recovered damages for the loss of the use of the ship. The entire principle of assessing damages for loss of the use of the vessel on the basis of her trading value, which has been acted on for many years in Admiralty cases and approved in many decisions, would be valueless if in such a case as the present the claimants could be awarded a sum over and above their actual expenses, whether called profits or interest on capital. If, for example, a vessel trading at a loss and worth 20,000*l.* were awarded, say, 5 per cent. interest, plus expenses, this would represent about 2*l.* 10*s.* per day. A vessel of similar value might show a profit of 1*l.* 10*s.* per day, and this on existing principles would be the measure of damages plus expenses. The consequences would be that the vessel which was trading at a loss would actually recover more than the one trading at a profit. The result is that I am of opinion that the claimants, the owners of the *Bodlewell*, can be awarded no sum for loss of use of the vessel beyond the actual out-of-pocket expenses. In this view I am also, I think, following the decision of the Court of Appeal and of the President in *The Marpessa*(*a*) (10 Asp. 197, 232 (1906), where "imaginary profits" were not allowed.

(*a*) This decision was subsequently affirmed, and is reported at p. 464.—ED.

The owners of the *Bodlewell* appealed from the decision of the registrar, claiming a further sum of 1073*l.* 10*s.*

Laing, K.C. and *H. C. S. Dumas* for the appellants the owners of the *Bodlewell*.—The owners of the *Bodlewell* are entitled to some general damages for the deprivation of their ship. The deprivation of a chattel by a wrongdoer is a ground for damage to the owner of the chattel, irrespective of the special use to which the chattel might have been put, and which might give rise to special damage:

The Greta Holme, 77 L. T. Rep. 231; 8 Asp. Mar. Law Cas. 317; (1897) A. C. 113.

That case was followed in *The Mediana* (82 L. T. Rep. 95; 9 Asp. Mar. Law Cas. 41; (1900) A. C. 113). The method by which the general damage is to be assessed where there is no proof of actual pecuniary loss to the injured owner by reason of the deprivation are the owners' out-of-pocket expenses, together with depreciation and loss of interest on the capital sunk in the vessel at the time of the deprivation:

The Marpessa, 94 L. T. Rep. 428; 10 Asp. Mar. Law Cas. 232; (1906) P. 95.

Aspinall, K.C. and *Balloch* for the respondents.—The registrar has found as a fact that these damages which are claimed are too speculative, and the court will not interfere with a finding of fact. The injured person is entitled to *restitutio in integrum*, but the recovery of his out-of-pocket expenses puts him in that position. The test is what would the shipowner have earned with his ship:

The Argentino, 61 L. T. Rep. 706; 6 Asp. Mar. Law Cas. 433 (1889); 14 App. Cas. 519.

And in this case the ship would have earned nothing. It is too speculative a matter to give the owner damages because a possible future profit may have been postponed.

Laing, K.C. in reply.—If the owners of the *Bodlewell* had hired another vessel to take her place, they could have recovered the cost of the hire; that would have been the measure of damage. They must be entitled to something more than mere out-of-pocket expenses, for their profit has been postponed. Difficulty in assessing the damages is no reason for refusing to give any.

BARGRAVE DEANE, J.—This is a motion in objection to the registrar's report. The two vessels came into collision, liability was admitted, and the matter was referred to the registrar and merchants to go into the figures and report at what amount damages should be assessed. The registrar's report was accepted with the exception of one item—or rather there are two items which have been put together—"loss of use of the vessel *Bodlewell* at Bizerta and also at Sunderland," the places where the vessel was repaired as a result of the injury. The claim was for a total sum of 4700*l.* odd, and the registrar in his report allows 1349*l.* 10*s.* The objection is that the registrar has only allowed out-of-pocket expenses, and has allowed nothing for the deprivation of the use of the vessel during that time.

The question I have to deal with is a difficult one. The *Bodlewell*, previous to this voyage on which she sustained damage, had been employed at considerable profit on other voyages, but having made a considerable profit on those other

voyages, she had been taken off that service, and, with other vessels belonging to the plaintiffs, had been placed on a line to carry cargo to the East, returning to Middlesbrough. They did not, according to the evidence, expect to make any profit at first upon that line. They saw an opening, and hoped that in course of time they would establish a prosperous line between Middlesborough and the East, and it was whilst they were seeking to obtain that prosperity that this accident happened. Not only did they not anticipate making a profit, but it is admitted in the evidence before the registrar that they were making a loss, and it was said that the freights they were earning did not amount to so much as the expenses of the vessel. In all these cases of damage there are two sorts of damage which have to be considered, general damage and special damage, and in the old days this court was in the habit of only recognising what could be put as special damage. An example of that will be found in *The Argentino* (*ubi sup.*), where the court held that where a vessel on her way home was damaged, and therefore was unable, owing to the delay, to take up a charter for her subsequent voyage, was entitled to be recouped the damage for not being able to take up that charter which had been accepted for her. That was special damage. There was a special loss which could be dealt with, and was dealt with by the court.

It was decided in this court that it was so, and the Court of Appeal upheld it. I am not aware, however, that antecedent to *The Greta Holme* (*ubi sup.*) that doctrine had been carried very much further in the case of ships. In ordinary cases of damage the question is referred to the jury, who find a lump sum, and it is very seldom easy to ascertain the process by which they arrive at that sum. We know that in the cases of individuals, where a man is injured, the jury are told to assess general damages for pain and suffering, and we know that on the other side of this court a co-respondent has to pay damages for the pain and suffering caused to the husband by the seduction of the wife. That is general damages. You cannot apply that to a ship. You cannot say that a man should be awarded general damages in respect of his regret and sorrow and trouble for his ship being disabled. With regard to a ship it seems very difficult to see where your general damages come in. I have to deal with this case on the principles laid down in the two cases decided in the House of Lords—*The Greta Holme* (*ubi sup.*) and *The Mediana* (*ubi sup.*). In those two cases a dredger and a lightship, the property of a public authority, were injured. They were not working for a profit, in the ordinary sense of the word, to the owners. They were employed to carry out certain public work, and the question of general damages was a very difficult one to decide. The question of a vessel of this sort, which is used for the purpose of pecuniary profit, is on quite a different basis.

Therefore I have, as far as I can, to follow the principle of *The Greta Holme* (*ubi sup.*) and *The Mediana* (*ubi sup.*) as applicable to a vessel of this sort. Now *The Greta Holme* (*ubi sup.*) was decided by the House of Lords, and there are certain matters in the case to which I will refer as showing that I am as far as possible following the principles laid down. As I have said, the plaintiffs, the owners of the vessel damaged, were the Mersey Docks and Harbour Board, which is a public body, and Lord Halsbury said this: "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 wrongdoer." That is only a general principle. Then Lord Watson says this: "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"—that is to say, I am not prepared to say that this public authority, by being deprived of the use of its dredger, does not suffer from having that dredger stopped in the performance of public work. Then he says the authorities seem to go to 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, and protect the pocket 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." Therefore that learned judge seems to think that in the case of this steam dredger, not only are the plaintiffs to be recouped the actual loss occasioned by necessary repairs, but also to recover damages for personally being deprived of the use of the article. It is very difficult quite to follow how you are to assess damages in that sort of case, unless it is by estimating what the expense would be of insuring another vessel to take the place of the dredger which had been taken off. That is *The Greta Holme* (*ubi sup.*). I ought to say that the House of Lords reversed the decision of the Court of Appeal, which thought there were no damages applicable because no profit was shown by the plaintiff. In *The Mediana* (*ubi sup.*) the Court of Appeal felt that they had to follow the House of Lords' decision in *The Greta Holme* (*ubi sup.*). Lord Justice Smith says he must follow the decision in *The Greta Holme* (*ubi sup.*), and Lord Justice Collins says this: "I take the decision in the case of *The Greta Holme* (*ubi sup.*) to be this—that the deprivation of a chattel by a wrongdoer is of itself a ground of damages to the owner, irrespective of the special use to which the chattel might have been applied, and for which there might also be special damages. The two may co-exist, and in the case of *The Greta Holme* (*ubi sup.*) they did. It is said that in the present case they do not, but I am not sure about that. If, however, they do not, still the deprivation of the chattel would, in my opinion, ground a claim for damages." That is, again, if there are damages. You cannot award damages unless you can see there are damages. The question is whether you can go beyond special damages and award others as general damages for the deprivation of the chattel. Lower down the Lord Justice quotes Lord Halsbury's decision in *The Greta Holme* (*ubi sup.*): "Lord Halsbury

says it is no answer to the claim to allege that the person would not have made money out of the chattel taken away if it had been left in his possession, and he then goes on to deal with the fact that had they had it they would have performed a public service with it. In the present case a public service would have been equally 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 are deprived of an instrument by which they were doing a public benefit." There again the difficulty I have is this, that there, as in *The Greta Holme* (*ubi sup.*) the court said that the fact of a public authority doing a public benefit shows that there is a loss owing to the chattel being taken away and put out of use. Then *The Mediana* (*ubi sup.*) went to the House of Lords, and there we have pretty well the same judges as in *The Greta Holme* (*ubi sup.*). Lord Halsbury refers to the decision in *The Greta Holme* (*ubi sup.*), and he says: "Lord Herschell in terms did lay down a much broader principle, and I may say that I myself intended to lay it down, though I may have expressed myself imperfectly—namely, that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used, or is taken away so that it cannot be used at all, that of itself is a ground for damages" —that is to say, again, damages beyond the mere expenses incurred through the actual physical injury, depreciation, and so on. Further on he says this: "What right has a wrongdoer to consider what use you are going to make of your vessel?" That does apply to this case. Lower down again he says: "The broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except—and this, I think, has been the fallacy running through the arguments at the Bar—when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage. In that case you must show it, and by precise evidence, so much so that in the old system of pleading you could not recover damages unless you had made a specific allegation in your pleading so as to give the persons responsible for making good the loss an opportunity of inquiring into it before they came into court, But when we are speaking of general damages no such principle applies at all and the jury might give whatever they thought would be the proper equivalent for the unlawful withdrawal of the subject-matter then in question. It seems to me that that broad principle comprehends within it many other things. There is no doubt in many cases a jury would say there really has been no damage at all: 'We will give the plaintiffs a trifling amount'—not nominal damages, be it observed, but a trifling amount; in other cases it would be more serious." The other Law Lords agreed with that judgment.

Practically it comes to this, that apart from the special damages you are entitled to ask the jury, as in this case, you ask the court to award you general damages, if you can show them. Then there is another case which has been cited to me, but, although I have taken great pains in reading it, I am not going to deal with that case. It is the case of *The Marpessa* (*ubi sup.*), which was decided by the President and affirmed by the Court of Appeal. That case is under appeal, and I see in to-day's list it is down for hearing in the House of Lords. I am not going to deal with it because, if the House of Lords overrules it, it might be said that my judgment was based upon it, and my judgment is not based upon it at all. I only say that because, although to a certain extent the decision of the President of the Court of Appeal in *The Marpessa* (*ubi sup.*) is in accordance with my views, the House of Lords might think differently.

My judgment is not based upon that, but I distinguish, as I believe I may do, those other cases from the present case. Here is a vessel admittedly trading at a loss. Her expenses are greater than her freight is expected to be, and at a future time it is hoped she may be able to make this new line a profitable concern. That we do not know, and I am right in saying that damages based on that would be very remote. Therefore, I take out of consideration the possibility of this vessel at some future time making a profit in this new line. It may be said that it is part of the large whole—that when you start a new line you have to do this preliminary work at a loss before you can hope to make a profit. I think any such consideration is a great deal too remote to be brought into account on the question of damages. But, although working at a loss, the plaintiffs were deprived of the use of their vessel for 113 days, during which she was under repair. It is not like *The Argentino* (*ubi sup.*), where there were prospects of a beneficial charter. It is said to be a case of a vessel being injured while on a particular voyage where she was working at a loss. Now, the registrar has allowed all the expenses, and during these 113 days the plaintiffs, instead of working at a loss, were not working at a loss. They were having all their expenses paid, and therefore, in a sense, they were benefiting by the delay.

The question seems to me to be this: Is there any damage? Is it possible you can find anything like general damages in this case? I have pointed out that you cannot apply the question of suffering and sorrow to it. Supposing this vessel was making a profit instead of a loss, say 30*s.* a day That would be a measure of general damages. But in this case are you to take a percentage on her value? What percentage are you to take? Five per cent.? If you do you would be giving her profit which she would not otherwise have had. The vessel would be more profited by being damaged in collision than if she had continued her voyage without accident. I cannot see my way to say that there is anything on which I can give general damages. I do not think there are any damages accruing to this vessel which have not been included in the registrar's assessment. For these reasons I think the motion must be dismissed, with costs. Leave to appeal was granted.

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

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

HOUSE OF LORDS.

Tuesday, July 2, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and ATKINSON, with Nautical Assessors.)

OWNERS OF THE CANNING *v.* OWNERS OF THE BELLANOCH; THE BELLANOCH. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—"Not under command"—"Aground"—"Taking any course authorised or required"—Regulations for Preventing Collisions at Sea, arts. 4, 11, 28—*Obligation to whistle.*

Two steamships navigating in shallow waters were crossing vessels within the meaning of art. 19 *of the Regulations for Preventing Collisions at Sea. The* B. *was on the starboard bow of the* C., *and was steering a course at about right angles to that of the* C. *The* C. *ported her helm to pass under the stern of the* B., *but struck her on the port quarter, and was held to blame for not having taken proper steps to avoid the collision. The* B. *was of deeper draught than the* C., *and was slowly dragging through the mud, occasionally putting her engines full speed astern to assist her in manœuvring. She had done this three times before the collision and at a time when the vessels were in sight of one another, but she had not sounded a three-blast signal.*

Held (affirming the judgment of the court below), that if the B. *had infringed art.* 28 *in not sounding three short blasts, the failure to do so could not, in the exceptional circumstances, have affected the collision.*

Semble, *art.* 28 *did not apply to the occasions when the* B. *put her engines astern, because neither vessel was then taking a course in reference to the other.*

APPEAL from a judgment (1907) P. 170) of the Court of Appeal (Lord Alverstone, C.J. and Kennedy, L.J.), Moulton, L.J. dissenting, affirming a judgment of the President of the Probate, Divorce, and Admiralty Division (Sir J. Gorell Barnes).

The case made by the plaintiffs was that the *Canning*, a steamship of 5366 tons gross and 3459 tons net register, was leaving Monte Video Harbour on a voyage to Buenos Ayres.

The *Canning* had her regulation under-way lights exhibited and they were burning brightly, and a good look-out was being kept on board of her. In these circumstances those on the *Canning* more particularly noticed the *Bellanoch* heading across the channel, apparently under way, about three-quarters of a mile off and about ahead.

The *Canning* kept on down the channel till she was at the black buoys, when she hard-a-ported her helm to pass astern of the *Bellanoch*, which had remained in much the same position.

As the *Canning*, swinging under her port helm, drew nearer to the *Bellanoch*, the latter was observed to be moving astern, whereupon the engines of the *Canning* were reversed full speed, her whistle being blown a short blast about the same time, which was answered by the *Bellanoch*, and, though the *Bellanoch* was loudly hailed to go ahead, she failed to do so, and the two vessels came together, the port side of the *Bellanoch* striking the stem of the *Canning*, doing damage.

The plaintiffs charged the defendants with not keeping a good look-out; with neglecting to give any warning of their condition or manœuvres by lights, shapes, or signals; with negligently coming astern; and with failing to comply with arts. 4, 11, 28, and 29 of the Collision Regulations.

The case made by the defendants was that the *Bellanoch*, a steamship of 2637 tons gross and 1678 tons net register, whilst bound from Monte Video to Antwerp with general cargo was in Monte Video Roads. The *Bellanoch*, which was proceeding under a port helm and with engines working at full speed ahead from her anchorage to the deep-water channel, with her stern dragging through the mud, was heading about east by south, and was making about a knot. It was daylight, and a good look-out was being kept on board of her. In these circumstances the *Canning* was seen clearing the breakwater about half a mile distant and broad on the port bow, and approached as if to cross ahead of the *Bellanoch*. When, however, she got within a few lengths distant she altered her course to starboard, and sounded a short blast on her whistle. The *Bellanoch* at once sounded a short blast in reply, and continued to keep her engines working at full speed ahead and the helm to port, but the *Canning* came on at considerable speed, and with her stem struck the *Bellanoch* a very heavy blow on the port side in the way of No. 4 hatch, cutting into her, and doing so much damage that the *Bellanoch* shortly afterwards sank.

The defendants charged the plaintiffs with not keeping a good look-out; with improperly failing to keep clear of the *Bellanoch*; with not stopping or reversing in time, and with neglecting to comply with arts. 17 (preliminary), 19, and 23; and counter-claimed for the damage they had sustained.

It appeared that the *Bellanoch*, in order to force her way through the mud, had from time to time put her engines full speed astern and then gone ahead again, but had not sounded her whistle three short blasts.

The material parts of the articles referred to are as follows:

4 (*a*). A vessel which from any accident is not under command shall carry at the same height as the white light mentioned in art. 2 (*a*), where they can best be seen, and, if a steam vessel, in lieu of that light, two red lights, in a vertical line one over the other, not less than 6ft. apart, and of such a character as to be visible all round the horizon at a distance of at least two miles; and shall by day carry in a vertical line one over the other, not less than 6ft. apart, where they can best be seen, two black balls or shapes, each 2ft. in diameter.

11. A vessel under 150ft. in length, when at anchor, shall carry forward where it can best be seen, but at a height not exceeding 20ft. above the hull, a white light in a lantern so constructed as to show a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile. A vessel of 150ft. or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20ft. and not exceeding 40ft. above the hull, one such light, and at or near the stern of the vessel, and at such a height that it shall not be less than 15ft. lower than the forward light, another

(*a*) Reported by C. E. MALDEN and L. F. C. DARBY, Esqrs., Barristers-at-Law.

such light. A vessel aground in or near a fairway shall carry the above light or lights and the two red lights prescribed by art. 4 (*a*)

17. Preliminary. Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.

19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

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 or reverse.

27. In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger.

28. . . . When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules, shall indicate that course by the following signals on her whistle or siren —viz., . . . three short blasts to mean, "My engines are going full speed astern."

29. Nothing in these rules shall exonerate any vessel, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

Aspinall, K.C., *Horridge*, K.C., and *A. D. Bateson* appeared for the plaintiffs.

Cohen, K.C., *Laing*, K.C., and *Dunlop* appeared for the defendants.

July 2, 1906.—The PRESIDENT.—This is a case of collision which took place on the 24th Dec. 1905, at about 4.45 in the morning, in Monte Video Harbour Outer Roads, between the steamship *Canning* and the steamship *Bellanoch*. The *Canning* is a large steamer of 5366 tons gross register, and was leaving Monte Video Harbour to proceed on her voyage to Buenos Ayres. She was drawing 19ft. 11in. forward and 19ft. 7in. aft, so she was not quite so much hampered by the shallow depth of water there as the other vessel, the *Bellanoch*, was. The case on the part of the *Canning* is that the *Bellanoch* was heading across the channel to the eastward, a channel which, I understand, was a dredged channel through the shallow water for the purpose of enabling deep-drafted vessels to leave the port, and it is said she was heading across the channel in that way, some distance off, and that the *Canning* kept on down the channel until she passed certain buoys which mark it, and that then she ported her helm to pass astern of the *Bellanoch*, and, while she was swinging under her port helm, the *Bellanoch* came astern and thus produced the collision, notwithstanding what the other vessel did to avoid it.

The defendants' vessel, the *Bellanoch*, is also a large vessel of 2637 tons gross. She was bound from Monte Video to Antwerp, and she had been hampered by the mud, I think, more or less to the westward of the extension, and was endeavouring to get to sea and to make her way into the channel, and her case is that she was proceeding, shortly before this collision happened, under a hard-a-port helm, with her engines working full speed ahead and her stern dragging in the mud, heading about east by south or east half south, and that, although she had occasionally been going astern with her engines, the plaintiffs say she was, in fact, going ahead and dragging slowly through the water. The issue, therefore, is a very simple one to state, but perhaps it is not so easy to determine which story is true about this particular point. I notice that the defendants' vessel, the *Bellanoch*, was drawing 24ft. 6in. aft and 20ft. 4in. forward, and had been endeavouring, obviously, from the evidence which was given in this case by her engineer, which is confirmed to-day by the master, to do what I have already stated —namely, move ahead from where she had been. I think that she had been originally at anchor with the object of getting to the eastward and so into deeper water. I do not propose to read the entries in the log-book; they all seem to me to go directly to the point, and, having regard to the evidence which I have heard on a previous occasion and to-day, I have no hesitation in coming to the conclusion, after seeing the witnesses, that it practicallydisposes of this case; it is a conclusion of fact pure and simple that the case of the plaintiffs is not made out, and that the case of the defendants is made out that they were going ahead and were not going astern.

This collision was not produced as the plaintiffs say. It may be perfectly true that it is a remarkable thing that the master of this large, fine vessel, the *Canning*, did not port enough to clear the vessel which was in front of him and broadside on to him, and, according to my view, going very slowly ahead. The only possible explanation which we meet with so frequently in this court is that sometimes sailors shave things too fine. I do not think that the master allowed enough room, and, if I remember rightly, there was a suggestion made which has some weight with the Elder Brethren in this case—namely, that he did not port enough because, probably, he had not allowed enough room having regard to the possibility of the current setting across his course, and therefore preventing him from sufficiently clearing the stern of the *Bellanoch*. This broad fact really disposes of the case on the merits entirely, but there are two or three, I think, in this case, I may say, highly technical points which are raised with considerable ingenuity by counsel for the plaintiffs with the view, not of preventing their own ship from being found to blame, but with a view to also making the defendants' ship to blame, because he contends that the *Bellanoch* has committed a breach of art. 4 and art. 11 of the Collision Regulations. Art. 4 provides that "a vessel which from any accident is not under command" shall exhibit certain lights or certain shapes according as it is before or after sunrise, and that this vessel was, from some accident, not under command. That seems to me to be a question partly of the construction of the article and partly a question of fact. This vessel, according to the view the Elder Brethren take, was under command; she was moving, and capable of doing what she wanted to do, and had in the course of three-quarters of an hour moved three-quarters of a mile; she was only hampered by the fact that she was dragging through the mud. And then, again, it is not necessary in this case that I should say anything definite about it, but, at any rate, it seems to me

doubtful whether she was "from any accident" not under command. With regard to art. 11, the only part of that article which is material is the last sentence: "A vessel aground in or near a fairway shall carry the above light or lights and the two red lights prescribed in art. 4 (*a*)."

I am of opinion, as a matter of fact, that this does not apply to a vessel which is not aground, and that also is the view of the Elder Brethren. According to my view of this case, neither art. 4 nor art. 11 applies, and there is this broad answer to any technical points of this kind—that the witnesses from the plaintiffs' ship said that if there had been lights up they could not have seen them because it was broad daylight; they might have seen the lanterns, and what they did see was the ship herself as plain as if the sun were up and it was broad daylight, and they could see everything this ship was doing. Therefore, although it is not necessary to go into it in this case, I cannot myself see that these articles have anything to do with the matter, or have anything in them which could by possibility affect the case in any way.

The last point is that under art. 28 the *Bellanoch* ought to have given three short blasts with her whistle. The point is connected with the possible suggestion that she was not keeping her course and speed. I think that, under the circumstances, she was doing so; she was doing all that she could to keep her course and speed in compliance with the provisions of the article; she was going ahead as fast as ever she could, but reversing at times, not with the object of going astern; her whole object was to get ahead, to get into deeper water and to go ahead; what she was reversing for, according to her captain, was to clear her propeller and to assist to get the vessel to answer her helm. If that was relied on, though I hardly think that it was suggested, there is practically nothing in it; and it was not a breach of the article which required her to keep her course and speed.

But it is said that on the two or three occasions on which she reversed with the object indicated she did not give three short blasts, and she therefore committed a breach of art. 28. Here, again, it is a highly technical point, and quite against any merits when once the decision is arrived at that the vessel did not go astern, or even if it could be said that there was a breach of the article unless there were something to qualify it, it would have had, as a matter of common sense, another article to control it, and that article is this art. 27: "In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger." What would have happened if she had indicated by her whistle, three short blasts, that she was going astern? She would have invited the other vessel to go ahead of her, and that might have misled the other vessel most completely if, after that, she had tried to keep her course and speed and go ahead, and the other vessel had said, "You gave three short blasts that you were going astern," then the *Bellanoch* would have been in very considerable difficulty. The answer is that using the signal in this particular way in these particular circumstances would have been most misleading and when the other vessel could see everything that was being done, there is really nothing in that point which has any weight at all, and I venture to say that there is no force in the technical points throughout. The result is that this case must be determined by holding that the *Canning* is alone to blame for this collision.

The plaintiffs appealed to the Court of Appeal.

Aspinall, K.C., *Horridge*, K.C. and *A. D. Bateson* for the appellants, the owners of the *Canning*.—The *Bellanoch* was solely to blame, or was also to blame, as she came astern and failed to give the appropriate signal under art. 28, and so did not give the *Canning* any warning of what she was doing. The *Bellanoch* raised her anchor at 3.47 a.m., an hour before the collision and before sunrise, so the rules as to lights applied. She was drawing 24ft. 6in. aft, and was 4ft. 2in. by the stern. The depth of water there was only 22ft. 6in., so her stern was dragging through the mud, and she was then not under command and should have exhibited the two red lights:

The P. Caland, 68 L. T. Rep. 469; 7 Asp. Mar. Law Cas. 317; (1893) A. C. 207.

As the *Canning* approached the *Bellanoch*, those on her hailed the latter, "Why don't you go ahead?" and received the answer, "I am going ahead all I can. I can do no more; my ship is on the ground." The *Bellanoch* ought therefore to have complied with art. 11, for she was aground in or near a fairway. The log of the *Bellanoch* shows that she was going astern on her engines on three separate occasions—from 4.20 to 4.24, from 4.28 to 4.34, from 4.37 to 4.40. On none of those occasions did she sound a three-blast signal as required by art. 28:

The Uskmoor, 87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1902) P. 250.

That duty is cast on her whether she is keeping her course and speed under art. 21, or departing from that rule under special circumstances under arts. 27 and 29. The failure to give that warning caused the collision, for the *Canning* has been held to blame for not giving the *Bellanoch* a wider berth. If there had been a whistle signal, the *Canning* would or might have ported sooner and reduced her speed.

Cohen, K.C., *Laing*, K.C., and *Dunlop* for the respondents, the owners of the *Bellanoch*.—Art. 4 has no application to the *Bellanoch*; the only thing that was the matter was that she could only proceed very slowly. Art. 11 has no application; the vessel was not aground within the meaning of that article. Art. 28 applies to a course authorised by rules for avoiding collision. The *Bellanoch* was moving ahead without reference to other vessels, there being no risk of collision; so the fact that she sounded no whistle violated no rule, and, in fact, her engines were not put astern for five minutes before the collision, which was the only time during which the *Canning* was manœuvring for her. Even if *The Uskmoor* (*ubi sup.*) applies to good seamanship, that case has no application, for the *Bellanoch* was not taking a course authorised or required by the rules:

The Mourne, 83 L. T. Rep. 748; 9 Asp. Mar. Law Cas. 155; (1901) P. 68.

The only question in the case is one of fact—namely, Did the *Canning* port too late? and it has been held that she did.

Horridge, K.C. in reply.—Those on the *Bellanoch* knew that it was the duty of the *Canning* to keep out of the way. They should have let her know what they were doing; they were altering their speed, and should have given the *Canning* warning of that. The absence of the whistle signal cannot be said by no possibility to have contributed to the collision:

The Fanny M. Carvill, 32 L. T. Rep. 646; 2 Asp. Mar. Law Cas. 565 (1875); 13 App. Cas. 455n.; *The Duke of Buccleuch*, 65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 68; (1891) A. C. 310.

March 18, 1907.—Lord ALVERSTONE, C.J.—This is an appeal in a case of collision which occurred in the Bay of Monte Video, a few minutes before sunrise, on the 24th Dec. 1905, between the *Bellanoch* and the *Canning*. The *Canning*, which had been at anchor north of the breakwater, had rounded under her port helm and passed down, just outside the breakwater, making a straight course about S. by W. to the two buoys which are to the southward of the breakwater at a distance of about half a mile. The *Bellanoch*, a large vessel belonging to Lamport and Holt, had been at anchor about three quarters of a mile to a mile to the westward of the buoys, and was, just before the collision, proceeding on a course about E. ½ S., roughly speaking at right angles to the course of the *Canning* down the channel. The *Canning* continued her course straight down to the buoys, and, after passing between them, ported her helm with a view to pass under the stern of the *Bellanoch*, which was still heading to the eastward, the *Canning* being at that time at a distance of about a quarter of a mile from the *Bellanoch*; and her case is that on seeing that the *Bellanoch* was coming astern the *Canning's* engines were reversed full speed, her helm being kept hard-a-port. The collision happened by the stem of the *Canning* hitting the port side of the *Bellanoch* about 40ft. forward of her stern. Under these circumstances the President found the *Canning* alone to blame, and I am clearly of opinion that she was to blame, on the ground that she ported too late, and maintained her speed far too long, not having room to clear the *Bellanoch* under her hard-a-port helm at the rate of speed at which she was going.

The real difficulty of the case is with regard to the manœuvres of the *Bellanoch*. Her case was that, drawing 20ft. 4in. forward and 24ft. 6in. aft, she had been dragging through the mud at a speed over the ground of about three-quarters of a mile to a mile an hour; that she had moved her engines ahead and astern, going astern to clear her propeller out of the mud. The collision happened, according to the time of both ships, at 4.45. The movements of the engines of the *Bellanoch*, according to her deck log and the log kept by the engineer, were as follows: 3.54 a.m. full speed ahead on the engines; 4.20 full astern; 4.24 full ahead; 4.28 full astern; 4.34 full ahead; 4.36 stopped; 4.37 full astern; 4.40 full ahead. It will be noted that during the seventeen minutes immediately preceding the collision—that is to say, from 4.28 to 4.45, her engines went full speed astern twice, namely, for a period of six minutes, from 4.28 to 4.34, and for a period of three minutes from 4.37 to 4.40. It was admitted that she gave no signal by whistle that her engines were going full speed astern, in accordance with art. 28 of the Regulations for Preventing Collisions at Sea, and it was strenuously contended, on behalf of the *Canning*, that her neglect to give these signals was a breach of rule 28, and that the *Bellanoch* had not proved that such a breach could not possibly have affected the collision. The learned President decided this point in favour of the *Bellanoch*, and went further, holding that to have given the signal might have misled the *Canning*.

The case is, in my opinion, by no means free from difficulty, but before deciding as to the application of the rules to the circumstances of the case, it is, in my judgment, necessary to determine clearly at what point in the navigation of these two vessels they became liable to obey the rules, or when, in other words, they were approaching so as to involve risk of collision. From the time the *Canning* cleared the breakwater—a distance of about three-quarters of a mile from the place of collision—and was heading her course down towards the buoys, she had the *Bellanoch* slightly on her starboard bow, the *Bellanoch* moving very slowly ahead towards the eastward. If it is to be taken, for the purpose of considering the duties of the two ships, that they were then approaching so as to involve risk of collision, it would be difficult to hold that the *Bellanoch* did not commit a breach of the rules in neglecting to blow her whistle so as to indicate that her engines were going astern on the two occasions already mentioned. It is to be remembered, however, that the course of the *Canning*, as directed by the river pilot, was down the dredged channel to the two buoys, and that until she reached the buoys she would not, in the ordinary course, manœuvre to avoid ships to the south of them; and we are advised by the assessors that the necessity for action on the *Canning's* part did not arise until the *Canning* was approaching the buoys, and that there was no difficulty after passing the buoys in her manœuvring to keep out of the way of the *Bellanoch*. When reaching the buoys it is quite clear that it was the duty of the *Canning* to port and go under the stern of the *Bellanoch*, and it was the duty of the *Bellanoch* to keep her course; this follows from arts. 19, 21, and 22.

There was, therefore, in my opinion no obligation upon the *Bellanoch* to sound her whistle, indicating that she was going astern, during the time that the *Canning* was coming down from the breakwater, until she got in proximity to the buoys. The action of the *Bellanoch* in going astern at the periods mentioned in the log was action taken by her not in consequence of the approach of the *Canning*, but in the ordinary course of her navigation, so as to enable her to go ahead upon her eastern course, as fast as the condition of mud would permit her. The speed of the *Canning* when she approached the buoys was stated by her preliminary act to be three knots, and by her captain to be from four and a half to five, reduced to three at the time of the collision. In my opinion it is not unfavourable to the *Canning* to assume that at the time when she passed between the buoys her speed was about four knots. This would give a mile in fifteen minutes, or a quarter of a mile in just under four minutes. The speed of the *Bellanoch* does not affect the question of time, as her course was at

right angles to the course of the *Canning*. Now, there is no dispute as to the time of the collision; it is fixed by both vessels at 4.45. According to the story of the *Bellanoch*, which the President has believed, her engines were going ahead five minutes before the collision, and I therefore come to the same conclusion as that at which the President has arrived, that her engines were not put full speed astern at any period when she was bound to control her actions in consequence of the approach of the *Canning*. It is true that art. 28 refers to the signals being given when vessels are in sight of one another, but the words immediately following, "in taking any course authorised or required by these rules," show that it does not mean in sight at any distance, but in sight with reference to the manœuvres which a vessel is authorised or required to take, having regard to the other vessel approaching, for the purpose of avoiding collision. I have been unable to see how it can be contended that the reversing from 4.37 to 4.40 can be said to be "a course"—we pointed out in *The Anselm* (*ante*, p. 438) that course does not mean course by compass, but the action of the vessel—"authorised or required by the rules."

In this respect the case differs entirely from *The Anselm* (*ubi sup.*), decided by Moulton, L.J. and myself a few days ago, in respect of a collision in the river Para, where the manœuvres in respect of which the *Anselm* neglected to give proper sound signals were taken with reference to and in order to avoid collision with the other ship, the *Cyril*. It was attempted to be argued by counsel for the appellants that the going astern of the *Bellanoch* would stop her way to a greater or less extent, and therefore involve a breach by her of art. 21, which required her to keep her course and speed. This was not pleaded, and, as pointed out by the President, was hardly suggested in the court below; but, in my judgment, the answer is the same as that which I have given to the earlier part of the case. I think that any retardation of her speed prior to 4.40 was in the ordinary course of her navigation and not when she was bound to act with reference to the *Canning*, whose duty it was to keep out of her way.

I am therefore of opinion that even if there had been a breach of the rule on the part of the *Bellanoch* in not sounding her whistle, it would be a purely technical objection, and that it had no possible effect on the collision. The captain of the *Canning* admitted that he saw what the *Bellanoch* was doing all the time, and he alleged that the collision was occasioned by the *Bellanoch* coming astern through the water, a case which has been entirely disbelieved by the learned President. I ought to add that it was at first contended that under the circumstances the *Bellanoch* was a vessel out of command and ought to have shown the signals prescribed by arts. 4 and 11 of the rules. The learned President considered that the *Bellanoch* was not in a condition which required her to show those signals, and I agree with him. For these reasons I am of opinion that the appeal should be dismissed.

MOULTON, L.J.—I regret that I cannot come to the same conclusion. This is an action brought by the owners of the steamship *Canning* against the owners of the steamship *Bellanoch* for damages occasioned by a collision between the two vessels on the 24th Dec. 1905, a short distance outside the harbour of Monte Video. The plaintiffs in their statement of claim throw the blame on the defendants' ship, and there is the usual defence and counter-claim in which the defendants throw the blame on the plaintiffs' ship. The court below has held the plaintiffs' ship alone to blame, and from this decision the present appeal is brought. To a great extent the circumstances under which the collision occurred are not in dispute. The place of the collision was a point about three-quarters of a mile outside the breakwater which defines the inner harbour of Monte Video, and almost in the line of the dredged channel which stretches from the breakwater towards the sea. It is admitted on both sides that it was practically daylight, although the sun had not actually risen. It is agreed that there was no tide and only a light N.E. breeze, which it is not pretended had anything to do with the events that happened. The *Canning* had lain in the inner harbour that night, and on leaving her moorings proceeded on the line of the dredged channel so as, in accordance with the direction of the pilot, to pass between the two buoys lying at a distance of about half a mile from the breakwater, which mark the line of the channel. The direction of her course was substantially due south. From the time that she came to the breakwater, where she landed her river pilot, she could see the *Bellanoch*. There is some dispute about the actual speed at which she was going, the plaintiffs' captain putting the maximum at five knots an hour and the defendants' evidence at somewhat over that. The *Bellanoch* had been anchored overnight in the bay to the south-west of the inner harbour, and some three-quarters of an hour before the collision occurred she had started in a direction substantially to the east and thus at right angles to the course taken by the *Canning*. She drew 20ft. 4in. forward and 24ft. 6in. aft, which was greater than the depth of water in that part of the bay, so that she was dragging through the mud all the time, the entry in the ship's log being "ship dragging heavily in mud and moving very slowly." According to the captain's evidence the actual rate at which she was going was about a mile an hour—it certainly could not have been more—and I think that we may safely take it that in the three-quarters of an hour before the collision she had made about three-quarters of a mile headway. But it is evident from the log of the *Bellanoch* that this ground was covered at an unequal rate. Her engines were going full speed ahead from 3.54 to 4.20, but from 4.20 to the time of the accident they were going ahead and astern alternately at short intervals. It is quite evident from the evidence what she was doing, and the nautical assessors inform us that they have no doubt on this point. She was dragging so heavily that she was from time to time brought to rest, whereupon she reversed her engines, went astern for a period over the channel which she had just cut for herself, and then started forward again, gaining acceleration as she did so, and charged into the mud before her with the impetus thus obtained. By this process of "tilting at" the mud she slowly made progress. In fact, her manœuvres were exactly those of a railway snow

plough in clearing away heavy snow drifts, and could not be better described than in the cross-examination of the defendants' helmsman by counsel for the plaintiffs. The log shows that the helmsman was entirely accurate in the evidence he gave, because it states that between 4.20 and 4.40 the engines went full astern three times, and that from 4.40 they went full ahead until the mud stopped the vessel, which was shortly before the collision, the time of which is given at 4.45. Under these circumstances the *Canning*, after going between the buoys, had the *Bellanoch* slightly on her starboard bow. It was her duty to go astern of her, and accordingly she ported her helm. There is substantially no contest so far, but here the divergence of the evidence commences. The captain of the *Canning* says that he hard-a-ported from the first, and that when he did so he had plenty of room to alter his course sufficiently to pass astern of the *Bellanoch*, but that the *Bellanoch* went astern, and that consequently the *Canning* was unable to clear her, and struck her on the port side some 40ft. or 50ft. from the stern. The master of the *Bellanoch* says that his ship was passing about 300 yards from the buoys, and that the *Canning* left her porting too late, and that she ought to have ported before arriving at the buoys; and he denies that his ship went astern after the *Canning* had ported. It is common ground, however, that the master of the *Canning* hailed him to go ahead as the ships approached. The captain of the *Canning* says the reply was: "I cannot go ahead, I am on the ground." The master of the *Bellanoch* says that his reply was: "I am going ahead all I can. I can do no more. My ship is on the ground." There is not much difference between the two versions, and as it is clear that the original statement of the helmsman of the *Bellanoch*, who heard it all, agreed with the evidence of the master of the *Canning* with regard to it, I think it is probable that the version given by the captain of the *Canning* is the more correct; but it is not necessary to decide this.

At the trial the President disbelieved the case made on behalf of the plaintiffs to the effect that the *Bellanoch* was going astern at the time of the collision. With this finding, which largely depended on oral testimony, we cannot interfere. The *Canning*, therefore, has no excuse for not clearing the *Bellanoch*. She either ported too late or did not port sufficiently, and she must be held to blame. It may, no doubt, be said on her behalf, that although she was aware that the *Bellanoch* was only moving very slowly, she did not know that the *Bellanoch* was liable to stop until too late. It is quite possible that the *Bellanoch* was, in fact, stationary, or almost stationary, during the critical minute or two immediately before the collision actually occurred, and that had she been moving, even at the average rate of progress which she had been making, she would have advanced the very short distance necessary to save the collision. But this is no defence for the *Canning's* action. Even if the collision had not occurred, the captain of the *Canning* would have been to blame for cutting it so fine. There was no excuse for so doing, and I therefore agree fully with the finding that the plaintiffs' vessel was to blame.

There is, however, a further question as to whether the defendant vessel was not also to blame, and on this point I regret that I find myself compelled to differ from the President of the court below, and, I fear, from my brethren here also. I have, however, a decided view upon the question, and as the points raised by the judgment seem to me to be of grave public importance, and as it may be that the case will go higher, I feel bound to give my reasons. I have already described the movements of the *Bellanoch* as taken from her own log. It is impossible to contest the proposition that these two vessels were under circumstances where the Regulations for Preventing Collisions at Sea were applicable to them. During the whole time material for the consideration of this case they must have been within a mile of one another and taking courses which crossed at right angles the distances being such that the vessels would probably meet at the point of intersection. I doubt if the *Bellanoch* was ever more than a quarter of a mile to the right of the line of course of the *Canning*, if so much. The decision of this court in the case of *The Beryl* (51 L. T. Rep. 554; 5 Asp. Mar. Law Cas. 321; 9 P. Div. 137) establishes what I should have thought was evident, even without a decision, that the regulations were intended not only to prevent collision, but to prevent risk of collision, and that they are applicable at a time when the risk of collision can be avoided. In fact, neither party seems to have suggested in the court below that the regulations were not applicable, and the decision takes it to be so. The next point that is clearly made out is that these ships were crossing ships. From the first the *Canning* had the *Bellanoch* on its starboard bow, and therefore by art. 19 was from the first under the obligation of keeping out of the way of the *Bellanoch*. This renders it indisputable that the *Bellanoch*, by virtue of art. 20, was under the correlative duty of keeping her course and speed. The judgment of the court below finds that she did so. I shall, in favour of the *Bellanoch*, accept this finding as correct, and, indeed, I agree with it. The circumstances were peculiar, but certainly the *Bellanoch* was keeping the same course throughout and was going at the best speed she could under the circumstances. Similarly, I shall accept in the *Bellanoch's* favour the finding that she was under command, though I have more doubt about it. A reasonable interpretation of "under command" would seem to me to be that the ship is capable of performing the ordinary manœuvres which would be expected of such a ship, and I have doubts as to whether a steamer that can only go ahead, and that very slowly, by repeated reversals of her engines, and can only imperfectly obey her helm by reason that she is on the ground, can be said to be under command. But it is unnecessary for me to discuss either of these findings, for I shall assume them in favour of the *Bellanoch*. If either of them be not justified she was certainly at fault, since it is admitted that she did not give the signals required by art. 4 to be given by a ship that is not under command. The next point that is clearly made out is that these two vessels were throughout in sight of one another. It could not be otherwise, for there was no obstacle whatever in the way, and it was fine weather and daylight. In fact, all the evidence shows that not only were the ships

in sight one of the other, but the men on each ship were actually watching the other ship. It follows as a statutory conclusion from these facts that under regulation 28 the *Bellanoch* was under the obligation to give the sound signals there prescribed in order to indicate what she was doing to the approaching ship. Now, we have it both from her log and from the evidence of her helmsman that during this period the engines of the *Bellanoch* were on three occasions going full speed astern, and therefore it was her duty to give on each of those occasions the signal of three short blasts to indicate the fact. She did not do so on any of the occasions. Similarly, though proceeding under a port helm, she omitted until the last occasion to give the corresponding signal, and then only did so at the last moment. She therefore committed a breach of the regulations, or, as it is commonly called, incurred statutory blame, and must, under sect. 419 of the Merchant Shipping Act 1894, be deemed to be in fault unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the regulations necessary.

There is no pretence for saying that any such circumstances existed in the present case. No one could contend that it was necessary for the captain of the *Bellanoch* to omit to give these signals on any one of the three occasions. Nor does the judgment of the learned President proceed on any such ground. He absolves the *Bellanoch* from blame for not giving the statutory signals by calling in aid the provisions of art. 27, and it is this part of the judgment of the learned President which I view with such grave misgiving, deepened by the respect which I have for his judgment and great experience in these matters. He holds that the captain of the *Bellanoch* was justified in withholding the signals which would have indicated to the *Canning* that she was reversing her engines because the information so given might have induced the master of the *Canning* to take a wrong course. It appears to me that this is *pessimi exempli*. The regulation directs that the vessel shall give the prescribed signal when the engines are going full speed astern. It is not left to the captain to decide whether or not it would be better to give the prescribed signal. The object of this regulation being made statutory and enforced by such strong statutory sanctions is for the very purpose of preventing captains from so acting. The captain of the *Canning* was entitled to be told what the *Bellanoch* was doing, and the responsibility is upon him to take the proper course upon such information being given. The gravity of the decision is that the issue is not whether the captain of the *Bellanoch* acted with good intentions; it is whether he acted according to the regulations. The decision of the court that he was justified in withholding the information because it might be put to a wrong use would, in my opinion, destroy the value of the imperative character of the provisions, and it would leave captains of all vessels uncertain whether they were being informed or deceived as to the movements of the vessels near them. I hold, therefore, that it is a breach of the regulation to withhold these signals on the occasion when they are prescribed, and that such a breach is not purged by showing that it was possible, or that the captain of the defaulting ship believed it to be possible, that the information might encourage the other ship to act unwisely. But I have the gravest doubt whether art. 27 has any application to a case of the withholding of information ordered to be given by art. 28. It will be seen that art. 27 comes at the end of and forms a member of a group of articles headed "Steering and Sailing Rules." It does not stand apart, as does art. 29, so that the word "rules," when used in it, has to be taken by the court to have general application to all the thirty-one rules and regulations, but it may bear the more limited meaning which would make it apply only to the group of rules in which it stands. When the language of art. 27 is closely scrutinised, the probability of this being the true interpretation is greatly increased, because we find that it speaks of a departure from the "above rules." It is scarcely possible that in a code drawn up with such care the word "above" would have been inserted if the word "rules" were intended to have the broader and not the more limited construction, and, although I do not wish to decide the point, I incline to the view that art. 27 had in contemplation only deviations from the "steering and sailing rules," and that above all it did not contemplate any relaxation of the imperative orders as to signals such as are contained in art. 28.

Nor do I think that it applies to circumstances such as are found in the present case. It does not leave captains at liberty to consider to what extent they shall obey the regulations as to signals during the period of from five to twenty minutes before the collision, but only applies to cases in which, in the throes of the danger, a departure from the strict observance of the rules is imperatively forced upon the captain of a ship by the danger in which he is placed.

But the courts have by their decisions rendered it necessary to notice another point which may in some cases be raised. They have held that where the omission is of such a character that it could not possibly have affected the events, it may be put on one side as not material to the case, so that it is ordinarily stated that where there is a breach of the regulations the offending vessel may still be held not to be in fault if it can be shown that the breach could not possibly have affected the matter. But it must be borne in mind that this issue is not whether the performance of the obligation would have affected the collision, but whether it could possibly have done so. For instance, if a ship is run down in broad daylight its rights would not be affected by the fact that it was not carrying an efficient fog-horn, or if it was run down by a vessel which was all the time to port, its rights would not be affected by its being shown that something was wrong with its starboard light, if that could not possibly have been seen by the offending vessel. The circumstances in the *Duke of Buccleuch* (*ubi sup.*), which is the case usually quoted in support of the doctrine, were substantially of this latter kind, inasmuch as the statutory breach was a defect in one of the lights of the vessel which could not have affected the matter. This must not be treated as though it were another statutory exception, of like status to that to be found at the end of sect. 419 (4). The courts have no power to add to a statute. The matter depends solely on the right of a court to reject that which is in its nature essentially immaterial in fact when considering the purview of the statute. It

is somewhat akin to an application of the legal maxim: *De non apparentibus et de non existentibus eadem est ratio.* But no circumstances exist here which would justify the application of such a principle.

It is impossible to say that if the *Canning* had been told on three separate occasions within a space of less than half an hour the *Bellanoch* had reversed its engines it might not have affected the conduct of the *Canning*. The most stupid of sailors must have realised that he could not calculate on the behaviour of a ship crossing his course which it was his duty to avoid, when it was alternately driving its engines ahead and astern in this way, and a natural consequence would be that he would approach it slowly and give it a wide berth when passing it. But it is not necessary or permissible to argue whether the *Canning* would or would not have acted thus on the information given to it. It is sufficient if the information was of a character which might possibly bear on the question of her course and speed, and it appears to me impossible to decide this otherwise than in the affirmative. In my opinion the courts must be very careful lest, under this plea that a breach of the statutory regulations could not possibly have affected events, they allow to creep in the question of what would or would not probably have occurred had the regulation been adhered to, and thus re-introduce the old issue of whether the breach contributed to the collision, which it was the direct object of sect. 419 to abolish in case of breaches of the statutory regulations. The statutory blame makes the offending vessel in fault unless the omission is of such a nature that it could not possibly have affected the course of events in any way, and I doubt if we can say this in any case where the omission is not of a matter which would never have come to the knowledge of the other ship. I am therefore of opinion that both vessels were to blame.

KENNEDY, L.J.—I have had an opportunity of reading the judgment which has been pronounced by the Lord Chief Justice, and I entirely concur in that judgment, both in its reasons and in its conclusions. I also desire to say that, with one slight exception, which is really immaterial for the purpose of this appeal, I agree with the judgment which was pronounced by the President of the Division. That slight exception is this, that I do not find in the evidence anything which would lead to the conclusion that there was some current setting across the course which would account for the mistake made by those who were navigating the *Canning* in giving insufficient room for the clearance of the vessel, which they were bound to avoid. Having said so much, I have to add but very few words to the judgments already pronounced. In my judgment it is clear that there was no statutory necessity, or necessity under the terms of the rule referred to, for any signal such as Moulton, L.J. has suggested to be given by the *Bellanoch*. It is not a question at all, in my opinion, of any judicial view in any way varying, or seeking to vary, statutory regulations, because in my opinion the statutory regulation referred to has no application to the period within which it is suggested that the *Bellanoch* ought to have given the signals that she at that time was reversing. Nobody can dispute, in this court, the judgment which has been given in the case of *The Beryl* (*ubi sup.*), which dealt broadly with the question of the time at which vessels, having a duty to act, ought to take steps, in accordance with the rules, to fulfil their duty, and nobody disputes that the time is when it is, or ought to be, apparent that there will be risk if nothing is done to prevent it. That is the rule, and it is, I venture to say with great respect to the judgment which has been pronounced, in my view not at all the right position to take up, that the period at which the complaint is made of the *Bellanoch's* not sounding her whistle was a period in which it was, and ought to be, apparent that there was any risk if nothing was done. That, I think, is the very language of *The Beryl*, and I wholly adopt that decision. I think, as a matter of fact, that there was no point prior to the time at which the offending vessel, the *Canning*, reached the buoys, at which there was anything which, under rule 28, called for a signal; indeed, I would go so far, having the authority of a judge of very great experience, the President of the Admiralty Division, to support it, as to say that I think that it would have been a wrong thing to do, because misleading. But I wish to point out, with regard to that, that as I read the judgment it certainly does not, as a necessary ground for the judgment, say that the *Bellanoch* must be held to be excused because of art. 27. The learned judge has expressly found that there was no breach on her part, but he says equally that if there is a technical breach proved he holds her excused under this article. In that he may be right, or he may be wrong. I do not think it necessary to enter into that discussion at all; but it is only just to him, after what has been said, to point out that his reference to art. 27 is after the words "even if it could be said that there was a breach of the article"—that means that if there was a breach he was prepared to hold there was a notification which made that immaterial under art. 27. I certainly hold, without any reasonable doubt, that there was no obligation on the part of those who were navigating the *Bellanoch* to give any intimation until the other vessel was in a position not of risk of collision, but in a position in which it ought to be apparent that there would be risk if nothing was done to prevent it. As to this case, I confess myself as leaning to the view that one ought to treat with some suspicion a change of case that is made in the course of an Admiralty trial. I look at the case which is actually put by the *Canning* in par. 3, in which they set out their statement of facts and their complaint. They describe themselves as having very particularly noticed the *Bellanoch* apparently under way about three-quarters of a mile off, and about ahead, and then follow these words: "The *Canning* kept on down the channel till she was in a position at the black buoys to do so, when she hard-a-ported her helm to pass astern of the *Bellanoch*, which had remained much in the same position." What is the meaning of that?—that the *Canning* says, to my mind, by implication of the clearest kind, that there was nothing we could do which we were in a position to do until we passed the buoys; in other words, if they are observing, as one does not dispute in this respect, the duty cast upon them, of avoiding the other ship in the position in which she was, they were not in a position to act

at all; they could not act, and it was immaterial that any signal should be given to them until they reached the buoys. It seems to me, if that is so, the complaint which they meant to urge and which they were deliberately putting on the pleadings is not right—namely, that after the position arose in which the rule in *The Beryl* (*ubi sup.*) would apply, the other vessel was in fault. That is the real case which they allege; then they go on to say that "the *Canning* swung under a port helm, drew nearer to the *Bellanoch*, and the latter was observed to be moving astern," and so on. It is quite true that they do include art. 28 in par. 7 of the claim as an allegation that there was a breach of that article; but to what period were they then referring? Not to the period before the buoys, which they themselves have discarded as an important period by their pleadings, but they were saying that the *Bellanoch*, after she was port to port, and when the period of action under the rules had arisen, moved her engines astern without giving the signal under art. 28. I can understand, looking at the evidence and the pleadings, that that was the case which they came to fight, and the case upon which they would have had real ground of complaint had their evidence been truthful, and been believed by the court, as to whether or not the vessel did then go astern. If she did she was bound to give a signal under art. 28, and that was their allegation, and it seems to me that it was not only a really technical point, but a point that was not made, and I think it was rightly not made, because when you come to look at art. 28 that clearly says that when vessels are in sight of one another "a steam vessel under way in taking any course 'authorised or required' by these rules shall indicate that course by the following signals on her whistle or siren—namely, three short blasts to mean my engines are going full speed astern." To what does that relate? It is made clear by the following words: "Any steam vessel under way in taking any course authorised or required by these rules shall indicate that course." I am not at all desiring to put a harsh meaning on the words "authorised or required," but "authorised or required" must surely mean some direction which, according to the doctrine of *The Beryl* (*ubi sup.*), a seaman ought to know, because he has to act, and if so he is authorised and required to perform the manœuvre. In *The Uskmoor* (*ubi sup.*), which was referred to, the word "authorised" has a larger meaning than "required." If the *Canning* herself says, "I was not in a position to act until I got to the buoys," if a vessel going down a dredged channel, a loaded vessel, until she gets to the buoys cannot safely navigate, if she knows that the other vessel would not expect her to navigate, it seems to me that there is no requirement or authority on the part of this other vessel, until that time comes, under those articles, to give the signals which are required. I am therefore of opinion that on this matter the *Bellanoch* is free from blame, and that the judgment appealed against is right.

The plaintiffs appealed to the House of Lords.

Aspinall, K.C., *Horridge*, K.C., and *Bateson*, for the appellants, contended that as the two vessels were in sight of each other the *Bellanoch* was in fault in not indicating by whistle signals that her engines were going full speed astern, and thereby infringed art. 28 of the Regulations for Preventing Collisions at Sea, and was in part to blame for the collision. She also infringed the regulation in not indicating by whistle signal that she was porting her helm. She came astern negligently, and must be held to have been either "not under command" or "aground" within the meaning of regulations 4 and 11, and did not exhibit the signals required by those articles. They referred to

The Khedive, 4 Asp. Mar. Law Cas. 182, 360, 567; 43 L. T. Rep. 610; 5 App. Cas. 876;
The Uskmoor, (*ubi sup.*);
The Anselm, *ante*, p. 438; (1907) P. 151.

Cohen, K.C., *Laing*, K.C., and *Robertson Dunlop*, who appeared for the respondents, were not called on to address their Lordships.

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

July 2, 1907.—The Lord Chancellor (Loreburn).—My Lords: I think that the judgment of the court below, affirming that of the President of the Admiralty Court, ought to be affirmed. I hope that I shall say nothing to indicate any doubt as to the duty of obedience to the 28th article. It ought to be remembered that the object of that article is to give information to another vessel, and it ought to be very strictly observed. In this case I am inclined to agree with the judgment of Kennedy, L.J. that in the peculiar and exceptional circumstances, inasmuch as both vessels were more or less in the mud, there was no obligation to give a signal until the *Canning* came to the buoys, after which there was, in fact, no default. I will assume, although I will not affirm, that the duty of the *Bellanoch* was to sound three short blasts on each of the three occasions when, according to her log, she reversed her engines. I think that if she had done so it could not in this case have affected the collision. The master of the *Canning* knew the course of the *Bellanoch*, and what her manœuvring was, and a whistle could not tell him anything but what he knew already, and could not have affected his action. For those reasons I submit that this appeal ought to be dismissed with costs.

Lord Ashbourne.—My Lords: I entirely agree with the judgment and order indicated by the Lord Chancellor. I should be very sorry to say anything to weaken the effect of the stringency of the 28th article, but I think for the reasons stated that it is avoided in this case.

Lords Macnaghten, James of Hereford, and Atkinson concurred.

Judgment appealed from affirmed, and appeal dismissed.

Solicitors for the appellants, *Stokes* and *Stokes*, for *Thornely* and *Cameron*, Liverpool.
Solicitors for the respondents, *Lowless* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

March 23 *and* 25, 1907.

(Before Sir GORELL BARNES, P., MOULTON and KENNEDY, L.JJ.)

THE HOPPER NO. 66. (*a*)

Collision — Limitation of liability — Right of charterer by demise to limit—"Owners" — Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *ss.* 503, 504.

Contractors hired from the owners the steam Hopper No. 66 *for eighteen months upon terms which amounted to a demise of the hopper.*

While the hopper was still on hire and while being navigated by the servants of the contractors she collided with and sank a steamship.

The owners of the steamship and her master and crew then brought an action in personam *against the contractors to recover damages caused by negligence, and in that action recovered judgment, the* Hopper No. 66 *being held alone to blame.*

The contractors then instituted proceedings as "owners" of the Hopper No. 66 *claiming to limit their liability under sects.* 503 *and* 504 *of the Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60).

Held, that charterers by demise are not "owners" within the meaning of sect. 503 *of the Merchant Shipping Act* 1894, *and therefore the contractors had not the right to limit their liability in respect of loss or damage caused by the improper navigation of the chartered ship by their servants.*

Decision of Bargrave Deane, J., The Hopper No. 66 (94 *L. T. Rep.* 344; 10 *Asp. Mar. Law Cas.* 203; (1906) *P.* 34) *affirmed.* (*b*)

APPEAL from a decision of Bargrave Deane, J. by which he held that the charterers of the *Hopper No.* 66 were not entitled to limit their liability in respect of a collision which occurred between that vessel and the steamship *Blanche*, on the 30th Nov. 1904.

The *Hopper No.* 66 was demised to Sir John Jackson Limited by her owners, the London and Tilbury Lighterage, Contracting, and Dredging Company Limited.

An action *in personam* was brought against Sir John Jackson Limited for the damage caused by the negligence of his servants in the navigation of the *Hopper No.* 66. In that action the *Hopper No.* 66 was found alone to blame.

On the 17th Nov. 1905 Sir John Jackson Limited issued a writ in a limitation suit claiming to limit his liability to an amount not exceeding 15*l.* per ton on the tonnage of the *Hopper No.* 66.

The facts are fully set out in the report of the case below, *The Hopper No.* 66 (*ubi sup.*).

J. A. Hamilton, K.C. and *Dawson Miller* for the appellants, the charterers of the *Hopper No.* 66. The charterers are owners within the meaning of sects. 503 and 504 of the Merchant Shipping Act 1894. The collision took place without their actual fault or privity, and the fact that they are not on the register is immaterial:

The Spirit of the Ocean, 12 L. T. Rep. 239; 2 Mar. Law Cas. O. S. 192 (1865); Br. & Lush. 366.

In other sections of the Act the words "owner" and "charterer" are used as equivalent terms as in sect. 289 (1) and (3) of the Act, which deals with the surveying of emigrant ships. In other sections the word "owner" obviously includes the words "charterer" as in sect. 502, which enacts that an owner of a ship shall not be liable in certain cases for damage to goods caused by fire; the word "owner" in that section must mean the person who undertook to carry the goods, and he is not necessarily the owner of the ship. So, too, in sect. 419, which requires all owners and masters to obey the collision regulations. And by sect. 458 (1) in every contract of service with a seaman there is to be an implied obligation on the owner that the person charged with the loading of the ship shall use all reasonable means to insure the seaworthiness of the ship; the "owner" in this section clearly means the person who enters into the contract with the seamen, and in the case of a ship chartered by demise that would be the charterer. Under sect. 111 the only persons who may engage seamen are persons licensed by the Board of Trade or owners of ships; under the corresponding section of the Act of 1854 a person who had contracted to buy a share in a ship was held to be an owner:

Hughes v. *Sutherland*, 45 L. T. Rep. 287; 4 Asp. Mar. Law Cas. 459 (1881); 7 Q. B. Div. 160.

Sect. 143 provides that a person in whose favour a seaman has made an allotment note of part of his wages may recover the amount from the owner, and under the Act of 1854 the "owner" where the ship is chartered by demise has been held to be the charterer:

Meiklereid v. *West*, 34 L. T. Rep. 353; 3 Asp. Mar. Law Cas. 129 (1876); 1 Q. B. Div. 428.

There are many cases in which when complete control is in the charterer he has been held to be the owner:

Trinity House v. *Clark*, 4 M. & S. 288.

A charterer by demise has been called a *pro hâc vice* owner:

The Lemington, 32 L. T. Rep 69; 2 Asp. Mar. Law Cas. 475, at p. 478 (1874).

And in such a case it has been held that a shipowner is not liable for damage to goods caused by the unseaworthiness of the ship:

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

Bateson (*Aspinall*, K.C. with him).—The charterers are not owners; they could not be registered. The history of the legislation on this subject shows that the limitation of liability was for the protection of the owner of a vessel;

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

(*b*) A charterer to whom a ship is demised is now included in the word "owner," for the Merchant Shipping Act 1906 (6 Edw. 7, c. 48), s. 71, provides that "sections 502-509 of the principal Act shall be read so that the word 'owner' shall be deemed to include any charterer to whom the ship is demised." This Act came into force on the 1st June 1907.—ED.

7 Geo. 2, c. 15, which is the first Act, clearly shows this is so. The Acts confer a privilege on the owner, and they must be construed strictly:

The Andalusian, 39 L. T. Rep. 204; 4 Asp. Mar. Law Cas. 22 (1878); 3 P. Div. 182.

Until the Merchant Shipping (Liability of Shipowners) Act 1898 (61 & 62 Vict. c. 14), the owner of an unregistered ship could not limit his liability, and when the Legislature intended to extend the benefit to builders or others interested in the ship, they did it in express terms. Again, the Merchant Shipping Act (Liability of Shipowners and Others) Act 1900 (63 & 64 Vict. c. 32), s. 2, which extends the protection to owners of docks or canals, by sub-sect. 5 includes in the word owner any person having control or management of any dock, which shows how careful the Legislature is as to who is granted the protection. If charterers are included in the word owners, sect. 12 of the Regulation of Railways Act 1871 (34 & 35 Vict. c. 78) was quite unnecessary, for the railway companies could have protected themselves by chartering vessels by charters amounting to a demise. A special enactment is necessary before these plaintiffs can claim the benefit of the limitation sections.

Hamilton, K.C. in reply.

The President.—This is an appeal from a decision of Bargrave Deane, J. giving judgment for the defendants in a limitation suit. It appears that on the 30th Nov. 1904 the steam *Hopper No.* 66, whilst proceeding from the Langton Dock, Liverpool, to sea, with a load of excavations, collided with the steamship *Blanche* in Liverpool Bay. In consequence of the collision the *Blanche*, which was bound from Fleetwood to Liverpool, sank, together with her cargo of gravel, and was lost, and seven of her crew lost their lives. The learned judge finds that the collision was caused by the negligent navigation of the steam *Hopper No.* 66 by the plaintiffs' servants, but without the actual fault or privity of the plaintiffs. Claims appear to have been put in, and the plaintiffs, Sir John Jackson Limited, on the 17th Nov. 1905, instituted in the Admiralty Court a limitation suit, claiming to do so as the owners of the steam *Hopper No.* 66.

They really were charterers by demise — the charter-party is set out, and the learned judge in his judgment gives the substantial paragraphs of it—by which the complete control over this steam hopper was given to the plaintiffs, but the legal ownership remained with the London and Tilbury Lighterage, Contracting, and Dredging Company Limited, the registered owners of the hopper. In their defence to the limitation suit the point which gave rise to this appeal was raised by the defendants' pleading that the plaintiffs were not at any time material the owners of the *Hopper No.* 66. The point was thus clearly raised whether the limitation sections of the Merchant Shipping Act applied to a vessel which is chartered by demise to the persons who are working her. I suppose that since the Act of last year such a point could hardly arise. What Bargrave Deane, J. said in the matter, after referring to the cases which had been cited to him, was this: "I now turn to the very simple defence put forward, which is as follows: This is a claim for a compensation for a tort, and the full compensation is due to the claimants, unless there is any statutory provision which may reduce it. It is said that the Merchant Shipping Act 1894, sects. 503 and 504 do. That Act must be construed strictly. The limitation of the liability to make full compensation is expressly reserved to 'owners,' and you cannot read into the sections words limiting or varying or adding to the word 'owners.' The owners of the steam *Hopper No.* 66 are and were the London and Tilbury Lighterage, Contracting, and Dredging Company Limited. Sir John Jackson Limited were the charterers, and the sections do not include charterers within the term owners." I agree in substance with what the learned judge has said, and I should like to expand a little more the reasons which induce me to arrive at my conclusion. Looking at the history of this legislation, I think it is fairly obvious that from first to last what has been dealt with is the real ownership of vessels; and, when the Merchant Shipping Act 1894 is looked at, the idea running through it is that it is dealing with ships and their real owners.

The first section and the second section, which dealt with the qualification of owners of British ships, and the necessity for registration thereof, have some bearing upon one point, because the section which we have to consider, sect. 503, which dealt with the owners of a ship, British or foreign, fortifies the view that what is being dealt with is the real owner of the vessel. In sect. 289 I find there is express mention of something to be done at the expense of the owners or charterers of the ship. In sub-sect. 3 of the same section there is again a dealing with the cost of surveys and expenses of the owner or charterer of the ship. In sub-sect. 4 there is this provision: "If any requirement of this section is not complied with in the case of any emigrant ship, the owner, charterer, or master of the ship, or any of them," &c. Again, sect. 293 has a similar provision imposing a penalty of 50*l.* for breach of the section upon "the owner, charterer, or master of the ship." Again, sect. 300 begins: "The owner or charterer of every emigrant ship." So that we find certain sections which specifically refer to the charterers by name, to show that where the word owners could not necessarily include the charterers, the word charterer is used.

It is an Act dealing primarily with owners, but in one or two sections introducing the word charterer, and in one or two instances, by the necessity of the case, forcing upon the word owner in a particular section a construction which does not mean owner unless he has control of the ship: (see *Hughes and Sutherland, ubi sup.*, and *Meiklereid and West, ubi sup.*). So we come to consider whether in the particular sections with which we have to deal there is anything which forces on us the construction contended for by the appellants in this particular case, because, unless there is, it seems to me we ought to give the term owner its natural meaning.

These limitation sections are a limitation upon the right of persons to maintain their action, and ought to be construed strictly, and if we turn to the sections I find that there is a clear indication in the actual wording of the section to support the view which is that of the learned judge in the court below. In the first place, sect. 502 commences with "the owner of a British sea-going

ship or any share therein." Again, sect. 503 does not begin in quite the same way, but subsect. 3 contains the words "the owner of every sea-going ship or share therein." Sects. 505 and 508 also use the words "part owners." I think, having regard to the language of those sections and the necessity of construing them strictly, there can be no reasonable ground for contending that as they stand and as they are drawn they include the word charterer.

Counsel for the defendant has referred to one or two Acts of Parliament to show that where there has been some further extension of the doctrine of limitation of liability there have been words introduced for the purpose. For instance, the Act of 1898 provided for its extension to contractors and other persons who might be interested in getting a ship from the place where she was launched to the place where she is to be registered. The words used are more extensive than the word owners. Again, in the Act of 1900 there is an extension of the limitation to owners of a dock or canal. Though this is not such a strong instance as the previous Act, there are words used extending the limitation beyond the owners and including in the term owners "any person or authority having the control and management of any dock or canal." It goes to show that where there has been a desire to extend the limitation beyond persons who are owners it has been done by separate statute. The last Act was that which extended the limitation of liability to charterers by demise. In my opinion the true meaning of the "limitation" sections of the Act of 1894 is that they are confined to persons who are the real owners of the ship and not charterers, and I think the judgment of the court below was right and this appeal must be dismissed.

MOULTON, L.J.—I am of the same opinion and for the same reasons, and therefore I have very few words to add. I am compelled to realise that throughout this long Act the word "owner" has not been used in strictly the same sense, but I should be very sorry to accept the contention that in part 8, which relates to a small and very definite question, there is any variation in the meaning of the word "owners." In some of these sections, as the President has shown, it is quite clear that the word "owner" means the true owner. It is contended in this case that it includes lessee. I can see no justification for holding that it does extend to lessee, and I may point out that sub-sect. 3, of sect. 503, which says that each separate accident must be accounted a separate liability to the owners, and that if they choose to avail themselves of this limitation of liability they must do so by separate action, is made to apply to "the owner of every sea-going ship or share therein." It is evident that so far as the class of people to whom this section is to apply is concerned, it must be intended to apply to every person who comes under the benefit of the first sub-section, which gives the limitation; in other words, that "the owners of a British ship," referred to in sub-sect. 1, cannot be wider than the class defined as "the owner of a sea-going ship or any share therein." That shows that the framers of the Act were thinking of the real owners, and not of the lessees.

KENNEDY, L.J.—I agree.

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

Solicitors for the respondents, *Batesons, Warr, and Wimshurst*, Liverpool.

HIGH COURT OF JUSTICE

KING'S BENCH DIVISION.

Friday, May 10, 1907.

(Before CHANNELL, J.)

ANDERSON *v.* MARTEN. (*a*)

Insurance—Marine — Time policy on disbursements—Perils of the seas—Warranted free of capture, seizure, and detention, and consequences of hostilities—Neutral ship carrying contraband of war—Damage by collision with ice causing leaks—Capture by belligerent before making port of refuge—Beaching of vessel—Total loss—Subsequent condemnation by prize court— Divesting of property — Liability of underwriters.

A vessel carrying contraband of war and bound for V. was insured against perils of the seas on a time policy for disbursements in respect to total loss only.

The policy contained the clauses: "Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." "Warranted free from capture, seizure, and detention, and the consequences of hostilities. . . ."

The effect of the policy as agreed was that, although the policy was a policy for disbursements and in respect of a total loss only, the point was the same as whether the ship was totally lost. The vessel, by reason of leaks caused by collision with ice, gave up going directly to V., and made for a port of refuge.

The vessel, which had a good chance of reaching the port of refuge, was stopped by belligerents, who put a prize crew on board, and ordered the vessel to proceed to Y., where a prize court was sitting.

On the voyage to Y., by reason of the leaks caused by the collision with ice becoming worse, the vessel was beached and became a total loss. The vessel was subsequently condemned by the prize court.

In an action against underwriters to recover as for a total loss by perils of the seas:

Held, the underwriters were not liable under the policy, because when the ship was lost by perils of the seas she was then the property of the captors and not of the assured, the effect of the capture and subsequent condemnation by the prize court being to divest the property in the ship from the shipowner.

Semble: *That the shipwreck was not a loss in consequence of hostilities within the meaning of the warranty.*

COMMERCIAL LIST.

Action tried before Channell, J., sitting without a jury.

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

The plaintiff was the owner of the steamship *Romulus*, and the defendant was an underwriter at Lloyd's.

The plaintiff's claim was for a total loss of disbursements, caused by perils of the seas, under a marine policy of insurance, dated the 11th Jan. 1905, for 3300*l.* on disbursements per the ship *Romulus* subscribed by the defendant for 200*l.*

The defendant alleged that the disbursements per the ship *Romulus* were not lost by perils of the seas.

The policy, which was a Lloyd's policy, contained the following provisions:

For and during the space of twelve calendar months commencing the 12th Jan. 1905 and ending the 11th Jan. 1906, both days inclusive, beginning and ending with Greenwich mean time. 3300*l.* upon any kind of goods and merchandises, and also upon the body, tackle, apparel, ordnance, munition . . . of and in the good ship . . . called the *Romulus*. . . . The said ship, &c., goods and merchandises, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at say on disbursements subject to the printed clauses attached, touching the adventures and perils which we the assurers are contented to bear . . . are, of the seas, men-of-war . . . takings at sea, arrests, restraints, and detainments of all kings, princes, and people . . . and of all other perils, losses . . . the consideration due unto us for this assurance by the assured at and after the rate of 75*s.* per cent.

The following clause was stamped upon the policy:

Warranted free of all average, being against the risk of total and (or) constructive total loss of steamer only as per clause attached.

The following clause was written:

No claim for salvage charges to attach hereto.

The attached clauses provided (*inter alia*) by clause 4:

Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy.

And by clause 5:

Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy and barratry excepted. . . .

The *Romulus* loaded at Cardiff on the 11th Dec. 1905 a cargo of coal for Vladivostok during the war between Russia and Japan, such coal being contraband of war.

The vessel, to avoid the attention of the Japanese cruisers, proceeded well to the eastward and northward of Japan, intending to make Vladivostok by passing through the Urup Strait (between Company's Island and Black Brothers in the Kuril Islands) and La Perouse Strait. In anticipation of meeting floating ice, the collision bulkheads had been shored up.

The vessel proceeded through Urup Strait, but on the 21st Feb. 1905 collided with floating ice, which damaged the bows, causing the vessel to make water. The water rose in holds No. 1 and No. 2, and the pumps were worked. Being in a dangerous state by reason of the risk of the fine coal getting into the bilges and choking the pumps, the captain put about and repassed the strait, abandoning the attempt to proceed to Vladivostok.

The crew mutinied, and the captain made for Hakodate as a port of refuge. Some of the cargo was jettisoned.

The vessel being down by the head, the course held was along the coast in case necessity arose of beaching the vessel.

On the 26th Feb. the vessel was not leaking quite so much. On that date, at 7 a.m., when thirty miles from Hakodate, the vessel was stopped by a Japanese cruiser. A Japanese officer remained on board, who directed the vessel to be steered for Yokosuka, where there was a prize court.

On the afternoon of the 26th Feb. the water increased rapidly in holds No. 1 and No. 2, and on the early morning of the 27th Feb. the water ran into the engine-room, and the vessel was steered for the shore. Before a spot was selected the vessel grounded at a place forty miles from where she was arrested. Not being able to be got off, the vessel was driven firmly on to the beach. The vessel became a total wreck, having broken her back.

On the 16th May both the ship and cargo were condemned by the prize court.

J. A. Hamilton, K.C. and *Balloch* for the plaintiff. —The vessel was a total loss caused by perils of the seas before condemnation by the prize court, and therefore the plaintiff can recover. The vessel might have foundered at any moment. The vessel might or might not have made Hakodate. But the cause of the loss having to be the approximate cause, it is immaterial to consider whether the vessel could or would have reached Hakodate. Had she gone there, however, she would have had to have stemmed an adverse tide, and could not have entered the harbour, because of the mines, until daybreak, and by that time she would probably have sunk. The arrest was not the approximate cause of the loss; it was only a conditional arrest. If the vessel was finally lost when the Japanese officer came on board and took charge, the assured's interest was gone. That cannot be so. The taking charge of the vessel was no taking out of the possession of the owner. The Japanese merely required the vessel to go to Yokosuka. It is not true to say that the vessel was taken from a place of safety into a dangerous place. Nor is there any authority to show that the vessel was lost directly the Japanese came aboard her. The policy is a time policy (not a voyage policy), and the deviation from Hakodate to Yokosuka does not put an end to it, and the vessel remains insured unless the underwriters can say that the ship has been already lost, which was not so. Unless it can be shown that the vessel had gone altogether on the 26th Feb., the loss on the 27th Feb. is the loss. The putting on board a prize crew cannot of itself cause the ship to be considered lost:

Ruys v. *Royal Exchange Assurance Corporation*, 8 Asp. Mar. Law Cas. 294; 77 L. T. Rep. 23; (1897) 2 Q. B. 135.

There may have been a capture, but there certainly was no loss by capture. As to the defendant's contention that the stranding was a loss resulting from the consequences of hostilities, it cannot be said that the stranding was proximately caused by the taking the day before. The old leaks made the vessel become a loss, and the beaching of the vessel and the breaking of

the vessel's back was caused, not through anything connected with the capture, but merely from fear of losing life due to the vessel filling with water from the leaks caused by the ice. Had the captain intended to go to Yokosuka instead of Hakodate, the loss would have occurred just the same. Had the vessel proceeded to Hakodate, the same bad weather might have been encountered. The Japanese officer's orders to proceed to Yokosuka were the remote cause. The principle of *proxima causa* has never been in doubt:

Dudgeon v. *Pembroke*, 2 Asp. Mar. Law Cas. 323; 31 L. T. Rep. 31; (1874) L. Rep. 9 Q. B. 581.

The property in the vessel did not go out of the plaintiff until condemnation by the prize court. Property and possession and insurable interest were in the plaintiff up to the time of stranding. "It has long, however, been the established rule of our law maritime that the property is not changed by capture in favour of a vendee or recaptor, so as to bar the original owner, till there has been a regular sentence of condemnation": (Arnould on Marine Insurance, 7th edit., sect. 830). "Property, therefore, in neutral goods or vessels which are seized by a belligerent does not vest upon the completion of a capture. It remains in the neutral until judgment of confiscation has been pronounced by the competent courts after due legal investigation": (Hall's International Law, 1904, 5th edit., p. 734). The plaintiff therefore had an interest in the vessel at the time of the shipwreck.

Scrutton, K.C. and *Bailhache* for the defendant. —The Foreign Office *précis* of the prize court decision is conclusive evidence of the capture on the 26th Feb. and the subsequent condemnation. The decision shows that the vessel was really going to Vladivostok, and that the damage caused by the ice was not so serious as the plaintiff alleges. The vessel was captured on the 26th Feb., and that is an excepted loss. Alternatively, the loss was a consequence of hostilities. The belligerent took the vessel out of smooth water into a stormy sea. But for the taking, the vessel would never have got to the place where she was beached. Being the consequence of hostilites, the loss is not one for which the underwriters are liable. The vessel on the 26th Feb. was captured and was afterwards condemned; it was taken away absolutely from the owner on the 26th Feb. If the policy had insured against capture, seizure, and detention, the owner could have sued the underwriters when the vessel was arrested, and, if that risk had been insured against, it could not have been said that the loss was not the result of capture. In *Ruys* v. *Royal Exchange Assurance Corporation* (*ubi sup.*) a vessel was insured against war risks, and, whilst carrying contraband, was captured by a cruiser belonging to a belligerent. The owners gave notice of abandonment, which the underwriters refused, and the owners then sued the underwriters. After the date of the writ the prize court decided that the vessel was lawful prize, but returned the vessel to her owners, and it was held that the owners were entitled to recover as for a total loss. Even assuming that the vessel was not a loss by capture on the 26th Feb. at 7 a.m., the loss next day was in consequence of hostilities. The *Romulus* was sailing six knots an hour within thirty miles of a port of refuge, and was not lost until twenty-four hours afterwards, but something happened which prevented the vessel being saved, and that was an act of hostility. In *Ionides* v. *Universal Marine Insurance Company* (1 Mar. Law Cas. O. S. 353; 8 L. T. Rep. 705; 14 C. B. N. S. 259) Erle, C.J. put certain cases illustrating what would amount to consequences of hostilities. The portion of the case set out at the foot of p. 287 is in point. The second case instanced by Erle, C.J. at p. 286 is analogous—viz.: "Suppose the ship chased by a cruiser, and to avoid seizure she gets into a bay where there is neither harbour nor anchorage, and, in consequence of her inability to get out, she is driven on shore by the wind and lost; that again would be a loss resulting from an attempt to capture, and would be within the exception" (consequences of hostilities). Here the vessel was not chased as in that instance, but was actually taken by the belligerent to the place where she was beached. The moment the ship is taken out of the control of the owner she is lost. This is not a case of a temporary taking as in cases of embargo. The ownership was divested, and the decision of the prize court dates back to the taking. The preventing of the vessel going to Hakodate was an act of hostility, and the taking her to another and less safe place, where the storm arose and caused the damage, was a consequence of hostilities. The loss was a loss by capture, seizure, and detention, and, if that is not so, then it was a loss by the consequences of hostilities, and the underwriters accordingly are not, in either event, liable on the policy.

Cur. adv. vult.

CHANNELL, J.—This case raises some interesting points in reference to insurance law. The claim is to recover on a time policy for disbursements in respect of the ship *Romulus*. There is a clause in the policy that the disbursements are to be deemed totally lost if the ship is totally lost. Those are not the exact words, but the effect of it is, as agreed by both sides, that although it is a policy for disbursements, and a policy in respect of total loss only, the point is really the same as whether the ship was totally lost. The body of the policy is in the usual form, with all the usual perils, and then attached to it is the clause "Warranted free from capture, seizure, and detention, and consequences of hostilities." The question is whether the plaintiff suffered any loss by perils of the sea, because, if he did, he is entitled to recover upon this policy. If the plaintiff did suffer loss, and such loss was by capture, or in consequence of hostilities, then, of course, he is not entitled to recover. The words, "warranted free from capture," when one comes to consider the particular facts of this case, if they were not quite common words, would be a little puzzling. But, of course, what they mean is that notwithstanding any words in the body of the policy the underwriters are not to be liable if the loss is from capture, seizure, or detention. In the case of *Ionides* v. *Universal Marine Insurance Company* (*ubi sup.*) there is authority for the proposition, which I suppose is a fairly evident one, apart from authority, that in construing the words, "capture, seizure, detention, and the consequences of hostilities," one is to construe them in the same way as one would construe them in a policy against

those events; and, in particular, that same case is a distinct authority for the proposition that "consequences of hostilities" in this warranty clause means the same as it would have meant in a policy — namely, the direct consequence of hostilities.

That, I think, is stated quite clearly both by Erle, C.J. and by Willes, J. in that case. That is all that at the present stage it is necessary to say about the terms of the policy. The facts are these: The vessel was bound to Vladivostok during the Russo-Japanese war with coal, and, in order to avoid Japanese cruisers, she went a roundabout course very much more to the north than she ordinarily would have gone, and there met with ice and sustained damage. In one sense obviously that is in consequence of hostilities, but it is agreed on all hands that that is far too indirect, and that that damage from the ice would not be a consequence of hostilities within the meaning of a policy against damage from that cause, and would not be within this warranty that has to be considered. The ship was seriously damaged, and was more or less in danger of foundering. The leaks were just kept under; sometimes they got a little better and sometimes a little worse, according as the coal dust sometimes choked the pumps and sometimes choked the leaks. The vessel gave up going directly to Vladivostok in the way in which she was going and came to the coast of Japan in order to get to a port of refuge where she might be repaired. She had got within about thirty miles of such a place when she met with a Japanese cruiser, and the Japanese cruiser put a prize crew on board, and forming the judgment that she was in a sufficiently good state not only to get to this port of refuge, Hakodate, which was the nearest port, but that she was also in a sufficiently good condition to have the chance of getting to another port further off where there was a prize court, the Japanese officers took her in the opposite direction to what she had been going, with the view of taking her to this more distant port where there was a prize court. On the way there the leaks got worse; they ran the vessel towards the shore with the view of beaching her, but before they knew exactly how near they were, and before they had any opportunity of selecting a good place to beach her, the vessel went ashore and could not be got off; so they got her further on in order to make her as safe as they could, and then she broke her back and undoubtedly became a total wreck. Shortly afterwards she was condemned in the Japanese prize court. There happens to be evidence from a surveyor, who was sent to see the vessel, that is quite as satisfactory as evidence about these matters occurring abroad can reasonably be expected to be. It is quite sufficiently satisfactory to show that the vessel had become a total wreck before the time when she was, in fact, condemned—about two days before, at any rate.

Upon these facts, did the owner of the ship suffer a loss by perils of the sea, or did he suffer a loss by capture, so that he could not lose it over again? One cannot lose the same property twice, unless, of course, one is fortunate enough, after one has lost it the first time, to get it again, and then is unfortunate enough to lose it again; in that way one can lose it twice, but otherwise one cannot lose the property twice. If one has lost it once one cannot lose it again. Looking at it from an ordinary and common-sense point of view, and apart from technicalities, most people would say that under those circumstances the owner lost his ship by capture, and the Japanese lost their prize afterwards by shipwreck. If that is the case, and if that really is correct, then I think that under this policy the plaintiff is not entitled to recover; but one has to consider some more difficult questions to see whether that is strictly correct. It seems to me to depend upon the effect of capture in depriving the owner of the property in his vessel. If the effect of what took place when the Japanese officers came on board and directed the captain to take her down the coast in the opposite direction to that in which she was going—that is to say, towards the prize court—was to divest the property from the owner of the ship, then he then and there lost it and he cannot lose it again. He had no insurable property after that. The ship itself, the fabric of it, undoubtedly was lost by the shipwreck—that is to say, by the perils of the sea—but the question is, who then lost it? If the property had passed from the original owner by the capture, he did not lose it; it was the loss of the Japanese who had got her.

That being so, one has to look and see what are the authorities about the effect of a capture Now, that this was a capture I think is hardly disputed. There is a question about the amount of control the officer took. No doubt the ship's crew and the ship's captain remained in one sense in charge of the navigation. They were steering her, and so on, but their movements were directed by the Japanese officers.

The test as to whether it was a capture or not appears to be whether there was an intention to deprive of the right of property. I will read from Arnould (sect. 829, 7th edit.), but it is the same in all the books: "A capture properly so called is a taking by the enemy as a prize in time of open war or by way of reprisals with intent to deprive the owner of all dominion or right of property over the thing taken." These Japanese officers undoubtedly had the intention to deprive the owner of that property, and it was a capture in that sense. Then the next question is the effect of that upon the property in the vessel. I have looked further into the authorities about it, and it is clear that the capture without condemnation does not divest the owner of his property. I say "without condemnation," and not "until condemnation"; I think that is the proper way of stating it. That apparently used to be a subject of considerable discussion, and according to the older books—I think the passages are repeated in the modern books too—it used to be, and possibly is now, a matter that was decided differently in different countries. Some countries had a rule that the property was divested as soon as the captors got their prize within the protection of their own coasts; but the English law always was that without condemnation the property did not pass.

During the argument Mr. Scrutton suggested that when there was condemnation, then the divesting of the property related back to the time of the capture. He did not quote any authority for it, and I was at the time rather inclined to think that it was a mere ingenious

suggestion, and that the doctrine of relation being a very peculiar one, unless there was authority to that effect, one would not be justified in applying it to matters of this sort. But on looking into it, I find that in the older editions of Abbott on Shipping there is a passage to this effect: "When by condemnation a complete title has vested in the captors the property in the prize relates back to the time of the capture, and an assignment by the captors in the meantime is valid": (9th edit., p. 22). For that three authorities are quoted—namely, *Stevens* v. *Bagwell* (1808, 15 Ves., p. 139), *Morrough* v. *Comyns* (1748, 1 Wils., p. 211), and *Alexander* v. *Duke of Wellington* (1830, 2 Russ. & My., p. 35). That passage is omitted in the more recent editions of the book, but I think the reason why it is omitted is that there was an Act in 1864 relating to naval prize money and naval prizes, and the learned editor of the more recent edition goes into a discussion of that Act of Parliament, and he deals with capture and recapture and other matters, and possibly takes the view that it supersedes the older law on this subject, and that consequently this passage in the older editions is no longer of very special interest. I have looked at the three cases that are referred to as the authorities for that proposition, and the proposition is stated there. I am not sure that the decisions bear upon it very much. Only one of them is a question of maritime prize, strictly speaking. One of them, the *Duke of Wellington's* case, is clearly a case of military prize; the other one relates to prize money in reference to the taking of a fort which was taken by the guns of, I think, British vessels. The decisions cannot be said to be exactly in point—they relate rather to dealings with prize money than direct dealings with a ship; but, at the same time, the proposition is stated, and on the whole, therefore, I think I ought to follow that, and to come to the conclusion that the true law is that although the mere capture in itself, when there is no condemnation, does not divest the property, and when you have got simply, as Mr. Hamilton pointed out, a *primâ facie* case of capture so that the owner can if he likes give notice of abandonment and say to his underwriters, "I give up to you any chance of getting this vessel back; you can go to the prize court and persuade them if you can that it is not a proper prize, and anyhow you shall have your chance of getting it back"—that he then divests himself of the property by that act, no doubt passing it on to the underwriters, and that the property is not by the mere fact of the capture or seizure divested; but when there is an adjudication of a prize court which is an adjudication *in rem*, and binding on all the world, when that adjudication does come it is a decision not merely that then at the date of the decision the property has passed, but a decision that it did pass at the time of the capture, and it may be described, therefore, as relating back.

Now, if that is right, what I started with by saying would be the common-sense and popular view of this matter, namely, that the owner had lost his ship by capture by the Japanese, and the Japanese had afterwards lost their prize, is correct; and I think on that ground I must hold that the plaintiff is not entitled to judgment. If that is so, it is unnecessary for me to deal with, and I do not propose to deal at any length with, the suggestion that even if this was not a capture, the loss by shipwreck was a loss in consequence of hostilities. The authority for that, if there is authority, depends upon one of the propositions of Erle, C.J. in the case of *Ionides* v. *Universal Marine Insurance Company* (*ubi sup.*), where he puts the case, which undoubtedly is extremely like this, namely, the case of a man-of-war chasing an enemy's merchant vessel and driving her into a bay where she ultimately went ashore. It is not necessary to discuss small points of difference or the view I entertain, but what the Chief Justice there said, because he dealt directly with the maxim of *causa proxima*, was this. He there thought that the case he was putting was a case where the action of a man-of-war had directly caused the loss. If it was, then, of course, it would be in consequence of hostilities. The decision, undoubtedly, is that it must be the direct consequence, and his illustration may not have been a very apt one. Now, in this case I do not think I could come to the conclusion that the shipwreck was the direct consequence of hostilities. It was the indirect consequence, no doubt. It arose just as the damage by the ice arose—from the existence of the hostilities, and perhaps a little more directly than that. If she had not been taken into that particular place by the Japanese prize crew, she certainly would not have been wrecked in that place and very possibly she would not have been wrecked at all, and on the whole of the evidence I think she had a good chance of getting safely to a port of refuge if she had not been interfered with by the Japanese cruiser. Therefore, as an indirect consequence, the shipwreck did take place; but I think it was only an indirect consequence, and on that ground I do not think I could have decided the case; but that, of course, becomes irrelevant if the first ground was right, and it appears to me that this was a loss by capture, and not only a loss by capture, but when the vessel was a total loss by capture then the owner had no further interest in her, and could not lose her again, and suffered no loss by the subsequent loss of the ship which did take place by shipwreck; but that was a loss of the Japanese, and not his loss. The consequence is that the defendant is entitled to judgment in this action.

Judgment for the defendant.

Solicitors for the plaintiff, *Woodhouse* and *Davidson.*

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

Supreme Court of Judicature.

COURT OF APPEAL.

Saturday, April 27, 1907.

(Before Cozens-Hardy, M.R., Buckley and Kennedy, L.JJ.)

Agincourt Steamship Company Limited *v.* Eastern Extension, Australasia and China Telegraph Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Submarine Telegraphs Convention—Cables—Protection—Cable fouled by anchor—Sacrifice of anchor—Measure of damages—Submarine Telegraph Act 1885 (48 *&* 49 *Vict. c.* 49), *schedule, art.* 7.

Art. 7 *of the schedule to the Submarine Telegraph Act* 1885 *provides that shipowners who can prove that they have sacrificed an anchor in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable.*

Held, that in the circumstances of this case the owner of the cable was liable to make compensation for the anchor and chain sacrificed, but not further to pay the damages resulting from such sacrifice; though the measure of the compensation is not necessarily merely the cost of replacing the anchor and chain sacrificed.

The plaintiffs were the owners of the steamship *Agincourt*, and the defendants, the Eastern Extension, Australasia and China Telegraph Company and the Great Northern Telegraph Company Limited, were the owners of submarine telegraph cables portions of which were laid across the bed of the Yang-tsze-kiang river, in the neighbourhood of Woosung, China.

On the 31st Aug. 1905 the *Agincourt*, while in the course of a voyage from Shanghai to San Francisco, *viâ* Japan, in charge of a licensed pilot, anchored in the river, and on the next morning, there being indications of an approaching typhoon, the anchor was weighed and the vessel proceeded further up the river to a safer anchorage. The starboard anchor was dropped about 1 p.m., and later, the wind having increased, the port anchor was let go.

At daylight on the 2nd Sept. it was necessary for the safety of the vessel that the anchors should be got up. Accordingly the port anchor was weighed, but it was found to be foul of a telegraph cable. It was then let go, and the starboard anchor was hove up, when it also was found to be foul of a telegraph cable. The telegraph cables were, the plaintiffs alleged, the property of the defendants jointly, or, in the alternative, the property of the first defendants, or, in the further alternative, of the second defendants.

With a view to the preservation of the defendants' telegraphs from injury, in the event of their being fouled by the anchors of vessels, the defendants issued the following public notice, which was dated Shanghai, the 1st Aug. 1902:

The Great Northern Telegraph Company Limited, of Copenhagen; the Eastern Extension, Australasia and China Telegraph Company Limited.—Important Notice to Owners, Captains, and Pilots of Steamers and Sailing Vessels.—The submarine telegraph companies in the Far East desire to draw attention to the fact that telegraph cables, when caught by ships' anchors, chains, &c., as frequently happens, are unfortunately often damaged or broken in the endeavour to free the said gear, the latter being at the same time often lost or destroyed. It is consequently in the interest of all concerned that in such cases the greatest care should be taken not in any way to forcibly strain the cable when hooked, but preferably to sacrifice anchors and other gear. The telegraph companies have therefore decided to compensate owners of vessels (excepting houseboats, launches, and similar small craft) for loss of material from the above causes by adhering, for the Far East, to the Submarine Telegraph Act of 1885, schedule, art. 7, according to which owners of ships or vessels who can prove that they have sacrified an anchor, &c., in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable.

Art. 7 of the schedule (the Submarine Telegraphs Convention) to the Submarine Telegraph Act 1885 is as follows:

Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or other fishing gear in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable. In order to establish a claim to such compensation, a statement, supported by the evidence of the crew, should, whenever possible, be drawn up immediately after the occurrence, and the master must, within twenty-four hours after his return to, or next putting into port, make a declaration to the proper authorities. The latter shall communicate the information to the consular authorities of the country to which the owner of the cable belongs.

It appeared from a statement of the captain that when it was found that the port anchor was foul of a telegraph cable he would have cut it, but that the pilot said he must slip the anchor and chain, they having received instructions that ships fouling the telegraph companies' cables would be reimbursed for any loss or delay through slipping their anchors and chains to save damage to the telegraph cables. The master added that, after the pilot again assured him that the plaintiffs would be "fully compensated" by the telegraph companies if the anchors were slipped, he decided that this should be done. In consequence of the loss of the anchors the *Agincourt* was delayed eight days at Shanghai, while endeavours were being made to recover the lost anchors or obtain others.

This action was brought by the plaintiffs for compensation for the loss of the ship's materials. They also claimed damages for the detention of the vessel at Shanghai, for the extra consumption of coal in steaming from the place of the accident to Shanghai and back, and for the expenses incurred to save her cancelling date at Portland under a charter-party, the total amount claimed being 2084*l.*

At the trial it was proved or admitted that one of the anchors had fouled an abandoned cable belonging to the first-named defendants, but the position of the other cable had not been ascertained. These defendants before the commencement of the action had supplied the ship with a new anchor, and they paid the sum of 85*l.* into court as representing the value of the chain which had been lost.

The action was heard by Bray, J., who by his judgment declared amongst other things—(1) that the captain had concluded a contract in the

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

terms of the notice issued by the defendants; (4) that by the terms of the notice each company was liable for its own cables only; and (5), further, that the liability of each company under the terms of the notice was not only for the value of the anchor and chain, but also for the damages resulting from such sacrifice, and he adjourned the trial of the questions of fact.

The first-named defendants appealed from declarations (1) and (5), and by their notice of appeal they asked for a declaration in lieu of declaration (5), assuming that they were liable under the notice of the 1st Aug. 1902, that their liability was limited to replacing the anchor and chain or payment of their value.

Upon the hearing of the appeal the appellants admitted their liability under the notice, the only question argued being the measure of damages.

J. A. Hamilton, K.C. and *Bailhache* (*Wolfe Barry* with them) for the appellants.—Upon the construction of art. 7 of the schedule to the Submarine Telegraph Act 1885 the plaintiffs are only entitled to compensation for the thing sacrificed, which in this case is the cost of replacing the anchor and chain. Damages resulting from the sacrifice are not included. It is argued that unless all the consequences of the sacrifice are included, the master would always cut the cable in preference to sacrificing the anchors, but under art. 2 injuring a cable is a punishable offence unless it is done for the purpose of saving the ship after every precaution has been taken to avoid injuring the cable. Then, if art. 7 has that limited meaning, it follows that a similar meaning must be given to the notice which expressly limits the compensation to loss of material.

Atkin, K.C. and *Raeburn* for the respondents.—The plaintiffs are entitled to compensation for any damage which flows naturally from the loss of this gear. The judge was right in holding that compensation was not limited to the loss of the materials. The offer of the telegraph companies was intended to induce shipowners not to cut their submarine cables, and unless the shipowner is to be compensated for the sacrifice—that is, for any loss arising directly and necessarily from the sacrifice—the offer is useless. If the owner of a fishing-boat sacrificed his net full of fish, his compensation would not be limited to the cost of a new net, or of a new net and the value of the fish in the net at the time, but must include something for the loss of opportunity to catch more fish at that time.

Hamilton, K.C. in reply.

Cozens-Hardy, M.R.—The question raised by this appeal turns mainly upon the true construction and effect of art. 7 of the schedule to the Submarine Telegraph Act 1885, because of the reference to that article contained in a notice issued by the appellant company, which notice was accepted by the master of the ship under circumstances which resulted in a contract made by the appellants with the shipowner. But a contract to do what? The language of the article is, "Owners of ships or vessels who can prove that they have sacrificed an anchor, a net, or other fishing gear in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable." The learned judge in the court below has in his fifth declaration held that the liability of the company under the terms of the notice is not only for the value of the anchor or chain sacrificed, but also for the damages resulting from such sacrifice.

The appellants are not content with that, and they ask to substitute for that a declaration that their liability is limited to the replacement of the anchor and chain or payment of their value.

With great respect to the learned judge, I think the language of his declaration is dangerously wide, and I also think that the language of the appellants' notice of appeal is wrong. The facts may be very shortly stated. The vessel was coming down from Shanghai; a storm arose; she dragged her anchor; the anchor got caught in a cable, and the pilot told the captain that he had better not try to clear his anchor, as the telegraph companies had issued a notice, the terms of which were not actually shown to the captain, but which he accepted on the statement of the pilot. That sufficed to create a contract between the parties. What happened was this: The ship left her anchor behind, buoyed, and went up to Shanghai. There the telegraph company presented the ship with a new anchor, which is conceded to be as good as the old one, and they have paid into court the cost of a certain number of fathoms of anchor chain.

Is that the full measure of the compensation which the company agreed to pay? I think it is not, or at least not necessarily. I think that the compensation may reasonably extend to the journey back to Shanghai, there being no suggestion that that was not a reasonable course for the captain to take under the circumstances, and, therefore, *primâ facie* I think that the offer of the telegraph company was not sufficient. On the other hand, the language used in this declaration seems to me to open a very wide field of inquiry which might result in grievous injustice to the telegraph company. I think that the proper form of order is that suggested by Buckley, L.J. The fifth declaration will be modified by making it run as follows: "Further, the liability of each company under the terms of the notice is to make compensation for the sacrifice of the anchor or chain sacrificed, but not further to pay the damages resulting from such sacrifice."

Buckley, L.J.—By their notice of appeal the Eastern Extension Telegraph Company ask this court to reverse the judge's first declaration, by which he found that there had been concluded a contract in the terms of the notice issued by the telegraph companies. That has not been pressed before us on the appeal, and we are asked to dispose of the appeal on the footing that there was concluded a contract in the terms of the notice.

The question, then, is one of the construction of that notice, and the first step towards that is the construction of art. 7 of the schedule to the Submarine Telegraph Act 1885. Read shortly, that article runs thus: "Owners who can prove that they have sacrificed an anchor shall receive compensation." That, I think, means that owners who can prove that they have sacrificed an anchor shall receive compensation for that sacrifice. The notice runs in a form which I think is truly reproduced by stating it thus: "The telegraph companies have decided to compensate

owners of vessels (with certain exceptions) for loss of material from the above causes; that is to say, owners of ships or vessels who can prove that they have sacrificed an anchor, &c., in order to avoid injuring a submarine cable shall receive compensation from the owner of the cable." That is effected in the notice by putting in the words "by adhering to art. 7," and then the material words of art. 7 are repeated as I have just read them. Reading the notice in the way I have suggested, it means that the shipowner is to be compensated for the sacrifice of the anchor, or for the loss of the anchor, or for the loss of material, whichever way you like to express it. What is the exact compensation for the sacrifice of the anchor is a question which we mean to leave open.

In my opinion, to limit the compensation to the replacement of the anchor and chain or payment of their value is not necessarily wrong. It may be wrong; under some circumstances it might be right; but I agree with the Master of the Rolls to this extent, that it is wrong to limit the compensation to that as a matter of principle. What you have to ascertain is the compensation for the sacrifice of the anchor. The exact form in which that should be expressed will be by altering declaration (5) of the judgment below in the manner stated by the Master of the Rolls. That will leave open the question what is the proper amount to be paid as representing compensation for the sacrifice of the anchor. Certainly, in my view, a large part of that which is claimed here by the points of claim is far outside anything of that kind, but I do not think we ought to do more than state here what the proper measure of that compensation is as a matter of principle. It is to be compensation for the sacrifice of the anchor. I think, therefore, that the declaration should be amended in the manner proposed.

Kennedy, L.J.—I agree, and the judgments which have been already delivered substantially cover, in my view, all that is important to be said. I only wish to add two things. First of all, stress was laid by the defendants in the court below upon the existence of the words in the notice which forms the contract, when accepted and acted upon by the captain of the ship, "for loss of material from the above causes." I think compensation for loss of material is really another way of stating that which is contained in art. 7 of the schedule to the Submarine Telegraph Act 1885, and nothing different. "For loss of material" means for losing your anchor, which is a sacrifice, if you do it intentionally, for the purpose of saving the cable. I think that nothing turns upon the use of the word "material," and that compensation for loss of material in this notice is not necessarily limited to the replacement of the thing lost, but comprises all that may be fairly included in the word "compensation," not merely for the thing, but for the act which has been done—the sacrifice which has been made. At the same time, without prejudging details, it is to my mind quite clear that many of the claims in the particulars *primâ facie*, at any rate, fall outside anything which can be properly called compensation. The only other observation I wish to make is upon a point made by Mr. Raeburn in his very clear and concise argument with reference to the loss by a fishing smack of its nets. My view upon that may be thus expressed. If the net was actually being used at the time of the sacrifice, I do not think that compensation is necessarily confined either to a subsequent furnishing of the boat with a net or to the value of the fish which were actually taken within the folds of the net. It might fairly include the loss of that which the use of the net at that moment might have got for the fisherman. On the other hand, putting another case, supposing, although the sacrifice was made, there was a comrade boat there, and the fisherman of that boat said, "Here is a net for you in lieu of the one you have just lost," or supposing the man who had sacrificed the net had a spare one on board, in either of those cases it would be absurd to say that anything more was needed as compensation than the cost of a new net when the vessel came into port. Each case must stand on its own merits. In my opinion the suggestion of my brother Buckley which the court has adopted places a proper limitation upon the order in the court below, and at the same time leaves open for future argument what compensation for sacrifice really means.

Solicitors: *Bischoff* and *Co.*; *W. A. Crump* and *Son.*

March 18 *and May* 7, 1907.

(Before Lord Alverstone, C.J., Moulton and Kennedy, L.JJ.)

The Hibernian; Tasker and Co. *v.* Allan Brothers and Co. (*a*)

Carriage of goods — Through bill of lading — Freight for land and sea carriage—Inland freight paid by steamship company—Damage to cargo during transit by sea—Cargo in part sold—Cargo in part transhipped and delivered —Lien of steamship company for whole inland freight paid.

Bags of flour were forwarded from Milwaukee to London under a through bill of lading, the flour being conveyed by rail to Montreal, and thence by the Allan Line to London. The through bill of lading contained clauses with regard to the carriage of the goods by land and sea, and also incorporated all the "conditions expressed in the regular forms of bills of lading in use by the steamship company at the time of shipment," and was signed by the carrying companies severally and not jointly. One of the clauses relating to the carriage by the railway company in the through bill of lading was as follows: "This contract is executed and accomplished, and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agent or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company."

Among the clauses relating to the sea carriage was one which provided: "That the carrier shall have a lien on, and a right of sale over, the goods for all freight, primages, and charges"; and another which provided "that freight payable on weight or measurement is to be paid on gross weight or measurement landed from ocean

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

steamship unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight." The following was a clause in the bill of lading regularly used by the Allan Line: "When the goods are carried at a through rate of freight, the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole and in part until payment thereof."

The steamship company having paid the railway company the amount of the inland freight, the flour was shipped on the H. *to be conveyed to London. On the voyage the* H. *got ashore, but her cargo was salved, and some of it was sold in a damaged condition, and the remainder was transhipped and brought to London. The steamship company refused to deliver the goods to the plaintiffs, who were indorsees of the bills of lading, until they were paid the amount of the inland freight paid to the railway company in respect of the lost goods as well as the through freight on the goods delivered.*

Held (affirming the decision of the Divisional Court), that the steamship company had under the terms of their bill of lading a lien for the whole of the inland freight on any part of the cargo actually delivered under the bill of lading, and that they were entitled to the inland charges which had been paid by them.

Decision of Sir Gorell Barnes, P. and Bargrave Deane, J. (The Hibernian, 95 *L. T. Rep.* 395; 10 *Asp. Mar. Law Cas.* 281 (1906) *affirmed.*

Appeal from a decision of Sir Gorell Barnes, P. and Bargrave Deane, J. reversing a decision given by His Honour Judge Lumley Smith, sitting in Admiralty in the City of London Court.

The facts and material clauses of the through and ocean bills of lading are fully set out in the judgment of Lord Alverstone, C.J.

The arguments of counsel were the same as in the court below.

F. D. Mackinnon for the appellants.

C. R. Dunlop for the respondents.

Lord Alverstone, C.J.—This is an appeal from the Divisional Court of the Admiralty Division, in an action brought in the City of London Court by the plaintiffs, the consignees of 1500 bags of flour, to recover the sum of 14*l.* 8*s.* 3*d.*, being an amount paid by them under protest to Allan Brothers and Co., in excess, as they allege, of their true indebtedness to Allan Brothers and Co., as the owners of the steamship in which the goods, of which the plaintiffs were consignees, had been conveyed from Montreal to London, under the circumstances which I will shortly state. The facts are agreed, and may be briefly summarised as they appear on the agreed statement. The Gem Milling Company, Milwaukee, consigned to the Gem Milling Company, London, 1500 bags of flour by three through bills of lading or contract notes, which provided that the flour should be carried from Milwaukee to London at an all-round rate of 19 cents per 100lb. This rate included railway, and other carriage, from Milwaukee to Montreal, and freight from Montreal to London. On the voyage of the steamship *Hibernian* from Montreal she ran aground, and of the 1500 sacks 366 were damaged, and were sold, and the balance — viz., 1134, were transhipped into another of the defendants' steamers, and duly arrived in London. Upon the plaintiffs, the consignees, demanding delivery of these goods, the defendants, as a condition of delivery and in exercise of a claim of lien, required payment of a sum of 85*l.* 5*s.*, which consisted of a charge of 6 cents per 100lb. as ocean freight on the 1134 bags delivered, and of 59*l.* 1*s.* 3*d.* for the American inland carriage, which had actually been paid by the defendants to the American railway company on the 1500 bags of flour from Milwaukee to Montreal. To the payment of 14*l.* 8*s.* 3*d.* out of this 59*l.* 1*s.* 3*d.*, representing the amount of the American railway carriage and charges upon the 366 bags which were not delivered in London, the plaintiffs objected, but ultimately paid, and they now claim in this action to recover that amount from Messrs. Allan Brothers and Co. The Divisional Court has decided that, having regard to the terms of the contract upon which the bags were carried, the plaintiffs are not entitled to succeed.

The question depends entirely upon the terms of the contract. Each of the three through bills of lading or contract notes provided that the bags to which it related should be carried from Milwaukee to London at 19 cents for 100lb. gross weight. The contracts contained two sets of conditions, one relating to the land service until delivery at the port of Montreal, the second relating to the service after delivery at Montreal until delivery in London. Under the first set, condition 12 was in the following terms: "This contract is executed and accomplished and all liability hereunder terminates on the delivery of the said property to the steamship, her master, agents, or servants, or to the steamship company, or on the steamship pier at the said port, and the inland freight charges shall be a first lien due and payable by the steamship company." This condition, in my judgment, has only an indirect bearing upon the question we have to decide. What it provides is that the railway company shall have a lien upon the goods for the inland freight charges payable by the steamship company on taking delivery at Montreal.

The conditions relating to the ocean carriage which are material are as follows: (5) "That the carrier shall have a lien on [and right of sale over] the goods for all freights, primages, and charges, and also for all fines or damages which the ship or cargo may incur or suffer by reason of the illegal, incorrect, or insufficient marking, numbering, or addressing of packages or description of their contents." (15) "That freight payable on weight or measurement is to be paid on gross weight or measurement landed from ocean steamship unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight." (17) "That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at times of shipment and to all local rules and regulations at ports of loading and destination not expressly provided for by the clauses herein." In my view condition 5 gives the ordinary lien for freights, primages, and charges in respect of

the ocean transit. Condition 15 deals with the way in which the freight shall be calculated upon the goods landed.

Condition 17, read in conjunction with the Allan Line bill of lading, to which it refers, is the condition on which, in the opinion of the court below and in my own, the question turns. The words "all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment" were for the purpose of argument agreed to mean the bills of lading of the Allan Line. Those bills of lading contained the following clause: "When the goods are carried at a through rate of freight the inland proportion thereof together with the other charges of every kind (if any) are due on delivery of the goods to the ocean steamship, and the shipowner or his agent shall have a first lien on the goods in whole or in part until payment thereof." It is in my opinion clear, and indeed it was not disputed by counsel for the appellants, who argued the case on behalf of the appellants with great ability, that, under this clause, taken by itself, if the shipowner paid the inland proportion, that is to say, the land charges upon the consignment, the shipowner would have a lien on the goods until repayment, or, in other words, that the clause in the Allan Line bill of lading just quoted was the counterpart of clause 12 of the first set of conditions on the through bills of lading, and was intended to protect the shipowner in respect of payments made by him to the railway company; but it was contended on behalf of the appellants that this clause, properly interpreted, was inconsistent with the provision of the through bills of lading that the goods should be delivered on payment of 19 cents per 100lb.

In my judgment the view taken by the Divisional Court is correct. There is, under the contract contained in the through bill of lading, an obligation to deliver the goods on payment of an agreed freight of 19 cents per 100lb.; but the bill of lading shows on its face that the contracting parties knew perfectly well that the route being a through route, at a through rate, some part of the through rate would be payable to the inland railway company carrying the goods for Milwaukee to the port of Montreal, and, accordingly, as it provided that in respect of these charges the inland freight was to be a first lien, it is provided by virtue of clause 17, that, in addition to the liability to pay the freight upon the quantity actually delivered, there shall also be a lien for moneys paid by the steamship company to the inland carriers in order to release the goods from the lien which the inland carriers had upon them; or, in other words, there are two liens created by the through bill of lading, one by clause 5 in respect of the ocean freight, the other by clause 17, incorporating as it does the conditions of the Allan Line bill of lading in respect of payments properly made by the shipping company to the railway company. Of course, in respect of the goods delivered in London these two liens may be said to coalesce, or overlap, but this does not, in my opinion, prevent the clause taking effect where, as in this case, the shipping company have paid to the railway company inland charges upon that part of the goods which has not arrived. To state the matter shortly, it being conceded that if the goods were carried under the Allan Line bill of lading the shipping company would have the lien in question, their right to enforce that lien is not destroyed by the fact that some portion of the goods was lost in transit. I am authorised to say that Kennedy, L.J. concurs in this judgment.

Moulton, L.J.—This is a most unsatisfactory case, and it has given me very grave doubt during the long consideration that I have given to it. The difficulty in the case is due solely to the slovenly way in which the document constituting the contract of carriage is drawn up. I regret to say that in this respect it resembles many other mercantile documents which by their nature have grown up by a long process of adding new terms and conditions to documents of older date, without any regard to whether they fit in with the provisions of those prior documents. Such documents become well-nigh unintelligible as contractual documents, and so far as my experience goes I have never met with so gross a case as the present one. Again and again I have found myself almost coming to the conclusion that it was the duty of the court to refuse to interpret this document. It purports to be a through bill of lading, relating to the carriage of goods from Milwaukee to London, partly by land carriage and partly by sea carriage, on ships of the Allan Line. It was admitted during the argument, and I think it is clear from the nature of the contract, that the land carriers and the sea carriers here combined to make an offer to the public to carry goods for the whole of the transit at a through rate.

No doubt the through freight was to be divided between the land carriers and the sea carriers, and in fact there are unmistakable indications in the conditions and terms of the contract that that was to be done; but the proportions in which the total freight was to be divided between the two are nowhere expressed in the contract, and, it was admitted at the Bar, were probably wholly unknown to the persons availing themselves of the through freight. The only reference to this division of freight between the two parties to the carriage—the inland carriers and the Allan Line—is to be found in condition 12, in the left-hand column of conditions; that is to say, in the column which relates to the conditions of the land carriage. It there states that the inland freight—the amount of which it does not define—shall be a first lien on the goods being carried; but it immediately provides that that shall not affect the consignee, because the steamship company, that is to say, the Allan Line, are to lift the lien by paying the inland charges. Thus, so far as the consignee is concerned, it does not affect the matter at all. We therefore have, so far as the consignee is concerned, a contract for the whole of the transit at a through freight; and the obligation to deliver the goods at London on the payment of that through freight is absolute. In the bill of lading there naturally are conditions with regard to the responsibility of the carriers for the goods carried, and we find in the right-hand column a series of conditions mostly of a nature to exculpate and hold harmless the carriers for accidents of travel, or giving them certain rights over the goods in respect of the services they rendered. It is under those conditions that the claim is made

in the present case by the defendants, that they were justified in holding the goods until the inland freight on the portion of the goods that had been lost was paid to them by the consignee. It is clear they must get some warrant for so doing, because the provision as to delivery of goods against payment of the through freight is expressed in very absolute terms, and it was admitted at the Bar that that was payment in proportion to the weight of the goods delivered; so that unless there is some condition which justifies them in insisting upon a payment beyond that freight on the actual weight delivered they were wrong in refusing to deliver the goods at the freight on the weight. They suggest that more than one of the conditions justifies them in thus demanding a lien for the inland freight on the goods that were lost. They first appeal to No. 5, which gives a lien for all freights; and may I point out that that imposes no liability to pay freight. It simply gives a lien for freights to which they have a right; and therefore it must be elsewhere that you find an obligation to pay, although as soon as you can find an obligation to pay this enables you to enforce it by a lien. So I pass from that and I come to the condition upon which this case really turns; that is to say, condition 17. It is in these words: "That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the steamship company at time of shipment, and to all local rules and regulations at ports of loading and destination not expressly provided for by the clauses herein." The contention that is put forward on behalf of the respondents here is that that incorporates all the conditions of the bill of lading in use by the Allan Line at the time. There seems to be no doubt that that is the bill of lading referred to. If you look at the through bill of lading which we have before us you will find it is practically a complete bill of lading, dealing with all the matters usually dealt with in bills of lading. The Allan Line bill of lading is also a complete bill of lading, dealing with all the matters usually dealt with in bills of lading. Therefore, taking the words of this condition, it would seem to be that these goods are carried according to one bill of lading subject to all the conditions of another bill of lading. These two bills of lading are just as different as two independently drawn bills of lading, drawn the one without any reference to the contents of the other, would naturally be. This court is asked to decide what the meaning of a bill of lading is which says that the goods are carried under it subject to all the conditions of another bill of lading. I have examined with the greatest detail the conditions of these two bills of lading, and they appear to me to be wholly distinct and on an abundance of points irreconcilable, and, as I have said, I have felt many times inclined to say that the document is as a contractual document utterly unintelligible. There is a long, carefully-drawn list of risks in the through bill of lading, the actual bill of lading under which the goods are carried, defining what are not to be the risks of ordinary carriers. If you look at the list in the Allan Line bill of lading it is not only not the same but it is drawn in different terms. The very conditions under which the goods are to be delivered when the freight is paid are different in the two. The special conditions with regard to grain are quite different; and it is to me extraordinary that the enormous trade which must be done by the Allan Line on through bills of lading should be governed by documents which as contractual documents are in such a hopeless muddle. I think it would be a very serious thing if the court were to take up the position that on account of the form in which it was drawn up the document was unintelligible, and so I have, perhaps against my better judgment, striven to give to it such meaning as I think that in business would be given to it by persons who were not so much lawyers as men of business.

I have come to the conclusion, especially seeing the weight of judicial opinion in favour of sustaining the contention of the respondents, that perhaps the best interpretation to put upon the document in order to do justice between the parties is this, that it is a notification to the shipper that his goods would be carried, so far as the sea carriage is concerned, in accordance with the well-known Allan Line bill of lading; and that although the form in which the document is drawn up makes it extremely difficult to give to it that meaning, and that meaning simply, I think that would be the impression produced by it among business men. Probably, in this case it is best to give to it that effect. If we do, then there is the strange and certainly unexpected result that the inland freight when it is paid by the Allan Line on receipt of the goods at Montreal immediately becomes due from the shipper, and can be enforced by lien on the goods delivered. Although I feel certain that they never intended there should be any liability for this inland freight until the goods were actually delivered, yet still, taking this as the most reasonable way of making a contract out of the document, it would follow; and therefore I am of opinion, though I say so with great doubt and difficulty, that on the whole the Allan Line bill of lading dominates here sufficiently to give the shipowners the lien on the goods which they claim. Therefore this appeal must be dismissed, with costs.

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

Solicitors for the respondents, *Holman, Birdwood,* and *Co.*

May 14 *and* 15, 1907.

(Before Lord Alverstone, C.J., Moulton and Kennedy, L.JJ., sitting with Nautical Assessors.)

The Kaiser Wilhelm der Grosse. (*a*)

Collision—Entrance to harbour—Crossing rule—Narrow channel—Good seamanship—Meaning of channel—Regulations for Preventing Collisions at Sea 1897—*Arts.* 19, 21, 22, 25, 27, 29.

The waterway between the ends of the breakwaters at Cherbourg, together with so much of the adjacent water as is necessary for the navigation of the passage, is a "narrow channel" within the meaning of art. 25.

Two vessels, one entering and one leaving Cherbourg, met just outside the entrance of the harbour,

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

which is about half a mile wide. The vessel entering the harbour had the green light of the vessel leaving the harbour on her port bow, and ported and slowed to enter the harbour well to her starboard side of the entrance. The vessel leaving the harbour endeavoured to cross ahead of the vessel entering.

Held, that the vessel leaving the harbour was alone to blame; that the crossing rule was inapplicable; that art. 25 of the collision regulations applied, and that vessels leaving and entering the harbour and navigating in the waters adjoining the entrance should keep to their starboard side of the channel.

The judgment of Sir Gorell Barnes, P. (10 *Asp. Mar. Law Cas.* 361; 96 *L. T. Rep.* 238; (1907) *P.* 259) *affirmed.*

The appellants were the North German Lloyd Steamship Company, the owners of the steamship *Kaiser Wilhelm der Grosse;* the respondents were the Royal Mail Steam Packet Company, the owners of the steamship *Orinoco.*

The action was brought by the owners of the *Orinoco* against the owners of the *Kaiser Wilhelm der Grosse* to recover the damage they had sustained by reason of a collision which occurred between the two vessels off the entrance to Cherbourg Harbour, half a mile W.N.W. of Fort de l'Ouest, about 7.30 p.m. on the 21st Nov. 1906.

The facts and cases made by both vessels are fully set out in the report of the case below (*The Kaiser Wilhelm der Grosse* (*ubi sup.*). The following is a short summary of them. The *Orinoco* was making for the entrance of the habour, which is formed by the ends of two breakwaters, and is about half a mile broad, when she saw the lights of the *Kaiser Wilhelm der Grosse*, which was leaving the harbour, over the eastern breakwater. Those on the *Orinoco* reduced her speed, sounded a port helm signal, and ported their helm to keep well over to their starboard side of the channel; the *Kaiser Wilhelm der Grosse* increased her speed and replied with a starboard helm signal. The same signals were again sounded by the vessels, and, on hearing the second starboard helm signal, those on the *Orinoco* reversed their engines, but the collision occurred, for although those on the *Kaiser Wilhelm der Grosse* did not starboard when they sounded the starboard signal they kept on a course across the *Orinoco's* course in an endeavour to cross ahead of her.

The President held that the *Kaiser Wilhelm der Grosse* was alone to blame for the collision on the ground that she ought to have ported when leaving the harbour, and so kept to the starboard side of the channel.

From that decision the owners of the *Kaiser Wilhelm der Grosse* appealed.

Arts. 25 and 29 of the collision regulations appear in the judgment.

Sir *R. Finlay* and *D. Stephens* appeared for the appellants.—It is said that the *Kaiser Wilhelm der Grosse* should have ported round the western end of the eastern breakwater, and so have come out of the harbour in that way, but she is a vessel 650ft. long, and such a manœuvre might have made her cross the course of the *Orinoco* twice, once as she left the harbour and again under the action of her port helm; that would have been bad navigation. [Lord Alverstone, C.J. — Art. 22 provides that the vessel leaving the harbour in these circumstances should avoid crossing ahead of the vessel entering?] That depends on the circumstances of the case. If in this case the *Orinoco* had kept her course instead of porting there would have been no collision. The evidence shows that those on the *Orinoco* knew the *Kaiser Wilhelm der Grosse* was coming out of port, so they ought not to have ported. [Lord Alverstone, C.J. — If art. 25 applies to this stretch of water between the breakwaters, the *Orinoco* was obeying that rule by porting.] It was bad navigation for her to obey that rule with this vessel coming out of the harbour. She had but to wait a moment to let the vessel leaving go clear, instead of which she ports and continues to port in pedantic obedience to art. 25. There is a duty on a vessel entering a deck or harbour to wait for a vessel leaving it:

Taylor v. *Burger and another*, 78 L. T. Rep. 93; 8 Asp. Mar. Law Cas. 364 (1898).

Further, art. 25 does not apply to this locality. There must be length to create a channel; this is a mere narrow entrance and not a channel at all. The facts in this case are not really similar to those in *The Knaresborough* (*Shipping Gazette*, Nov. 10, 1900), which was cited in the court below; and there is no specific rule dealing with vessels leaving and entering this harbour as there is in the Tyne:

The Harvest, 55 L. T. Rep. 202; 6 Asp. Mar. Law Cas. 5 (1886); 11 P. Div. 90.

The case of *The Clydach* (51 L. T. Rep. 668; 5 Asp. Mar. Law Cas. 336 (1884) shows that the rule is only to be applied when it is safe and practicable. The *Orinoco* is also to blame for not stopping and reversing sooner than she did.

Aspinall, K.C. and *Dunlop* for the respondents, the owners of the *Orinoco*.—[Lord Alverstone, C.J.—We need only trouble you to deal with the point as to the not stopping and reversing on the *Orinoco*.] To port was the only right manœuvre for the *Orinoco*. To ease her speed would have been wrong, for by porting and going ahead the vessel leaving the harbour was given more room in which to manœuvre. There is no rule which directs the vessel entering the harbour under these circumstances to reverse. The reversing by those on the *Orinoco* was not necessary until it was demanded by good seamanship under art. 29, and those on the *Orinoco* are entitled to have sufficient time to consider whether they ought to reverse or not; in this case they reversed the moment it was brought home to them that those on the *Kaiser Wilhelm der Grosse* were persisting in their wrong manœuvre; that is all that could be expected of them.

Lord Alverstone, C.J.—This case is certainly one of great importance. It was a collision near the mouth of the entrance to Cherbourg Harbour, between one of the largest passenger ships in the world—the *Kaiser Wilhelm de Grosse*—and the *Orinoco*, belonging to the Royal Mail Steam Packet Company. I have come to the conclusion that the judgment of the learned President was right with regard to the obligations and duties of both vessels, and I should content myself with saying that I agree with his reasons, but that

having regard to the able arguments which have been addressed to us by counsel for the appellants I think it right, out of respect to them, if for no other reason, to state briefly the grounds upon which I have come to the conclusion that the judgment ought to be affirmed. The first and most important point to be considered is which of the rules applies to the case. If we had come to the conclusion that the case had fallen under the crossing rule, a question would have arisen with regard to the manœuvres of the *Orinoco*, though I have very little doubt, even under those conditions, that the *Kaiser Wilhelm der Grosse* would have been to blame for not obeying arts. 19 and 22, I do not wish to express any opinion as to whether under those rules the *Orinoco* would have been held to blame, but the case would have been more difficult, having regard to the statutory provisions respecting the duty of a vessel to keep her course. Now, the other rule which would apply is art. 25, which is in these terms: "In narrow channels every steam vessel 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 vessel." I have come to the conclusion, which accords with that of the President and the Elder Brethren below, that that rule applies, and we are advised by our assessors, so far as it is a question of navigation, and so far as it is a question for them, that undoubtedly it was a narrow channel within the meaning of that rule. We have heard a good deal of argument from counsel for the appellants asking us to hold that art. 25 did not apply, upon the ground that this was what he called an entrance or opening, and not a narrow channel. I cannot think that such a construction ought to be put upon the word channel. It is said that channel imports or denotes length of channel as well as breadth, narrow or wide. That may be true, but it seems to me to be going too far to say that if the channel is very short the article does not apply. To put an instance, we know perfectly well that between buoys or between lightships, approaching an opening between them, there may be dredged channels, but it seems to me to be very dangerous to suggest that the obligation to keep upon the starboard side for the purpose of navigation should depend upon there being, or not being, a dredged channel; and I think it could be seen, even from a landsman's point of view, that a place like the neck of a bottle may be a place involving exactly the same risk to vessels coming in and going out as a longer neck or channel. Therefore I ventured to say to counsel for the appellants, looking at the object of the rules, that it is very difficult to see there is not as much reason for applying art. 25 to this spot as to longer channels. Therefore I approach the consideration of this case entirely from the point of view of holding that art. 25 applies. Dealing with the case from that point of view, what were the obligations of those on the ships?

The duty of the *Orinoco* was undoubtedly to get as well over, as far as she could get, on to the side of the entrance which is at the western side. You ought to enter fairly close to the side of the channel on which is Fort Chavagnac; and the duty of the *Kaiser Wilhelm der Grosse* would be to go out on the side of the channel which is near Fort de l'Ouest; and the question of what either vessel would have to do in order the one to come in on the west side and the other to go out on the east side depends upon the points they started from. Now, I think we ought to assume, on the evidence, that both vessels knew perfectly well what the other was doing, generally speaking. They had seen one another some hours before. It was known on the *Orinoco* that the *Kaiser Wilhelm der Grosse* would come out as soon as she had taken her passengers on board, and it was known on the *Kaiser Wilhelm der Grosse* that the *Orinoco* was bound in. Therefore they were vessels which ought to be regarded as manœuvring for one another, with the knowledge that the one was coming in with the obligation to keep to the westward of the channel, and that the other was going out with the obligation to keep to the eastward of the channel — and I would point out that this art. 25 is not merely a rule which is to be obeyed by one vessel as regards another vessel, but it is a positive direction that they should be kept as far as practicable on the starboard side of the channel.

Under those circumstances what does the *Kaiser Wilhelm der Grosse* do? I ought to say first that it was attempted to be suggested that it was the duty of the *Orinoco* to wait until the *Kaiser Wilhelm der Grosse* came out, and a passage has been read from the judgment of Lord Halsbury in the case of *Taylor* v. *Burger and another* (*ubi sup.*). In my judgment that case has no application at all. It was the case of a dock entrance, and there was only room for one vessel to pass in or out at a time. In a channel which is half a mile wide there is no such obligation on vessels to wait for one another. I do not wish to say more than is necessary in this case with regard to the navigation of the *Kaiser Wilhelm der Grosse*, but I must say that having regard to her duty, which has been laid down by the learned President, and which I venture respectfully to affirm, and having regard to her admission that her practice was to go out on a much more northerly course, or in other words to take a course which would take her much nearer to the Fort de l'Ouest—more to her starboard side of the channel—to go out at what is called half speed—really eighteen knots—on a N.W. course, is only a manœuvre which can be undertaken when there is absolutely no risk of other vessels coming in. Lay down a N.W. course on the chart and you will see that as long as a vessel is on that course between the two piers she is preventing any other vessel from coming in. It may be a perfectly safe thing to do while no vessel is in the way, but in my opinion it is not a prudent course to take when another vessel is coming in or there is risk of other vessels coming in. In those circumstances it seems to me it is quite impossible to hold the *Kaiser Wilhelm der Grosse* free from blame, when, instead of keeping on the starboard hand of the channel, she had kept a N.W. course to such an extent that at the admitted place of collision she was very nearly over to the west side of the channel, and at a distance from the western breakwater of between 300 and 400 yards. I really need say no more about this part of the case, and I do not wish to enlarge upon a navigation which seems to me to have been unfortunate and seems only to have been justified on the suggestion that her great speed would enable her to get across the bows of

the incoming ship. Therefore, I think the *Kaiser Wilhelm der Grosse* is certainly to blame for this collision.

The point upon which we desired to hear counsel for the *Orinoco* was whether she stopped or reversed early enough; and it must be remembered that if art. 25 applies, as I have already said in my opinion it does, then there is no article which gives any direction with regard to the course or speed of the *Orinoco*; but with reference to the point that was made by counsel for the appellants that the collision was brought about by the porting of the helm of the *Orinoco*, the moment you come to the conclusion that art. 25 applies this complaint against the *Orinoco* practically disappears. It was the duty of the *Orinoco* to get over to the west side of the channel. She had slightly starboarded as she came in, at a distance of a mile and a half, or thereabouts, so as to get Fort Chavagnac slightly on the starboard bow, and when the other vessel is seen coming out she puts her helm to port and alters somewhere about two points. All that would assist the *Kaiser Wilhelm der Grosse* if the latter had been doing her duty. It would tend to give her more room—and she had ample room to port—and it cannot be said to have contributed to the collision. But it is said that at a period when she could have stopped and reversed and ought to have stopped and reversed the *Orinoco* had a signal from the *Kaiser Wilhelm der Grosse*—a two-blast signal—indicating "I am starboarding my helm." I do not attach very much importance to the fact that the *Kaiser Wilhelm der Grosse* was not starboarding her helm. Of course she could not starboard very much because at that speed she ran very great risk of running ashore—and I take it in favour of the *Kaiser Wilhelm der Grosse*, although I think it is making a concession, that it was a signal indicating "I want to go out ahead of you." I have already said that in my judgment to go out ahead of a vessel coming in was a direct infraction of art. 25, and that it was bad seamanship and bad navigation to do it at that high rate of speed or to do it at all, but I agree that, there being no rule which directly affects the course or speed of the *Orinoco*, it must depend entirely upon the provisions of art. 29, that "nothing in these rules shall exonerate any vessel . . . from the consequences of any neglect . . . of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." In other words, she is responsible if she has contributed to the collision by negligent navigation. Of course one must remember it is not a breach of the rules involving consequences under the statute, but it is a question of negligent navigation.

I think the highest that can be put against the *Orinoco* is that as soon as she really became aware that the *Kaiser Wilhelm der Grosse* was keeping her speed and going across the bows of the *Orinoco*, she ought to have stopped and reversed. For the purpose of my judgment I accept that. Now it is said, and it puts the *Kaiser Wilhelm der Grosse* in a very great dilemma, that they gave the first signal of two short blasts when about opposite and somewhere in the neighbourhood of Fort de l'Ouest. If that is so it was, roughly, half a mile from the collision. Now, having regard to the distance of the vessels one from another, having regard to the fact that at that point the *Kaiser Wilhelm der Grosse* had ample room to port, I think that a vessel may well pause before it acts upon a signal given at that distance and showing that another vessel is going to perform a very wrong manœuvre. The learned President has taken the view, which I myself should take, that the sound signals were not given so far off as that, but much nearer. If they were given at that distance, and so much earlier, it would by no means benefit the *Kaiser Wilhelm der Grosse*; but I think the evidence of the pilot of the *Orinoco* shows that the man was applying his mind to the right question. He is asked: "Did you not know from her two-blast signal that she was trying to do it? Yes, but as we replied to her with one blast and she had not reached the middle of the entrance, she had time to come round, and we expected that she would have come round to starboard—I think he said he hoped! We expected that she would come round to starboard.—Then she blew another two-blast signal? Yes.—And you kept on going to starboard under a port helm between the first and second two-blasts? Yes, we were keeping to the right, we could not come to port. —Why did not you stop at the first two-blasts? Because she had not yet reached the entrance, and as we gave one blast we thought she had plenty of time then to come round to starboard. All that time she had the whole of the entrance to herself, nearly two-thirds." I think he might have said nearly three-quarters.

Now, we are advised by our assessors that from a seaman's point of view certainly there was no negligence in not stopping and reversing earlier, and I think I might put it higher and say there was no duty upon those in charge of her, as seamen, to stop and reverse earlier. We have to consider whether we can reverse the finding of the learned President, who has said in his judgment that in his opinion "it was not until it was made reasonably clear to them that the *Kaiser Wilhelm der Grosse* was determined to cross the bow of the *Orinoco* that it was necessary for them to think she would do otherwise than come port to port, and as soon as they had a proper opportunity of realising that she did not mean to do that, her engines were reversed and put full speed astern." The only criticism I should address to that passage is on the word "determined." I hope nothing I say may be thought to minimise the duty and obligation of men to stop and reverse as soon as there is appreciable risk of collision, because I believe more collisions have been prevented by stopping and reversing than by any other manœuvre—but I may point out that perhaps the word "determined" is a little too high. I think in this case the *Orinoco* did stop and reverse as soon as she had reasonable ground for thinking that there was persistence by the *Kaiser Wilhelm der Grosse* in wrongdoing. We are pressed to say that it would have been dangerous in the circumstances for the *Kaiser Wilhelm der Grosse* to have ported round the end of the breakwater. Upon what theory of navigation it can be suggested there was the slightest danger in the *Kaiser Wilhelm der Grosse* porting round it it is impossible to see, and therefore I think I should say in this case that the captain and pilot of the *Orinoco* were perfectly justified in waiting at any

rate for some few seconds—half a minute or thereabouts—in order really to see whether this signal did mean that this vessel was going to take such an extraordinary manœuvre; and the pilot was right in coming to the conclusion that for a considerable time after passing the Fort de l'Ouest she might have been expected to port a little and go clear. I think, therefore, the view taken by the learned President, that there was no negligent navigation on the part of the *Orinoco*, was right, and this appeal must be dismissed.

Moulton, L.J.—I am of the same opinion. With regard to the question of the *Kaiser Wilhelm der Grosse* being to blame, I find little difficulty. In fact I think that counsel for the appellants realised that the sole chance of saving the *Kaiser Wilhelm der Grosse* from blame was to get the court to accept as a rule that in a harbour like this an incoming ship ought to wait until the outgoing ship has cleared. I can find no justification for coming to the conclusion that any such rule exists. It would be a most unreasonable rule to say that a channel half a mile broad is not wide enough for one vessel to come out and another vessel to go in, if they keep on their proper sides, at the same time. There is no evidence to prove any such rule exists with regard to this port. In the case referred to, in the House of Lords, there was a dock opening of a completely different character, and it was obvious that one ship must wait until the other had gone clear; and if that is so it is the business of the incoming ship to wait; but that does not in the least indicate that any such rule applies to the entrance to the harbour at Cherbourg.

Putting that on one side, the impropriety of the movements of the *Kaiser Wilhelm der Grosse* is evident. For my part I agree with the opinion of the Lord Chief Justice, that art. 25 applies here—that a constricted channel of this type ought to be considered to be a narrow channel within the meaning of that rule; and that it is the imperative duty of ships to get to the right hand in passing through such a channel. But even if I do not think that it was within that regulation, I have no doubt whatever, and our nautical assessors advise us, that as a matter of seamanship a captain ought to recognise that the proper way of using such an opening is to keep to one side, and that side is the starboard side. The consequence is that the *Kaiser Wilhelm der Grosse* was wrong in not porting round the light-house at the west end of the breakwater and taking a northerly course in coming out of harbour. You have only just to state what the actual manœuvre of the *Kaiser Wilhelm der Grosse* was to see how rash was the conduct of her captain. Here was the case of a vessel coming out at night, with the knowledge that a fairly swift vessel was close to the port coming in, and she attempts to dash across the opening of the harbour of Cherbourg at a speed which gradually rises from something like eighteen knots towards twenty-two knots, obviously trusting to her enormous speed to get clear, but performing a manœuvre which no captain could help seeing involved the gravest risk of collision. I have therefore no doubt whatever that the *Kaiser Wilhelm der Grosse* is to blame.

Now I come to what in my eyes is the difficult part of the case, and that is as to whether the *Orinoco* is also to blame. The difficulty appears to me rather a difficulty for the court of first instance than for us. I was much impressed by the remarks made by counsel for the appellants, on the absence of material witnesses — namely, the men on the look-out on the *Orinoco*—whose absence was quite unaccounted for. They were still in the service of the plaintiff company, and there was no reason that I can see why they were not called. In a case like this, where the preliminary act showed there probably would be serious conflict of evidence, the absence of those witnesses constitutes a great difficulty in the case of the plaintiffs. On the other hand, some of the evidence called appears very clear and satisfactory. On the other side, the tale told by the witnesses for the *Kaiser Wilhelm der Grosse* is, to my mind, far from satisfactory. According to the tale of the captain, coming out of the port he ported, as he naturally must, and gave no signal, and he twice of his own proper motion gave a signal that he was starboarding, when on his own confession he was doing nothing of the kind. The absence of the first signal is easily accounted for, but that he should of his own proper motion twice signal he was starboarding, when he was doing so on neither occasion, seems to be highly improper. It looks to me as though he had received a notification that the *Orinoco* was keeping to the starboard side of the channel, and that his first signal was either an order or an invitation to her to abandon her project, and that what he did was to give a signal which somewhat exaggerated his deliberate neglect of the rule, in order that he might throw upon the *Orinoco* the responsibility of stopping at once. I cannot believe that without something having provoked him to do so he would have given a false signal; and I think the fact that he twice, on his own confession, gave these false signals, throws very great doubt on the tale that was being told on behalf of his ship. On the other hand, there is great unanimity in the evidence given on behalf of the *Kaiser Wilhelm der Grosse* as to what occurred, and on the whole it becomes a case in which the question of fact cannot be adequately revised or reviewed by a Court of Appeal. So much depends upon the way in which witnesses give their evidence, and their demeanour, and the impression made upon the court of first instance, that I think we should be acting in a way which would be unjustifiable if in such a conflict of evidence we were not to accept the findings of fact of the court below. For that reason I accept their finding, which I may say I think is quite consistent with the balance of evidence—namely, that the order of the occurrences was this, that the *Orinoco* ported to get to the starboard side of the channel and gave a single blast; that thereupon the *Kaiser Wilhelm der Grosse* gave a double blast, which indicated she was starboarding; that immediately the *Orinoco* repeated her signal that she was acting under a port helm, and continued so to do; that then, after a short interval, the *Kaiser Wilhelm der Grosse* repeated her signal that she was starboarding; and that thereupon, at once, the *Orinoco* stopped and reversed, leading to a collision in the spot agreed upon.

I have to consider whether in behaving in that way the *Orinoco* was guilty of improper navigation. In the first instance I am satisfied that it was not only permissible, but that it was the duty of the *Orinoco* to port so as to pass through the channel on the right side, and she certainly was right in signalling that she had done so. The difficulties commence when, in reply to that signal, she receives a signal that the *Kaiser Wilhelm der Grosse* is starboarding—an improper thing for that ship to do. The *Orinoco* may be said at that time to have been committed to a port helm. I prefer to put it in this way that she had an imperative duty to keep to the right hand side of the channel, and that no circumstances had yet arisen which would have excused her departing from that, her positive, duty; and that, therefore, what she ought to have done was to do what she did do, instantly repeat the signal stating the fact that she was going on a port helm. The other ship might not have heard the first signal, or might have persisted in starboarding, but whatever was the meaning of this starboard helm signal from the *Kaiser Wilhelm der Grosse* I am satisfied that it did not alter the duty of the *Orinoco*, and she was right in continuing under port helm and signalling at once that she was doing so. But then, ought she to have stopped and reversed? Now, there were two alternative possibilities. It was possible that her second signal might have recalled the other vessel to her duty. Not only was that possible, but it is what ought to have occurred. On the other hand, it was possible that the other vessel would persist in her disobedience to the rule. We must look at the question of stopping and reversing in the light not of one only of those possibilities but of both. What would have been the effect if the vessel had been recalled to a sense of its duty by the second signal? The effect would have been that the safest way to avoid the collision would be for the *Orinoco* to proceed. If she went on under port helm she was clearing the way for the porting of the *Kaiser Wilhelm der Grosse*, and diminishing the risk of that manœuvre bringing about a collision. If, on the other hand, the *Kaiser Wilhelm der Grosse* persisted in her disregard of the rules, there is no question that stopping and reversing would diminish the risk of collision; but where a vessel has to choose between those two alternatives, I am not going to say it is negligence that she does not realise that a vessel plainly informed of the impropriety of what she is doing is going to persist in starboarding. Had she acted, the *Kaiser Wilhelm der Grosse* might have said, "Your second signal made it imperative upon us to port, and yet you stopped your vessel just in the way in which a port manœuvre might easily bring about a collision." I am of opinion that the *Orinoco* was perfectly justified in not stopping and reversing on the first occasion, and if I might trust my own opinion upon a matter of this kind I should say she was bound not to stop and reverse at that period; and as soon as the second signal came which indicated that the *Kaiser Wilhelm der Grosse* was persisting in her course, there is no doubt that the *Orinoco* stopped and reversed immediately. For these reasons I am of opinion that the *Orinoco* is not to blame, and that the appeal must be dismissed.

KENNEDY, L.J.—I have come to the same conclusion, and there is very little I can usefully add. With regard to the case of the *Kaiser Wilhelm der Grosse*, it appears to me to be perfectly clear that that vessel was to blame for the collision which occurred, and I am not going to refer to the manœuvres of that vessel. The fact was that without anything to prevent that vessel being navigated in that which is proved to be the regular practice, though not the absolute rule, of navigation, that vessel, leaving that port, was navigated at very great speed across the mouth of the entrance at a time when those on board knew there was a vessel coming in. Apart, therefore, from neglect of the regulations for avoiding collisions at sea, there was a disregard of that which under the circumstances of the place was the duty of those who were in charge of the navigation of the defendant ship. I agree with the Lord Chief Justice and Moulton, L.J. that there was in fact a breach of the regulation which applied—that the narrow channel rule, as it is called, does apply to a locality such as this entrance to the harbour of Cherbourg; and if that be so it is quite clear that the only possible excuse for disregarding the rule would be that there was something which rendered it neither safe nor practicable to follow that rule; and there is a total absence of anything which could suggest the foundation for such an excuse. That being the case, the question, and it is a question which, on the evidence, deserves to be carefully considered, is whether those on the *Orinoco* can also be held in part to blame for this lamentable occurrence. That again resolves itself into a question whether the *Orinoco* ought to have delayed stopping and reversing until the moment when that stopping and reversing was ordered and executed on board. The other suggested fault was that the *Orinoco* did not wait outside while this vessel came out of the port, and to my mind, and I think the nautical views of our advisers agree, it is absurd to suppose that with a large entrance of this kind the incoming ship is to wait until the outgoing ship has come out and cleared.

But on the question of stopping and reversing there is much more weight, at any rate, in the contention of the defendants. I respectfully add my own opinion to that of the Lord Chief Justice as to the great importance of maintaining a strict scrutiny in any case in which it is reasonably possible that stopping and reversing on the part of the two vessels which came into collision might have prevented that collision.

The question here is was there blame, either statutory or in point of seamanship, on the part of the *Orinoco*, for delaying that manœuvre till the moment she did. The learned President has come to the conclusion, upon the facts, that there was no breach of duty on the part of the *Orinoco*, but of course we have to consider it, and if we had found in the evidence that there had been a distinct choice of that, which in our humble judgment was not the preferable view of the facts, we should of course frankly say so. I think it may be treated as a common fact that those on the *Kaiser Wilhelm der Grosse* sounded a two-blast signal, indicating that their course in substance was to keep on, crossing to the port side, and the question arises whether those on the *Orinoco*, whether they gave a second short blast or not, were right in delaying for about forty

seconds after receiving that second two-blast signal in reversing their engines. The old duty under art. 18 no longer exists, and the duty which fell upon the *Orinoco* must rest upon art. 29. I think there is no doubt what the word "required" in that rule means, because it has been long and clearly settled by authority. It must mean that which Lord Herschell laid down in *The Ceto* (6 Asp. Mar. Law Cas. 479 (1889); 14 A. C. 670)—namely, "The necessity must not be such as to become manifest only when all the facts are ascertained; but must be such as would be apparent to a seaman of ordinary skill and prudence with the knowledge which he possesses at the time."

The question, therefore, must be ought the *Orinoco* to have stopped and reversed being a vessel in the position in which she was, and having received a signal from that other vessel, and no doubt able to see, though it was night, from the position of the other vessel's lights, that she was not going to the starboard side at the time she made that signal. I am not prepared to differ from the conclusion which the learned judge came to; and as the position is one which is of circumstances, and as it must depend upon the circumstances which a reasonable seaman ought then to have taken into consideration as to whether he should then stop and reverse, I think it is not immaterial for the defence of the *Orinoco's* not reversing that while no doubt one must be very careful not to say: "Oh, I thought the other vessel might change her course even at that moment, and do her best to comply with what proper seamanship required," there is this to be remembered, that it is not the case of two vessels meeting in the open sea and one apparently going a wrong course and giving a signal, in which case it must be very dangerous to speculate upon that vessel wisely reporting of a wrong course. Here the pilot and captain of the *Orinoco* would have a right to consider that they ought to assume that those on the approaching ship knew the rule or practice of the place, and to say that they themselves were pursuing the right course and were counting upon the other vessel obeying what was the well-known practice of the place, as well as pursuing the course which the ordinary seamanship required. It seems to me that the decision arrived at by the learned judge was perfectly right, and I agree that the appeal should be dismissed with costs.

Solicitors for the appellants, *Clarkson, Greenwell,* and *Co.*

Solicitors for the respondents, *Holman, Birdwood,* and *Co.*

Thursday, May 16, 1907.

(Before Lord ALVERSTONE, C.J., MOULTON and KENNEDY, L.JJ.)

THE KATE. (*a*)

Collision — Damage—Towage contract—Contract of indemnity—Damage caused by neglect or default of any servant of the company—Shipowners' undertaking to indemnify.

A steamship, one of the Tyser Line, was being repaired by ship repairers under a contract which provided that they would bring the steamship back to the A. Dock to load. By a rule of the dock company no tugs except those of the dock company could be employed to bring a vessel into the docks. The contract under which the tugs were hired from the dock company was signed by the marine superintendent of the Tyser Line, but it was a term of the contract that the hire of the tugs was payable by the ship repairers. The contract provided that "the masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport, and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property . . . and to indemnify the company (if so required) against any claims for . . . injury . . . to any vessel or property of any other person . . . whether such damage, loss, or injury be occasioned by . . . neglect or default of any such masters, crew, or men, or any servant of the company . . . or by any other cause of any kind in connection with the towage or transport." The steamship having been moved into a berth, another tug, not supplied under the contract, and some men from the tugs supplied under the contract to tow the steamship were directed by the dock-master to move certain barges, the K. being among them. By the negligence of the men the K. collided with the propeller of the steamship and was damaged. The owners of the barge sued the dock company, who admitted liability and claimed to be indemnified in respect of the damage by the owners of the steamship.

Held, that even if the towage contract had been entered into by the owners of the steamship, the men and tug whose negligence caused the damage were not employed under the contract when the accident happened; that the towage and transporting had ceased; and that the owners of the steamship could not be liable to indemnify the dock owners, as the towage contract only made the servants of the dock company actually employed in the towage and transportation the servants of the person contracted with.

Judgment of Bargrave Deane, J. affirmed.

APPEAL by the London and India Docks Company against a decision of Bargrave Deane, J. holding that the owners of the steamship *Marere* were not bound to indemnify the dock company against a claim for damage done to a barge.

The contract, which it was alleged imposed an obligation on the shipowners to indemnify the dock company against claims for loss caused (*inter alia*) by the neglect of the dock company's servants was one under which the dock company undertook to dock the *Marere*.

The case is reported in the court below: *The Kate* (96 L. T. Rep. 89; 10 Asp. Mar. Law Cas. 347; (1906) P. 317).

The owners of the steamship *Marere* entered into a contract with R. and H. Green and Co, ship repairers, under which the latter agreed to repair the steamship and return her repaired to the Royal Albert Dock, which was owned by the appellants.

The dock company never allowed any tugs but their own to make use of the docks, and accord-

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

ingly application was made to them for the use of one or more of their tugs. The application was made on the 30th April 1906 on a form, and was in the following terms:

Please supply tugs to assist in transporting the vessel *Marere* from locks to berth. Such assistance, which includes the removal to and from any intermediate berth or mooring which the vessel may occupy, is subject to the conditions on the back hereof, and is supplied at your published rate for one charge only, payable by R. and H. Green Limited.—(Signed) H. BARNES.

The conditions on the back were as follows:

Notice is hereby given that tugs and (or) transporting men are supplied on the following conditions only. The masters and crews of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport, and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to the person, or to the vessel or craft towed or any cargo on board the same or to any vessel or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss, or injury be occasioned by any actual or supposed act, neglect, or default of any such masters, crew, or men, or any servant of the company, or by any defect or insufficiency of the tugs or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport.

H. Barnes, who signed the application form for the tugs, was the marine superintendent of the Tyser Line, but R. and H. Green Limited paid for the hire of the tugs, as stated on the form.

The dock company supplied two tugs, the *Beatrice* and *Louise*, and the *Marere* was moved into a berth in the dock. The *Marere* was moored against the wharf ahead and astern, but 6ft. or 8ft. ahead of the spot where she was intended to lie, when it was seen that some barges would have to be moved from astern of her to enable her to get into the exact spot selected for her. She was quite fast, and had only to heave on her own winches to get into position. Both the tugs had cast off.

The dock master then sent a tug, the *Rattler*, to remove the barges. The headfasts of the barges were made fast to a buoy, and were so entangled that it was necessary to break some of them to enable the barge next the quay to be towed out.

The dock master then ordered a man from the tugs *Beatrice* and *Louise* to get on to the buoy and deal with the headfasts. The headfasts were let out, and the *Rattler* towed out the barges astern of the *Marere*, and in doing so the chain which fastened the barge *Kate* to the buoy was fouled, and the *Kate* was swung against the starboard propeller of the *Marere*, causing the barge and her cargo to sink.

The owners of the *Kate* and her cargo issued a writ against the London and India Docks Company claiming the damage they had sustained by reason of the collision.

The dock company then issued a third-party notice claiming to be indemnified by the Tyser Line in respect of the damage and admitted liability to the owners of the *Kate*.

The third parties, the owners of the *Marere*, admitted the facts as to the collision, but denied that Barnes and R. and H. Green Limited were their agents to engage the tugs, and alleged that the tugs were supplied to R. and H. Green, and that the damage was not caused by the transportation and docking of the *Marere*. In the alternative, they alleged that if the ticket had been signed by Barnes on their behalf, the damage was not caused by an act done in pursuance of the contract.

Bargrave Deane, J. dismissed the action.

The dock company appealed.

R. A. Wright (*Hamilton*, K.C. and *George Wallace* with him) for the appellants.

The arguments advanced in support of the appellants' case were the same as in the court below.

Laing, K.C. and *Dawson Miller* for the respondents, were not called on.

Lord ALVERSTONE, C.J.—In this case I think the result to which Bargrave Deane, J. has arrived is a right result. Two points have been raised, upon one of which I am not quite so clear that I should have followed the judgment of Bargrave Deane, J., but we have not heard counsel for the respondents upon the point, and I do not wish to express any final opinion. All I will say is this, that I can quite understand the shipowners coming under some liability in respect of some obligation undertaken by them or by a person on their behalf under such a contract as this, even though there had been an arrangement that the payment of some particular service was to be made by a third party. I am not prepared without further consideration to assent to the view that there was no responsibility upon the shipowners in respect of Barnes, their agent, having signed a contract which contained this condition, or having assented to a contract on their behalf with this condition in it. It seems to me, however, there is a very clear ground, upon the second point decided by the judge, on which I can entirely concur in his view. Now, taking the contract in the sense contended for by counsel for the appellants—assuming for the moment that Tyser and Co. are to be held the principals—what are their obligations?

Inasmuch as this is a contract which is to make people liable for negligence or want of skill of persons other than their own servants, it requires to be worded strictly and plainly. It says: "Notice is hereby given that tugs and (or) transporting men are supplied on the following conditions only. The masters and crew of the tugs and transporting men shall cease to be under the company's control in connection with the towage or transport, and become subject to the orders and control of the master or person in charge of the vessel or craft towed or transported, and are the servants of the owner or owners thereof, who undertake to pay for any damage to any of the company's property or premises, and to indemnify the company (if so required) against any claims for loss of life, or injury to person, or to the vessel or craft towed, or any cargo on board the same, or to any person or property of any other person or persons, or to the tug or tugs supplied, whether such damage, loss, or injury be occasioned by any actual or supposed act, neglect, or default of any of such masters, crew, or men, or any of the servants of the company, or by any defect or insufficiency of

the tugs or their machinery or ropes, or by any other cause of any kind in connection with the towage or transport."

I agree that from some points of view the words are wide. I agree that for the present purpose it may be assumed in favour of the appellants that they include negligence of masters and crews of the tugs, defect in machinery of the tugs or tackle, and possibly any act done by any servant of the company in connection with the towage or transport. It is rather a large order, but it is construing the condition at any rate in a way which the appellants cannot object to. I can quite appreciate the view that others might take, but for the purpose of the present judgment I will assume the wider view. In both parts of the clause which indicate the liability you find the words "in connection with the towage or transport," and at the end "or by any other cause of any kind in connection with the towage or transport." As a matter of fact the two tugs that were supplied had brought this vessel to her berth, and she had moored to the berth, and it is found by the learned judge—and it appears also in the evidence—that so far as the actual getting close to the quay was concerned, it would be done not by the tugs but by her own winches, and any further work would be done by the dock company because of their general supervision of the docks. That being so, the learned judge found that the damage was caused not by the tugs or their crews, not by the dockmaster, "but by the carelessness of the men he employed to cast off these barges from the buoys. If the barges had been properly cast off, especially the *Kate*, there would not have been this damage accruing by the tug swinging the *Kate* up against the starboard propeller of the *Marere*. It seems to me it cannot be said, when the dockmaster, finding the two tugs had finished their work and were lying idle, took a man from each of them, that he had any right to do so unless he recognised they had ceased to be the servants of the transporting company. I think by taking them he showed that he himself recognised the fact that the contract, so far as the hire of the tugs was concerned, was at an end, and these men had passed back to his own service, and he had a right to claim their service."

In any view, whatever may be the proper mode of expressing it, and without adopting the exact language of the learned judge, I understand it to mean that the towage and transporting contemplated by the contract had ceased. The two tugs were no longer engaged in that operation. The crews were no longer engaged in that operation, and, the services of the tugs being no longer engaged in that operation, the dockmaster, finding the ship in there and knowing she would in the ordinary course possibly have to be hauled up closely to the side of the quay, in order that she might do her loading work—the dockmaster, in the exercise of his general jurisdiction and proper jurisdiction, orders the people to move away certain barges which he thought were where they ought not to be, having regard to the position of the *Marere*. The learned judge having found—I must say I myself should have come to the same conclusion—that the towage and transporting had ceased, it is impossible to extend the liability of the persons who are liable under the contract to an act which was independent of the transporting work, and only done by the dockmaster in the exercise of his general control over the dock. I think this appeal must be dismissed.

Moulton and Kennedy, L JJ. concurred.

Solicitors for the appellants, *Turner* and *Sons*.

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

Friday, June 7, 1907.

(Before Vaughan Williams, Moulton, and Buckley, L.JJ.)

London and India Docks Company *v.* Thames Steam Tug and Lighterage Company Limited. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Dock dues — Exemption — Lighters "bonâ fide *engaged in discharging"—Lighter entering dock to discharge goods, but leaving without discharging—Free water clause—West India Dock Act* 1831 (1 *& 2 Will. 4, c. lii.*), *s.* 83.

The West India Dock Act 1831, *which empowers the dock company to levy dues on lighters entering the dock, provides by sect.* 83 *an exemption from dock dues in the case of lighters entering the dock to discharge goods into any vessel lying there, so long as such lighters shall be* "bonâ fide *engaged in discharging."*

Two barges entered the dock, laden with goods intended to be discharged into a vessel lying there. The barges lay in the dock until it was found that the vessel was fully loaded, and they then as soon as possible left the dock without having discharged any part of their cargoes.

Held, affirming the decision of the Divisional Court (95 *L. T. Rep.* 506), *that the barges were exempt under sect.* 83 *from liability to pay any dock dues.*

Appeal by the plaintiffs from a judgment of the Divisional Court (Kennedy and A. T. Lawrence, JJ.) affirming a decision of the judge of the City of London Court.

The action was brought to recover the sum of 1*l.* 11*s.* 6*d.* in respect of dues charged upon two barges belonging to the defendants (being the ordinary dues at 6*d.* per ton) for entering the East India Dock belonging to the plaintiffs.

The facts of the case were shortly as follows:—

The defendants' barges *Clarence* and *Pike* entered the East India Dock, laden with goods intended to be discharged into a vessel called the *Umfuli*, which at the time of the entrance of the barges was lying in the dock.

The barges lay alongside the vessel until it was found that the vessel was fully loaded and was unable to take any more cargo on board.

The barges thereupon, at the first opportunity, left the dock without having discharged any of the goods which they had taken into the dock.

It was not suggested on the part of the plaintiffs that there was any want of care or foresight on the part of the shipowner, or any negligence or undue delay on the part of the defendants, but it was contended that, inasmuch as the barges had not in fact discharged their cargoes or any part thereof into the vessel before leaving the dock,

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

they were liable to the rate in force for entering the dock.

No question was raised on this appeal as to the right of the plaintiffs under sect. 76 of the West India Dock Act 1831 to impose dues under sect. 76 of that Act on barges entering the East India Dock; but the defendants relied on sect. 83 of that Act, which provides an exemption in certain cases in favour of barges which otherwise would become liable to the dues imposed by sect. 76, and they contended that, upon the facts of the case, the two barges in question came within the exemption created by sect. 83.

The West India Dock Act 1831 (1 & 2 Will. 4, c. lii.) provides as follows:

Sect. 76. And be it further enacted that the said company shall and may take or receive for or in respect of every ship or vessel entering into any of the said docks, basins, locks, or cuts, or lying therein or departing therefrom, such reasonable rate, rent, or sum for every ton, according to the register tonnage of such ship or vessel as the said directors shall from time to time appoint; and it shall be lawful for the said company to take further reasonable rates or sums for the unloading, coopering, or mending of the cargoes of such ships or vessels, or other work which may from time to time be performed by the said company in respect of such ship or vessel; and the said company shall and may also take or receive for or in respect of every lighter, barge, or craft entering into any of the said docks, basins, locks, or cuts, or lying therein, such reasonable rate, rent, or sum not exceeding the rate, rent, or sum which may at the same period be payable by ships or vessels trading coastwise between the port of London and any port or place in the United Kingdom, as the said directors shall from time to time appoint.

Sect. 80. And be it further enacted that the said company shall and may take or receive for every article of goods, wares, or merchandise which shall be brought into, or landed or deposited within, or delivered or shipped from, the said dock premises, such reasonable rates, rent, or sums as the said directors shall from time to time appoint, for and in respect of wharfage, unshipping, landing, relanding, piling, housing, weighing, coopering, sampling, unpiling, unhousing, watching, shipping, loading, and delivering of every such article, and of other work to be performed in respect of such goods. . . .

Sect. 83. Provided always, and be it enacted that all lighters and craft entering into the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein, shall be exempt from the payment of any rates so long as such lighter or craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid, and also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever.

The judge of the City of London Court gave judgment for the defendants.

The Divisional Court consisting of Kennedy and A. T. Lawrence, JJ. affirmed the decision of the judge of the City of London Court, but gave leave to appeal.

The case is reported *ante*, p. 33; 95 L. T. Rep. 506.

The plaintiffs appealed.

J. A. Hamilton, K.C. and *E. Church Bliss* for the plaintiffs.

Scrutton, K.C. and *Cranstoun*, for the defendants, were not called upon.

Reference was made to the unreported case of *Knight, Bevan, and Sturge* v. *London and India Docks Joint Committee*, in which Wills and Wright, JJ. gave a decision upon the construction of sect. 83 of the Act of 1831.

Vaughan Williams, L.J.—I think that the decision of the King's Bench Division was quite right. I am entirely in agreement with the judgment of Kennedy, J. I do not propose to deliver a very lengthy judgment in this matter. It seems to me that this case depends entirely upon the construction of sect. 83 of the West India Dock Act 1831, and that the particular words in that section that we have to construe are the words: "So long as such lighter or craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid." But before I deal with the construction of those words I wish to say something about the words at the end of the section: "And also all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever." In my judgment those words are introduced into this section solely for the purpose of embodying at the end of sect. 83 the provisions of sect. 80 in respect of vessels from which goods have been shipped or unshipped, and they do not have the slightest bearing upon the construction of the words which we have to construe here, which, I think, ought to be construed exactly as they would be, quite independently of the words at the end of the section, which really are dealing with a different subject-matter in the sense that they only are embodying the effect of sect. 80 in respect of goods covered by that section. That being so, let us see what is the meaning of the expression "*bonâ fide* engaged in discharging or receiving" ballast or goods. I do not think that anyone has gone to the length here of saying that "*bonâ fide* engaged" means that the exemption shall not apply in a case where for some reason or other the discharging or receiving goods into or from a lighter has been delayed by reason of the condition of the vessel into which, or from which, the goods were to be discharged or received by the lighter. As I understand the judgment of Wills, J., he himself excludes that construction. He seems to me to say in terms that that construction cannot be applied. He says: "Now, it is said that you must not construe that"—those are the words which I have been reading—"as applying to the physical act of discharging, but apply it to the whole of the time she is physically discharging. I agree so far." Wills, J. himself does not say that the exemption applies only so long as the physical act of discharging or receiving is being performed. According to my understanding of those words, "*bonâ fide* engaged in discharging," they mean so long as the vessel which entered the dock or basin for the purpose of discharging or receiving goods from on board of any ship or vessel lying therein continues. According to my view, when the lighter does enter into the dock for this purpose of discharging into or receiving from a vessel lying in the dock she is engaged in discharging into or receiving goods from a vessel. I think that the exemption of the lighter begins from the very moment that the lighter enters the dock or basin for this purpose, and that these words mean this, that when a vessel has entered into the dock or basin qualified for the exemption, because she has entered for the purpose of loading or discharging in respect of a vessel lying in the docks, that so long as that

qualification for exemption lasts, the exemption itself shall last, and that it is not true to say either in respect of the first entry of the lighter into the dock or basin, or in respect of the continuance of the exemption, that it only lasts so long, or only applies in respect of cargo that is physically discharged or received. Practically for the purpose of the business of the dock companies this construction does not place the slightest hardship upon the dock company. The dock company is competent, if it thinks fit (and for aught I know may have done so), to make a rule that every lighter entering into the dock for the purpose of discharging into a vessel there lying or receiving cargo from it, shall specify the name of the vessel into which it is going to discharge, or from which it is going to receive. If my construction here is applied, the result would be that if a lighter entered into the dock, not really for the purpose of loading or discharging into a ship then lying there, but for the purpose of seeing if it could pick up a job there, the result would be that as soon as the facts were ascertained the dock company would be entitled to say that the lighter must pay the full charge without any exemption whatsoever.

I do not think that I need say any more in order to express my view with regard to the construction of sect. 83; but I should like to add that not only did Wills, J. abstain from a construction which involves saying that the exemption only lasted as long as the physical act of discharge or receipt was continuing, but expressly refused to put such a construction on the words as involved saying that the exemption only applied in cases where not only the lighter was there for the ordinary purpose of discharging or receiving, but also that it was necessary that the vessel from which, or into which, the receipt or discharge of goods was to be, should always be ready during the whole time that the lighter was there to receive or discharge, as the case might be. The learned judge seems himself to have felt that it was impossible to put that construction on this section; but, as I understand the judgment of Wills, J., what he does say is this, that if the lighter enters, and enters at a time when the vessel is not ready to receive or discharge, as the case may be, that the application of the exemption will only arise in a case where ultimately the vessel is ready to discharge or receive, and does, in fact, discharge or receive. I cannot find myself any words in the section which do in any way express that condition of exemption. I mean I do not find a word in the section which suggests that the exemption shall only apply in cases in which there is by the lighter either a receipt of goods from the vessel or a discharge of goods into the vessel; and I would point out with reference to that that it seems to me if the Legislature had intended to make the actual receipt or discharging of goods from or into a vessel a condition of the exemption, they would have worded this section very differently. That is to say, instead of the words: "Be it enacted that all lighters and craft entering into the said docks, basins, locks, or cuts, to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt," the Legislature would have said: "All lighters, in fact, going into the dock and receiving or discharging goods," shall have this exemption. The Legislature has not so expressed it. It begins the words relating to the exemption with a statement of the entry of the lighter into the dock for the particular purpose. Bearing that in mind, when we come to construe the words "*bonâ fide* engaged" we ought, in my judgment, to read those words as covering the time during which the lighter is entering or has entered into the docks for the purpose of going to a vessel lying there to discharge goods into that vessel, or receive goods from it, and we ought not to read the words "*bonâ fide* engaged" here as only giving the exemption in cases in which there is an actual receipt or discharge. I think that the judgment of the Divisional Court was quite right, and that this appeal ought to be dismissed with costs.

Moulton, L.J.—I am of the same opinion and for the same reasons. The question turns entirely on the construction of sect. 83 of this particular Act of the dock company, which relates to the exemption of barges under certain circumstances from dock rates. The section, so far as it relates to these lighters, consists of two parts. The first deals with the question as to what barges are exempted on entering, and the second part deals with how long that exemption continues. Now, taking the first part, we find that the qualification which initiates or gives rise to the exemption from dock rates depends on the purpose with which the barge enters the dock. The relevant words are that "all lighters and craft entering into the said docks . . . to discharge . . . goods from on board a ship or vessel lying therein shall be exempt from the payment of any rates"; so that the question of whether or not they entered to discharge is the question to be decided in order to find out whether the barge has the exemption. There is no question in the present case that these barges entered the dock to put goods on board a vessel lying in the dock. Therefore if, as in my opinion must be the case, the question of exemption on entrance is to be decided by the circumstances as they existed at the moment of entrance, that is to say, the purpose with which the lighter entered, it is not contested that these lighters acquired the exemption on entry. The case depends on the second part of the section which deals with how long that exemption lasts. The continuation of the exemption is fixed in this way: it lasts so long as the lighter continues to possess the qualification of being "*bonâ fide* engaged in discharging." We have to consider the meaning of that phrase. Everyone conceived that a lighter entering to discharge and waiting about for that purpose, and actually discharging the whole or some of its contents on to the ship and then going out again, continues to possess this qualification throughout the whole time; in other words, that waiting to discharge satisfies the language of being "*bonâ fide* engaged in discharging." But the appellants contend that although the clause says that the exemption is to last so long as this qualification lasts, there can be an *ex post facto* defeasance of a qualification provided the lighter does not succeed in discharging any of its cargo. To take a concrete example. Two barges enter equally to discharge their cargo on board a ship. They equally wait about *bonâ fide* for that purpose. Therefore, so far as the purposes of this

section are concerned, during the whole of that time they are equally within or without the scope of the section. One succeeds in discharging some of its cargo on to the ship. That one remains in possession of the privilege of exemption, and goes out without having become liable to rates. The other does not succeed. According to the contention of the appellants, the whole of the time that it has been exactly in the same circumstances as its more successful companion, it has not possessed the qualification of being *bonâ fide* "engaged in discharging," although the other barge in exactly the same circumstances did possess it. I do not believe that there is anything whatever in this section which points to any *ex post facto* defeasance of that kind. If it was intended that there should be any such, it would certainly be expressed in plain and definite language. I think that what is meant is, that a barge continues to possess this qualification of exemption so long as it is there *bonâ fide* for the purpose of discharging, and, so long as it is in that condition, it possesses the qualification, and that cannot be taken away from it by any subsequent event, namely, whether or not it does succeed in discharging.

I will only add one more word. I think it is clear in considering the meaning of the words which describe the qualification, namely, being "*bonâ fide* engaged in discharging," that the initial qualification is clearly one of intention — that the lighter enters to discharge. I do not think it unfair to say that that renders it very probable that the later words mean so long as it continues in the dock to discharge—that is, with the *bonâ fide* intention of discharging —it satisfies the latter portion of the section. I am, therefore, of opinion that these barges throughout were exempt from dock rates. With regard to the words at the end of the section relating to goods, I entirely agree with what Vaughan Williams, L.J. has said with regard to them. I think they made provision that no charge should be made in respect of goods on board such lighters in the only case in which they could be liable to be charged, that is to say, when they had been either shipped or unshipped.

BUCKLEY, L.J.—Upon the concluding words of sect. 83 the appellants have raised an argument that the discharge mentioned in that section must be a discharge in fact, and that there is no exemption unless there has been in fact a discharge. In my opinion that argument fails. I want to clear those words away in the first instance. Their effect, intention, and result, I think, is this: Sect. 76 imposes a rate upon vessels or lighters entering the docks, and that rate was according to the register tonnage of the vessel. Sect. 80 then also provided for rates upon goods, and, as I read sect. 80, it is confined to goods, to use the words of the section, "In respect of which goods some work is performed." If the vessel entered the dock with goods in her hold which remained there throughout the time that she was in the dock, and she went out with them there, still, no rates, I think, could be charged under sect. 80 in respect of those goods. They must be goods in respect of which work is done in the nature of shipment or unshipment, such as loading, landing, delivering, and so on. They must be goods handled in some way on the premises. In that state of things sect. 83 contains this provision, that if goods are put on the ship, or taken off the ship into a lighter, those goods shall not be charged. They have been shipped or unshipped, and therefore would be within sect. 80; but if they are shipped or unshipped into or out of a lighter, then they are not to be charged. That is the whole effect, in my opinion, of those words. Then sect. 83 is one in which we have to determine the true meaning of the words "*bonâ fide* engaged in discharging." The lighters with which we have to do are lighters which entered the dock intending to discharge goods which they had on board into a vessel called the *Umfuli*, which was at the time of their entrance lying in the dock, and with *bonâ fide* reason to believe that that vessel would be able to take their goods. They were there upon a definite job, the business of carrying goods to a vessel which they expected to receive them; and from that which I am going to say I exclude altogether the case of a barge which goes in in what I may call the hope of finding a vessel which will take her load. This was not that case. They were there upon a definite business of discharging their cargo into a vessel which they had good reason to believe would receive it. Under these circumstances, the question is whether those lighters (although in point of fact they never did discharge) were within these qualifications that they "entered to discharge," and that they were there "*bonâ fide* engaged in discharging." Certainly they "entered to discharge"; there can be no question about that. Were they "*bonâ fide* engaged in discharging"? I answer, Yes. "They also serve who only stand and wait"; and those barges also are "engaged in discharging" which only enter, wait, and leave again for the purpose of discharging, although, in point of fact, they never do discharge. They were engaged throughout *bonâ fide* in discharging, and none the less because in point of fact, through no fault of theirs, no discharge took place. For these reasons I think that the judgment of the Divisional Court was right, and that this appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs, *E. F. Turner* and *Sons.*

Solicitors for the defendants, *Keene, Marsland, Bryden,* and *Besant.*

Friday, July 5, 1907.

(Before Lord ALVERSTONE, C.J., MOULTON and BUCKLEY, L.JJ.)

OCEANIC STEAMSHIP COMPANY *v.* FABER. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance — Insurance of vessel while in port—"Loss of or damage to machinery through any latent defect in machinery"— Latent defect in shaft before policy effected— Discovery of defect in port after policy effected — No evidence when defect became patent — Right of assured to recover.

A policy of insurance for one year from the 18*th May* 1902, *upon a vessel while in port, provided: "This insurance also specially to cover loss of*

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

and (or) damage to hull or machinery . . through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull."

While the vessel was in port in 1902 *during the currency of the policy the shaft was drawn, and a fracture was discovered which caused the condemnation of the shaft. The shaft had previously been examined in* 1900, *when no defect was discovered. Between* 1900 *and* 1902 *the vessel had been on several voyages. The fracture discovered in* 1902 *was the direct result of an imperfect weld in* 1891 *which left a latent defect.*

Held (dimissing the appeal), that, the assured not having proved that the defect first became patent while the vessel was in port during the currency of the policy, they were not entitled to recover from the underwriters the cost of replacing the defective shaft.

APPEAL of the plaintiffs from the judgment of Walton, J. at the trial of the action without a jury.

The plaintiffs brought this action upon a policy of marine insurance to recover from the defendant the cost of providing a new tail shaft for the plaintiffs' steamship *Zealandia*.

The plaintiffs were a shipping company carrying on business at No. 329, Market-street, San Francisco, U.S.A.

The defendant was one of several subscribers to a policy of marine insurance, dated the 14th May 1902, for twelve calendar months from noon on the 18th May 1902, on the plaintiffs' steamship *Zealandia* at San Francisco, subject to the printed port insurance clauses attached thereto.

The premium paid on the policy was 10*s.* per cent.

Attached to the policy was a port insurance clause providing (*inter alia*):

With leave to dock, undock, and change docks as often as may be required, and to go on slipway, gridiron, and (or) pontoon, and (or) to adjust compasses. The insurance also specially to cover loss and (or) damage to hull or machinery through the negligence of master, mariners, engineers, or pilots, or through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull, provided such loss or damage has not resulted from want of due diligence by the owners of the vessel, or any of them, or by the manager. In case of any claim for average, the claim to be paid without deduction of one-third, whether the average be particular or general. The above clauses and conditions are additional to those contained in the policy, and, so far as they are inconsistent therewith, are to supersede the same.

By supplementary agreements, dated respectively the 24th June and the 17th July 1902, attached to the policy, it was agreed (1) to suspend the insurance from time of vessel leaving San Francisco until expiry of thirty days after her rearrival there, from which date the policy should reattach; and (2) that the reinsurance should attach from noon on the 10th July 1902.

On the 11th July 1902 the *Zealandia* docked at San Francisco on completion of a voyage from San Francisco to Honolulu and back, and on the 13th July proceeded to Martinez. Martinez was a place on the bay of San Francisco.

On the 11th Oct. the *Zealandia* left Martinez and proceeded to the wharf at San Francisco; and on the 30th Oct. 1902 the vessel was docked at the Union Ironworks Dry Dock, San Francisco, for the purpose of being overhauled. The propeller was removed, and the tail shaft drawn into the tunnel for examination. A fracture about 3ft. forward of the after liner was then discovered and the shaft condemned.

On the 27th Aug. 1904 the shaft was further examined, after breaking it at the point of fracture, at the ironworks where it was then lying.

Unless the owners of the *Zealandia* had reason to fear that something was wrong with the tail shaft or its connections, they never drew the shaft except when requested to do so by Lloyd's surveyor.

The shaft was drawn in April 1900 and was examined by Lloyd's surveyor, and from that date until Oct. 1902, when the shaft was again drawn to be examined by Lloyd's surveyor, it remained in place subject only to the ordinary examinations which all machinery undergoes at the hands of the chief engineer.

It would have been an impossibility to have discovered the condition of the shaft while the shaft was in place in the ship.

Even if the shaft had been drawn and examined within a year prior to its condemnation, it is possible that the condition of the shaft could not then have been discovered.

The owners did not employ a superintendent engineer before Jan. 1902. Any special overhauling of the machinery done prior to that time was under the special supervision of the chief engineer of the ship, and Lloyd's engineer surveyor would be called in to certify as to the condition of the machinery.

Nothing occurred between the 18th May 1902, the date mentioned in the policy for the inception of the risk, and the 30th Oct. 1902 to warrant the withdrawal of the tail shaft.

On the 5th Nov. 1902 a survey of the vessel was made, and the report stated: "A fracture was found in the tail shaft, about 3ft. forward of the after liner, extending diagonally for a distance of 13in. and about five-eighths of an inch deep."

On the 27th Aug. 1904 a survey of the shaft was made, and the report stated that "the defect which caused the shaft to be condemned was the direct result of an imperfect weld. Subsequent inquiries proved that this shaft had a new end welded on from the vicinity of the present fracture, in 1891."

A report made on the 27th Aug. 1904 by the same surveyor who had reported on the 5th Nov. 1902 stated: "The cause of the flaw is the result of imperfect welding at that point under the surface, thus leaving a latent defect."

The action was tried before Walton, J. without a jury, and judgment was given in favour of the defendant: (10 Asp. Mar. Law Cas. 303 (1906); 95 L. T. Rep. 607).

The plaintiffs appealed.

J. A. Hamilton, K.C. and *Leslie Scott* for the appellants.—The plaintiffs are entitled under this policy to recover for this loss. When the defect in the shaft was discovered the only proper course was to condemn and remove the shaft. The result is just the same as if the shaft had actually broken and become useless, and the shipowners are entitled to be indemnified under the policy, under the words "loss of or damage to . . .

machinery through . . . breaking of shafts." The special port insurance clause attached to this policy contains additions to the ordinary perils insured against, and full effect must be given to it. This is a special insurance against a special kind of risk. This is either a "loss of machinery through breaking of shafts," or "a loss of or damage to machinery . . . through any latent defect in the machinery." The machinery of this vessel was disabled by being practically without a shaft owing to the latent defect in the shaft; and that resulted in a loss owing to the latent defect, which is within the terms of the policy. There was a loss—that is, the loss of the shaft; and the shaft was lost owing to the latent defect as soon as the latent defect became patent—that is, when it was discovered and caused the condemnation of the shaft. It would unduly limit the operation of this special clause and deprive the assured of protection from loss which it was intended to insure against, if this clause is construed as not including this loss. It cannot be necessary for the assured to prove that the latent defect became patent during the currency of the policy. It must be sufficient to show that the defect was in fact discovered during the currency of the policy inasmuch as the loss did not occur until the discovery. This was a time policy, and the time might begin in the middle of a voyage when the defect could not be discovered. The material time is the time when the latent defect causes the loss—that is, when the defect is in fact discovered and the condemnation of the shaft became inevitable. The insurance is against loss through any latent defect, and the defect is latent until in fact it is discovered. They referred to

Jackson v. *Mumford*, 8 Com. Cas. 61; 9 Com. Cas. 114.

Scrutton, K.C. and *Maurice Hill* for the respondent.—This loss has not been shown to be covered by this policy. By this policy the vessel was insured only while in port, and the assured must show that the loss occurred while the policy attached—that is, while the vessel was in port. After the vessel was last surveyed in 1900 she made many long voyages; and after the commencement of this policy she made a voyage to Honolulu and back. This policy attached only while the vessel was in port at San Francisco, and the development of this defect could not have happened while the vessel was in port and the machinery at rest. The development of the latent defect into a crack apparent on the surface of the shaft must have occurred during a voyage, and it was a mere accident that it was discovered only when the vessel was in port. The risks of a port insurance are very light and the premium is small; the insurers are liable only for losses occurring in port, and it is incumbent on the assured to show that the loss occurred in port. [They were stopped by the Court.]

J. A. Hamilton, K.C. in reply.—Loss of the shaft involves discovery of the defect and condemnation of the shaft, and therefore the precise time when the latent defect developed into a patent defect is immaterial. Conceding that it is more probable that the defect came to the surface when the vessel was at sea than when she was in port, that is immaterial, because there was no loss at all before the discovery in port.

Lord ALVERSTONE, C.J.—I have followed this argument with very great interest. Upon the point which appeared to me at one time to be the main ground of the argument I have not heard Mr. Scrutton, and I am not prepared to assent to it. As to the view expressed by Walton, J. when he said, "I cannot help feeling doubt whether it was or was not intended by this clause to make the underwriters liable not merely for the consequences of the breakage of the shaft, but for the breakage of the shaft itself if it happens during the currency of the policy," I am very anxious not to say anything which may be cited as an authority, because I have only heard an argument on one side, and it would require very substantial argument to satisfy me that, if a shaft breaks in the course of a voyage from a latent defect, and does no harm except to itself, or if a shaft is condemned because it is found unworkable, and that state of things arises during the currency of the policy, the underwriters would not be liable.

But that is a very different case from the present case as it is now before us upon Mr. Scrutton's argument. There is no proof in this case as to when the shaft got into such a condition that it ought to be condemned, and must be condemned. During the argument for the appellants, I was much impressed with the view that, treating this as an ordinary commercial document, and assuming it to be a risk for twelve months during which the ship or vessel was always at risk, if all that was known was that the vessel had been examined during the current year, and the shaft then was condemned, *primâ facie* it was a case in which there was evidence that there was a loss of the shaft by reason of a latent defect, within the meaning of this policy. But it now seems to me that the state of things is really very different. I think the plaintiffs have absolutely failed in proving their case. The policy now turns out to be a policy, though on the face of it for twelve months, which only covers the ship while in port, and, while it is quite true she might move about, the risks incidental to a shaft during a voyage are very different from what might happen while the vessel is in port. It is in regard to that policy that we have got to construe those words: "The insurance also specially to cover loss of and damage to hull or machinery through . . . breaking of shafts, or through any latent defect in the machinery or hull." I should have thought certainly that there was not a breaking of the shaft; but, if the shaft did not break, I should have thought that *primâ facie* it was a loss of or damage to machinery through a latent defect in the machinery. But it is quite plain to my mind that, in order to make that good, at least it was incumbent upon the plaintiffs to prove that that condition of things arose during the time when the policy attached—namely, while the vessel was in port. The appellants meet that by saying the policy must be a policy against loss caused by the latent defect, and that the loss is only caused by latent defect when it is discovered so that the shaft is condemned. As applicable to a general policy covering the whole of the time, I think that observation would be a strong one. As applicable to a policy which covers only broken periods while the vessel is in port it seems to me that it is quite impossible to hold that there

is evidence that the loss did occur during the time the vessel was in port.

To put an extreme case, suppose that this vessel was at sea from the 18th May 1902 up till the 16th May 1903, when she came into port, and then it was found that the shaft must be condemned, and it is condemned immediately, I think it would be impossible to hold in that case that there was evidence that the loss of the machinery was caused by the latent defect while the vessel was in port simply because the discovery of it occurred on that day. I therefore think that Walton, J. was right in holding that there was no evidence to show that the loss by the latent defect was caused during any period covered by this policy so as to make the underwriters liable. Therefore, I think on this point, and on this point only, the appeal must be dismissed.

MOULTON, L.J.—I have come to the same conclusion. I agree with what the Lord Chief Justice has stated as to there being no evidence whatever that this condition of things with regard to the shaft occurred in any way during the period during which this policy attached. But, in my opinion, the appeal fails on the construction of the clause itself. In my opinion the words that are critical here are the words "loss of or damage to hull or machinery." In my opinion that means actual loss of hull or machinery, or actual damage to hull or machinery. Now, I may miss out the words which relate to the negligence of master, mariners, engineers, or pilots, and go to the words which more particularly concern the question in this case, "or through explosions, bursting of boilers, breaking of shafts, or through any latent defect in the machinery or hull." In my opinion the explosions, the bursting of boilers, and the breaking of shafts, support the view that the loss or damage in question means actual loss or actual damage.

But I may say here that, if a shaft breaks, it appears to me that that is actual loss caused by the actual breaking of the shaft, and I see no reason why that should not be covered by the policy, though I do not decide it, as it is not necessary to decide it in this case. Then we have got, "through any latent defect in the machinery or hull." I am satisfied that that means only actual loss to the machinery or hull, or actual damage to the machinery or hull, caused by a latent defect, and that it does not mean condemnation by reason of a patent defect, which is what the argument of the appellants here contends for. A defect initially latent, but spreading until it becomes a patent defect, is an ordinary incident of all machinery. A person may carefully examine a cylinder cover on one day and find no trace of any defect in it. A week after he may find that there is a trace of a crack. It is his duty, of course, then to replace it, if he can do so. He may be perfectly certain in his mind that the reason that the economic life of that cylinder cover has come to an end is because there was initially something weak in it, and, as is always the case, the weak point is the first to give in. That is a case of a latent defect developing into a patent defect. But it is so ordinary an instance that it is one of the commonest forms in which the economic wearing out of a part of the machinery occurs. Now, I do not believe for one moment that this clause means that the insurers insure the machinery against the existence of latent defects. It only means that, if through their latency those defects have not been guarded against, and actual loss of the hull or machinery, or damage to the hull or machinery, comes from those defects, then the insurers will bear the burden of that loss. For these reasons I think that in the present case there was no loss of shaft or machinery, or of any other portion of the machinery, or of the hull, by reason of any latent defect, but simply condemnation of a shaft which had shown that it was no longer fit to be used.

BUCKLEY, L.J.—This is an action brought upon a contract of insurance against risks. The subject-matter with which we have to deal is the shaft of a vessel. The policy took effect from the 18th May 1902. In Oct. 1902 the shaft was drawn into the tunnel, and it was then discovered that a defect had developed which caused the shaft to be condemned. There is nothing whatever to show that that defect, latent in the metal, had become patent on the surface since the 18th May 1902. On the contrary, upon the evidence I think it certainly did not. It is attributed by the experts to an imperfect weld which was made in the year 1891, and presumably if the shaft had been examined at some time before the 18th May 1902 it would have been found then on the surface. It had not been found on the surface in 1900. Suffice it for the moment to say at all events that the plaintiffs have not proved that it became patent on the surface of the metal after the 18th May 1902. Now, the words under which liability arises are "loss to machinery through breaking of shafts, or through any latent defect in the machinery." The shaft did not break. Happily it was found out, and no harm resulted. Mr. Hamilton argued faintly that it broke constructively, in that it was reduced to such a condition as that it might have broken. I do not accept that argument. It did not break, and no loss occurred at all to the shaft or to anything else from its breaking; and that leaves only the words, "any latent defect in the machinery." I agree that, if a shaft has disclosed such weakness as that it is condemned, and that happened during the currency of the policy, that would be a risk covered by the policy. I do not accept what Walton, J. said, as to the loss being confined to the injury occasioned to some other parts of the ship by the breaking of the shaft. I think it includes the loss arising from the deterioration of, or the discovery of the defect in, the shaft itself. If, therefore, the plaintiffs had proved that the defect had come to the surface, and had rendered the shaft defective, after the 18th May 1902, I think they would have been entitled to recover; but that is not so. I think the evidence is rather to the contrary. Then that only leaves this: Does this insurance cover the risk of discovering, after the 18th May 1902, that the shaft was in this particular condition? It seems to me unnecessary to lay down in this case that that could not be so in any case. When a shaft is inclosed in a shaft tunnel, and in the ordinary course of practice would not be withdrawn except at long intervals for the purposes of surveying, it is quite possible the defect which would be patent on the surface of the shaft, if you could look at it, would be latent

if the shaft was in such a position as that you could not look at it. I do not want to say anything about that general question. Here I have to consider whether upon the true construction of this policy, being such a policy as it is, it was intended to cover that risk. In my opinion it plainly was not. This was only a policy on the vessel while she was lying in port. The suggestion, therefore, is that it was intended to cover by the small amount of premium which was payable on such a policy as this the possibility of overhauling the vessel while she was in port, and discovering the latent defect which had occasioned no injury to anybody, and that the insurance office was to be liable for that. It seems to me that, as a matter of construction, it is impossible to put that meaning upon it. I do not think that in this case the risk which was covered included the risk of discovering during the currency of the policy that the latent defect, which had been existing for some time previously, was there. For these reasons I think the appeal fails.

Appeal dismissed.

Solicitors: for the appellants, *Field, Emery, Roscoe*, and *Medley*, for *Batesons, Warr*, and *Wimshurst*, Liverpool; for the respondents, *Waltons, Johnson, Bubb*, and *Whatton*.

HIGH COURT OF JUSTICE.

PROBATE, DIVORCE, AND ADMIRALTY DIVISION.

ADMIRALTY BUSINESS.

June 12 *and* 13, 1907.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE REGINALD. (*a*)

Collision — Pilot vessels — Lights — "On their station on pilotage duty" — Collision Regulations 1897, *art.* 8.

A pilot vessel which had been cruising with a pilot on board put him on to a vesssel, and was then rowed up the river Avon in charge of two men. She was exhibiting a white light at her masthead, and had a flash light on her deck ready for use. A steamship going down the river ran into and sank the pilot vessel. Those on the steamship charged the pilot vessel with exhibiting improper lights.

Held, that the pilot vessel was carrying improper lights as pilot vessels are only on their stations on pilotage duty within the meaning of art. 8 *of the Collision Regulations* 1897 *when in their pilotage district and on the look-out for vessels to pilot, and they are only allowed to exhibit the special lights mentioned in that article in those circumstances, but that the steamship was liable for the collision as it was caused by the absence of look-out and excessive speed on her part.*

ACTION OF DAMAGE.

The plaintiffs were the owners, master, and crew of the pilot cutter *Ellen*; the defendants were the owners of the steamship *Reginald*.

The case made by the plaintiffs was that shortly before 10.20 p.m. on the 11th Aug. 1906, the *Ellen*, a wooden pilot cutter of 15 tons register, manned by a crew of two hands, but having no pilot on board, was in the river Avon near the hospital ship stationed in the river between Nelsons Point and Pill. The weather was fine, clear and starlight, and the tide was last quarters flood of the force of about one to one and a half knots. The *Ellen* had her mainsail, topsail, foresail, and jib set, but, there being no wind, these were useless, and she was being rowed up the river a little on the Somersetshire side of mid-channel and was making about half a knot an hour through the water. She carried at her masthead the regulation white globular light which was being duly exhibited and was burning brightly, and she had on deck a flash light ready for exhibition when required. A good look-out was being kept on board of her. In these circumstances those on the *Ellen* saw about a mile off and bearing a little on the port bow the masthead and red lights of a steamship, and the masthead towing and red lights of a steam tug which proved to be the lights of the *Reginald* and her tug. The *Ellen* continued being slowly rowed up the river on the Somersetshire side of the channel, and the *Reginald* and her tug approached showing their port lights and in a direction to pass to the eastward of the *Ellen*, but, instead of keeping clear of the *Ellen* as she could and ought to have done, the *Reginald* when a short distance off opened her green light, and notwithstanding that she was loudly hailed came on at great speed, and with her stem struck the starboard bow of the *Ellen* close to the stem a violent blow cutting right through her and causing her to founder immediately with one of her crew.

Those on the *Ellen* charged the *Reginald* with not keeping a good look-out, with failing to keep clear of the *Ellen*, with improperly starboarding, with neglecting to keep in her proper water, with proceeding at an excessive speed, and with neglecting to ease, stop, or reverse her engines.

The case made by the defendants was that about 10.25 p.m. on the 11th Aug. 1906 the *Reginald*, an iron screw steamship of 436 tons net register, manned by a crew of twenty-three hands all told, was in the river Avon in the course of a voyage from Bristol to Waterford. The wind was calm, the weather fine and clear but dark, and the tide flood of the force of one and a half knots.

The *Reginald*, with the tug *Avonmouth* fast ahead, was proceeding on a down-river course at a speed of about four and a half knots over the ground. Her regulation lights were being duly exhibited and were burning brightly, and a good look out was being kept on board her. In these circumstances those on board the *Reginald*, who had previously seen a number of white lights lower down the river, suddenly saw a white light on the *Ellen*, which vessel was under way about ahead, about a ship's length distant. The *Reginald's* engines were immediately reversed full speed and her tug towed off her port bow, but, notwithstanding this, the two vessels came together, the *Ellen* being struck on the starboard bow by the *Reginald's* stem. Just before the collision the tow-rope was cut by those on board the *Reginald*.

Those on the *Reginald* charged the *Ellen* with not keeping a good look-out, and neglecting to

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

carry and exhibit lights in accordance with the regulations.

The following are the material parts of the regulations referred to during the course of the case:

1. The rules concerning lights shall be complied with in all weathers from sunset to sunrise, and during such time no other lights which may be mistaken for the prescribed lights shall be exhibited.

7. Steam vessels of less than 40, and vessels under oars or sails of less than 20, tons gross tonnage respectively, and rowing boats, when under way, shall not be obliged to carry the lights mentioned in art. 2 (*a*), (*b*), and (*c*), but if they do not carry them they shall be provided with the following lights . . .

3. Vessels under oars or sails, of less than 20 tons, shall have ready at hand a lantern with a green glass on one side and a red glass on the other, which, on the approach of or to other vessels, shall be exhibited in sufficient time to prevent collision, so that the green light shall not be seen on the port side, nor the red light on the starboard side.

8. Pilot vessels, when engaged on their stations on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes. On the near approach of or to other vessels they shall have their side lights lighted, ready for use, and shall flash or show them at short intervals to indicate the direction in which they are heading, but the green light shall not be shown on the port side, nor the red light on the starboard side. A pilot vessel of such a class as to be obliged to go alongside of a vessel to put a pilot on board may show the white light instead of carrying it at the masthead, and may, instead of the coloured lights above mentioned, have at hand ready for use a lantern with a green glass on the one side and a red glass on the other, to be used as prescribed above. Pilot vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage.

Aspinall, K.C. and *D. Stephens*, for the plaintiffs, cited *The Englishman* (37 L. T. Rep. 412; 3 Asp. Mar. Law Cas. 506; 3 P. Div. 18) as an authority for the proposition that, as the *Reginald* had no look out, the *Ellen* was not to blame for carrying wrong lights, as they could not by any possibility have contributed to the collision.

Laing, K.C. and *A. D. Bateson* for the defendants.

BARGRAVE DEANE, J.—This is a case which involves one important point—namely, as to the position of a pilot cutter—whether she is or is not on her station. This pilot cutter had been on her station. She was manned by a crew of two hands and one pilot, and her station was apparently Bristol and the river Avon. We have not been told the limits of her station. I rather agree with Mr. Marsden's definition of when a pilot cutter is on her station. She must be "cruising or at anchor and on the look-out for ships." A pilot cutter may be on her station in one sense and yet not looking out for ships, having no pilot on board, or no man on board capable of piloting a ship. Therefore, being on the station involves two things—place, and being on the look-out for ships.

I am satisfied that this particular pilot cutter was not on her station, and that takes the case as to lights out of art. 8. That article provides that: "Pilot vessels, when engaged on their station on pilotage duty, shall not show the lights required for other vessels, but shall carry a white light at the masthead, visible all round the horizon, and shall also exhibit a flare-up light or flare-up lights at short intervals, which shall never exceed fifteen minutes. Pilot vessels, when not engaged on their station on pilotage duty, shall carry lights similar to those of other vessels of their tonnage."

In my opinion what had happened was this: This vessel had been on her station and had had her masthead light up, and had had a red and green light (in one lamp) on her deck ready to be shown. When her pilot, Mr. Buck, had gone on board a vessel, the pilot cutter came in. She had ceased then to be on her station, but she had not hauled down her masthead light, and she continued to show the same lights as when she was on her station, and so she came into the river. There was no wind, and according to the preliminary acts of both sides it was the last of the flood tide, force a knot and a half. In that way she was drifting up on the flood tide, with the two hands on board her rowing with sweeps. As she came up she was passed by a launch attached to a hospital ship. That launch made fast alongside the hospital ship and then the people on board her, who have been called, say they saw the cutter coming up, and they could see her light as she came up. We have seen a model of the cutter, and we have seen the lamp, a powerful white globe lamp, and that lamp was burning brightly, according to the evidence of everybody, before the collision, at the time of the collision, and all night, after the vessel sank that part of her mast to which the lamp was attached being still above water.

Therefore there cannot be a doubt that this powerful light was burning at the time of the collision. There is a dispute as to whether that lamp ought to have been visible at that time. One witness, I think on the side of the defendants, admits that in all his years'—I think he said thirty years—experience of the Avon he had never known these pilot boats to carry anything in the Avon except one masthead light. But that does not end the question, because we have before us this model which has been sworn to as being to scale, and seeing this model I think it is perfectly clear that that lamp would be visible until you got two points abaft the starboard beam. If that be so, and the cutter was heading anything like up the river, that lamp would be visible to anybody coming down, and it is said by the people on the hospital launch, and by the master of the hospital ship, who saw this cutter coming up and were away on her starboard bow, that they saw this lamp right away up to the time of the collision. According to the rule she ought to have been showing at that time—not being on her station—a "port and starboard" light, and no masthead light, and in the opinion of the court she ought to have been showing a "red and green" light and not a white light. In our opinion, however, that does not affect the collision at all.

The *Reginald* and her tug were coming down, and, without going into details, it is perfectly clear that the evidence as to the speed of the *Reginald* and her tug is not true. She must have come faster than she says, to have covered the ground. In forty-seven minutes she had

covered five and a half miles, and she says that her slow speed, which was what she was going at, was only four to five knots. In addition to that, she had a knot and a half tide against her, and so she was going at six to seven knots, which is a great deal more than her slow speed. Therefore we have not been told the truth. I do not think the speed at which she was going all the way down is material. What is material is the speed at which she was going just before the collision. Was she going at a proper speed shortly before the collision, or was she going too fast, and was that the cause of the collision, because she could not avoid this vessel? Another point is whether she had a proper look-out. We have heard what to me is a strange story. It is said that, by the rule of the Waterford Company, going down the river Avon the whole of the watch is put on the forecastle head, and that on this particular occasion the chief officer, the quartermaster, the carpenter, and two A.B.'s were on the forecastle head, on the look-out. It is not an uncommon experience in this court to find that what is the business of so many is the business of none, and it is extremely likely that, with these people on the forecastle head, whereas all were supposed to be looking out, none really were, but each was relying upon the other. The fact remains that this brilliant light, which, as I have said, would be obscured only two points abaft the starboard beam, was seen only at a ship's length, and then was not seen first by those on the look-out, but by the captain on the bridge, 100ft. aft. I am only saying now what is apparent to anybody. The cutter was struck on the starboard bow, and there is a dispute between the experts as to whether she was struck at an angle of two points or four points leading aft. I confess, looking at the photographs, they support two points rather than four points, because we find the actual stem of this vessel cut and part of it carried not to port but aft. We find as a fact, and this is a matter in which the Elder Brethren advise me, that this vessel was struck very nearly end on. If so, how was she heading? She cannot have been heading at an angle which would have obscured that light. If the light was not obscured, why was it not seen? The reason, I think, was that there was not a proper look-out.

It is quite possible that the captain on the bridge may have been at the moment thinking of other things and trusting to the look-out, and the look-out were talking among themselves and not keeping a proper look-out. It is quite clear there was not a proper look-out. I had in my mind the case of *The Englishman* (*ubi sup.*) before it was cited by counsel for the plaintiffs, but what I had in my mind about the case is this. It does not matter whether the cutter had proper lights up, according to the regulations or not. Here was a big white light staring these people in the face and they never saw it. It might have been any light. Here was a light which ought to have been seen, and if it had been seen the collision could have been avoided. The fact that it was not seen was the whole cause of the collision. The pilot cutter was moving at about two knots up river, and she was only seen when 240ft. away. At that time the *Reginald* was going so fast that she could do nothing. Her tug apparently towed off to port, and when they found that was happening they cut the rope and ported, so as to turn their head to starboard, which may have just accounted for the two point blow. For these reasons, although we think the pilot cutter was not carrying the regulation lights, in the circumstances we do not think it had anything to do with the collision, and in our opinion the sole cause of the collision was want of look-out, and, in the circumstances, excessive speed on the part of the *Reginald*. We find the *Reginald* alone to blame.

Solicitors for the plaintiffs, *Downing, Handcock*, and *Co.*, for *Inskip* and *Sons*, Bristol.

Solicitors for the defendants, *Thomas Cooper* and *Co.*, for *Gerrish, Harris*, and *Co.*, Bristol.

July 12, 13, 15, *and* 16, 1907.

(Before BARGRAVE DEANE, J. and Elder Brethren.)

THE RED CROSS. (*a*)

Collision — Crossing rule — Narrow channel — Cardiff Drain — Non-application of Collision Regulations 1897.

Those on a steamship, after leaving the Roath Dock Basin under the orders of the dockmaster, sighted the masthead and red lights of a tug and the green light of her tow two to three cables off and one to two points on the port bow. The tug and tow were coming up on the east side of Cardiff Drain, which runs about north and south, bound into the East Bute Dock. The steamship and tug both sounded a port-helm signal, but a collision occurred. In a damage action each side charged the other with breaches of the Collision Regulations 1897.

Held, that the Collision Regulations did not apply to vessels meeting in such circumstances in Cardiff Drain, and that the steamship was alone to blame for the collision, as she ought to have waited till the channel was clear before she attempted to cross the incoming traffic.

DAMAGE ACTION.

The plaintiffs were the owners of the barque *Nantes*; the defendants and counter-claimants were the owners of the steamship *Red Cross*.

The collision between the two vessels occurred about 7.45 p.m. on the 20th Sept. 1906 in the Cardiff entrance channel. The wind at the time was N.E., light; the weather was dark and clear, and the tide flood of no appreciable force.

The case made by the plaintiffs was that the *Nantes*, a steel barque of 2785 tons gross and 2157 tons net register, manned by a crew of twenty-six hands all told, in charge of a duly licensed Bristol Channel (Cardiff) pilot and with a Cardiff Dock pilot also on board, was, while on a voyage from Geelong, Australia, to the Bute East Dock, Cardiff, in the Cardiff entrance channel between the low-water pier and the channel dry dock.

The *Nantes* was being towed up on the east side of the channel on her way to the east dock, which had the light exhibited showing that the dock was open for vessels to enter. She was slowly forging through the water, making about a knot to a knot and a half, the tug *Prairie Flower* being fast ahead, but at the time

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

having her engines stopped, and another tug, the *Hibernia*, being fast astern.

The *Nantes* and both the tugs had their proper regulation lights duly exhibited and burning brightly, including on the *Prairie Flower* the small white light abaft the funnel, and on the *Nantes* a stern light. A good look-out was being kept on the *Nantes* and the tugs. In these circumstances those on the *Nantes* saw, about 600 or 700 yards off and about a couple of points on the starboard bow, the masthead light of the *Red Cross* in the Roath Basin Lock. Very shortly afterwards, as it was seen that the *Red Cross* was coming ahead, by order of the pilot the *Prairie Flower* towed to starboard and sounded a single short blast to allow the *Red Cross* to pass across to the west side, which was her proper side of the channel.

The *Red Cross* sounded a short blast in reply, which was the signal under the Bute Dock By-laws that she was directing her course to starboard to cross over to the west side of the channel. The *Prairie Flower* sounded another short blast, and, to give the *Red Cross* as much room as possible to cross on to her right side of the channel, the helm of the *Nantes* was put hard-a-port; the stern tug of the *Nantes* towed full speed astern and sounded three short blasts; the *Prairie Flower* continued towing to starboard, and the *Nantes* quickly lost her way; but the *Red Cross*, which was approaching at a considerable rate of speed with her red light open on the starboard bow of the *Nantes*, failed to act in accordance with her signal, and, keeping on the east side of the channel, caused danger of collision, and, although loudly hailed to go full speed astern and to drop her anchor, she kept on, apparently without reducing her speed, and came into collision with the *Nantes*, which was still over on the east side of the channel, striking with the bluff of her port bow the stem and port bow of the *Nantes*, doing her considerable damage.

The plaintiffs charged the defendants with not keeping a good look-out; with failing to cross over to their proper side of the channel; with improperly navigating on their wrong side; with failing to port in accordance with the signal given on their whistle; with proceeding at an excessive speed; with failing to ease, stop, or reverse their engines; with neglecting to drop their anchor; and further alleged that, if the defendants were unable to cross to their proper side of the channel, they should have waited in the Roath Basin Lock until the *Nantes* had passed clear.

The case made by the defendants was that the *Red Cross*, a steamship of 2877 tons gross and 1832 tons net register, manned by a crew of twenty-six hands all told, and in charge of a duly licensed pilot, was proceeding down the Cardiff entrance channel on a voyage to Monte Video with a cargo of coals.

The *Red Cross*, which had shortly before left the Roath Basin under the orders of the dock-master, was making about two knots with her engines working at slow. The regulation lights for a steamship under way were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on board the *Red Cross* observed distant between two and three cables and bearing between one and two points on the port bow the masthead, towing, and red lights of the *Prairie Flower*, and shortly afterwards the green light of her tow, the *Nantes*.

When the lights of the tug were seen, the helm of the *Red Cross* was ported a little and steadied, and one short blast was sounded on her whistle, to which the *Prairie Flower* replied with one short blast. The *Nantes*, however, came on, still keeping her green light open, and the helm of the *Red Cross* was thereupon put hard-a-port and one short blast was again sounded on her whistle. The *Prairie Flower* again sounded one short blast in reply, and immediately afterwards, as the *Nantes* still showed her green light, the engines of the *Red Cross* were put full speed astern and three short blasts were sounded on her whistle, but the *Nantes* still came on across the channel, and with her stem struck the port bow of the *Red Cross*, doing her damage, for which her owners counter-claimed.

The defendants charged the plaintiffs with not keeping a good look-out; with failing to keep to their starboard-hand side of the channel; with failing to keep out of the way of the *Nantes*; with failing to port her helm and follow the tug; with improperly starboarding; and with failing to slacken her speed or stop.

The local by-laws referred to were the following:

Regulations for entrance channel. — Vessels bound into the Bute Docks shall, after rounding the fairway buoy, take up a position on the east side of mid-channel, at least a cable's length astern of preceding vessels, which distance must be maintained. Vessels bound from the Bute Docks to sea must keep to the westward of the channel, and maintain at least a cable's length distance from the vessel ahead, and pass out to sea through the entrance channel, so that the rule of port helm may be always applied to clear vessels both outwards and inwards. Vessels bound out from Roath Basin at such times as vessels are passing up to the East Basin must make good use of art. 19(*a*) of the Rules for Preventing Collisions at Sea, so soon as in the pilot's judgment it is prudent to cross over to take up the west side of the navigation. In taking a course authorised or required by these regulations, a steamship under weigh may indicate that course to any other ship which she has in sight by the following signals on her steam whistle—viz.: One short blast to mean "I am directing my course to starboard." Two short blasts to mean "I am directing my course to port." Three short blasts to mean "I am going full speed astern." The use of these signals is optional, but, if they are used, the course of the ship must be in accordance with signals made.

Laing, K.C. and Dr. *Stubbs* for the plaintiffs.—The main question in this case is on which side of the channel did the collision occur. If it was on the east side, the *Red Cross* is to blame. It is said that the *Nantes* should have kept out of the way, and it is said she is the give-way ship:

The Leverington, 55 L. T. Rep. 386; 6 Asp. Mar. Law Cas. 7 (1886); 11 P. Div. 117.

But the *Nantes* should never have been put in such a position, for those on the *Red Cross* should have waited until it was prudent to cross over on to the west side of the navigation.

Aspinall, K.C. and *Dawson Miller* for the defendants.—No complaint was made by the wit-

(*a*) Art. 28 of the Collision Regulations 1897 is now substituted for art. 19 of the Collision Regulations 1884.

nesses for the *Nantes* that the *Red Cross* came out of the lock at a wrong time; their complaint was that the *Red Cross* improperly starboarded, otherwise she could have got over. The evidence is clear that the *Red Cross* did not starboard, and she cannot be blamed for coming out of the basin at the time she did, as she was then obeying the commands of the dockmaster.

BARGRAVE DEANE, J.—This is an action brought by the owners of the French barque *Nantes* for damage occasioned by a collision between the barque and the *Red Cross*, a steamer, at about 7.45 on the evening of the 20th Sept. 1906, and the place of collision was at Cardiff. The *Nantes*, a steel barque of 2785 tons, was coming up to go into the East Bute Dock. The *Red Cross*, a steamer of 2877 tons, was going out of the Roath Dock, bound to Monte Video, with coal. Both vessels were fully laden, the French barque with grain. There is a contradiction in this case, as in most of these Admiralty collision cases, which the court has to try to solve—to try and arrive at what is the real truth of the matter. Fortunately we have in this case certain facts and certain statements which are a very good guide; but I wish to say a word or two first about the port of Cardiff.

It is one of the most important ports, I suppose, in Great Britain. It has large docks, and additional docks are being made, and so far as I am able to learn, and in the course of the case I have tried to elicit information about it, each dock has a different dockmaster, and there seems to be no supreme authority. The result is that according to the regulations each dockmaster has control over his own dock, to let ships in or out as he pleases, and it is possible that three or four ships may be sent out of three or four different docks at the same moment into a part of the port which, so far as I am able to gather from looking at the chart before me, is a *cul de sac* about 1000 yards long and 300 yards wide at the widest part. The reason I mention this is that I find that the master of the *Red Cross* in evidence says that he was ordered to go out of the Roath Basin, and apparently had no option. I see that is also pleaded in the statement of defence. He says that he went out, and took it for granted that the coast was clear—that is to say, he did not accept any responsibility for going out—he went out because he was told to go, and he assumed that the coast was clear. All I can say about it is that it seems to me that what is wanted in the port of Cardiff is a very much more clear and distinct set of regulations, and that there should be some supreme authority who should have some control over the incoming and outgoing ships of that port.

The story is this: The *Nantes* had anchored at Penarth and she came up that evening on the flood tide, and she had a tug ahead of her and a tug astern. She came up, according to her own evidence, about in mid-stream until she got to the low-water pier, and she passed close to that, some 40ft. off, and then proceeded on to the east side of mid-channel and came into collision with the *Red Cross*. The *Red Cross* came out of the Roath Dock, and her story is an odd one. The Roath Dock Basin is said to lie S.W. by W., and she says that she came out of the basin, and when she approached the outer of the two buoys off the dock entrance she had to starboard a little to clear it, and then she ported back, and so she kept on a course of S.W. by W., and she never starboarded except that short starboarding which was subsequently corrected, but later on she hard-a-ported, and that would take her head, she says, about half a point to the northward of the S.W. by W. course. That would make her, at the time of the collision, pointing well over to the west shore, and it is said she was pointing in the direction of a buoy which one sees on the chart. The *Nantes*, coming up, as I have said, kept to the east side. The collision, according to the *Nantes*, happened somewhere to the east side of mid-channel; according to the *Red Cross* it happened well to the west of mid-channel. We have got to see which story is accurate. How are we best to arrive at a conclusion? We begin with the photographs of the two ships, and the court is of opinion that the angle of the blow, as shown by the damage on both, was an angle of from one to two points—not more than two points. It will be seen that the blow is not a cutting-in blow at all. There is no cutting-in. The blow is a sliding blow, and the steel stem of the barque seems to have ripped the plating off. The Elder Brethren and I are agreed that the damage shown is the damage of a glancing blow, and not the damage of a blow of anything like three or four points. We say that the blow was at an angle of not more than two points, and, when we remember that at the time of the collision the *Red Cross* was under hard-a-port helm, and had paid off about half a point at the moment of the collision under the hard-a-port helm, it may well be that the cut in the after part of the wound was caused by the fact that she was paying off to starboard at the time. How do you get the vessels in collision at an angle of one to two points, the port bow of the *Red Cross* against the port bow and stem of the *Nantes*? As I have said, we have some statements in this case which help us, and the first statement I will refer to is the official statement made by Mr. Owen, who was the pilot in charge of the *Red Cross*, in the execution of his duty to the port authorities. He says this: "Time 7.45 p.m., 20th Sept. 1906. The *Red Cross* heading about S.S.W.; the *Nantes* heading about N.W. by N." That is his statement made at the time, and you will also find in the defendants' preliminary act that, when the other vessel was first seen, the heading of the *Red Cross* was S.W. by S. I have already pointed out that the story told by the defendants is that they were heading S.W. by W., but when the story is first told, as you will see by the pilot's statement and preliminary act, that is not what was said. It has been altered since, but if you take the heading S.W. by S. and give two points as the angle of the blow you will find that will put the *Nantes* heading a little to the east of north, which would be a course pretty well straight up the channel and not pointing to the west shore. Those two matters bring us to the conclusion that the *Nantes* was heading pretty well up the channel, and that the other vessel was heading about S.W. by S. That would put them exactly on a two-point angle, and that would agree with the damage which has been caused, and it would agree with a great deal of the evidence given in the case.

We have another curious contradiction in the case. There was another vessel which came up about the same time as the *Nantes*—a small steamer called the *Dolphin*. The *Dolphin* passed the *Nantes* coming up, and came in ahead of her into the basin, and then, according to her pilot, she eased off to the east side of the basin or *cul de sac* close up to a Spanish ship on the east side. According to the pilot who was in charge of the *Dolphin*, when he was in that position the *Nantes*, coming up, and her tug, having about ten fathoms out and towing on the starboard bow of the *Nantes*, came close up to his vessel, and he says without any hesitation that at that time the *Nantes* was on the east side of mid-channel, and her head was not pointing to the west of mid-channel. A great deal has been made of the fact that the tug was towing on the starboard side, and it is urged that the reason was that her head paid off to the west, and it was sought to bring her back. On the other side those representing the *Nantes* say her head was not to the west, and that when they saw the *Red Cross* crossing their bows they ordered the tug to pull her to starboard in order to try and avoid the *Red Cross*. The master of the *Dolphin*, oddly enough, does not agree with the pilot, and we have to say whom we accept. The master, rightly enough, says he was not looking after the navigation of his ship, and we therefore prefer the evidence of the pilot. What does this result in?

It results in this, that we cannot accept the story of the *Red Cross* that she did nothing more with her helm than starboard a little, port back, and then hard-a-port. We are satisfied that she starboarded, and therefore her story is not true. If she starboarded, is she to blame for starboarding? There the court has a difficulty.

I cannot bring myself to believe that the Navigation Rules for Preventing Collisions at Sea can apply to this particular place in the port of Cardiff. How can it be said that a vessel which is over on her starboard side of the channel has to keep out of the way or to keep her course and speed or do anything particularly? How is it to be said any of those rules can apply? How can it be said that vessels in a certain position must pass port to port or green to green? It seems to me you cannot apply those rules to a *cul de sac* of this sort, only 300 yards wide and 1000 yards long. I am not going to apply those rules to this particular collision. I think it is a case where you want seamanship, and where you want masters to apply their minds to the position in which they find themselves, and not be bound by hard and fast rules which are not applicable.

What, in our opinion, ought to have been done in this case? The Elder Brethren are very strong upon one point. They say that the *Red Cross* had no business to charge out of this lock, across this small space, without first being satisfied there was nothing in the way. She might have waited. When she was clear of the lock and ceased to be under the control of the dockmaster she might have waited outside by those buoys until she was satisfied there was nothing coming up. If you take the navigation rule, she was a crossing ship —crossing the line of traffic—but I do not think the crossing rules apply; but what she ought to have done, and what was not in her mind to do, was to pay some attention to the incoming traffic. Her master said, "I assumed all was clear, because the dockmaster said I was to go out."

In our opinion the *Red Cross* was to blame in going ahead as she did, without thought as to what might possibly be ahead. In addition to that, this collision happened certainly not to the westward but if anything to the eastward of mid channel. I have referred to the pilot's official report. He does not say it happened to the westward of mid-channel, although now, in the witness-box, he says, and a witness has been called to corroborate him, that after the collision he called attention to the fact that he was then to the west of mid-channel. It does not follow that the collision took place there. He may very well have got across to the west side after the collision. He himself, in his official report, wrote that the casualty occurred in the middle of the entrance channel, opposite the Channel Dry Dock. In our opinion it did not take place on the west side of mid-channel, but a little to the east of it, and it took place there in consequence of this vessel starboarding and not going over into her own water, as she ought to have done, and as she now says she did. I do not think there is anything I need say about the speeds of the vessels, except this, that it only emphasises what I have said about the navigation rules. What speed was either of these vessels going that it should be said she should keep her course and speed? Neither was going above a knot or a knot and a half, and according to the evidence of the hindermost tug, the *Hibernia*, she was actually going astern at the time, but neither vessel had any real speed upon her. Yet, if we are going to apply the crossing rules, one vessel has to keep her course and speed. It only emphasises what I have said—that those rules cannot be held to apply in such a place as this.

I do not know that I need say anything more. So far as we are able to see, the *Nantes* was properly navigated. She was brought up, as we believe, on the east side of mid-channel, and so far as we have heard there was nothing to stop her going on. It is not suggested that the dock signals were against her, and, that being so, she was going on in the due course of her voyage to her place of destination, with nothing to stop her which had any authority. So long as she kept her own side of the channel, and so long as she was not going at such a speed as to render it impossible to handle her, nobody can say she was doing wrong. The result is that we find the *Red Cross* alone to blame for this collision.

Solicitors for the plaintiffs, *Downing, Handcock, Middleton*, and *Lewis*, agents for *Downing* and *Handcock*, Cardiff.

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

HOUSE OF LORDS.

July 2 *and* 3, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and ATKINSON, with Nautical Assessors.)

OWNERS OF STEAMSHIP ORAVIA *v.* OWNERS OF STEAMSHIP NEREUS AND OTHERS; THE ORAVIA. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Collision—Fog—Excessive speed.

APPEAL from a judgment of the Court of Appeal consisting of Lord Alverstone, C.J., Cozens-Hardy, M.R., and Moulton, L.J., sitting with nautical assessors, reported 10 Asp. Mar. Law Cas. 100, 434 (1907); 96 L. T. Rep. 869, affirming the decision of the President of the Admiralty Division, reported 10 Asp. Mar. Law Cas. 100 (1905); 93 L. T. Rep. 278, in an action which the owners of the steamship *Nereus* brought against the owners of the steamship *Oravia* in respect of a collison in which both vessels were seriously injured. The collision happened on 9th Oct. 1904, in a bank of thick fog at the entrance to the River Plate. The courts below found the *Oravia* alone to blame. The short facts were that the *Nereus*, when making about eight knots, saw the *Oravia* three miles about a point on the port bow. The *Oravia* was making about ten knots, and the vessels were on opposite courses. The *Nereus* was kept on her course, and the *Oravia* broadened to about two points on her port bow, the vessels thus approaching so as to pass clear port to port. A fog bank then hid the *Oravia* from sight, and the *Nereus* continued on her course and speed until she reached the fog bank, when she heard the whistle of the *Oravia*. She then sounded her whistle and her engines were put to slow, when another whistle was heard, and her engines were put full speed astern and her whistle sounded. The *Oravia* then came in sight 300 or 400 yards off under a starboard helm and at high speed, and struck and sank the *Nereus*. The *Oravia* was found to blame for going at an excessive speed in a fog and for starboarding her helm, and there was no appeal as to this. The *Nereus* was found free from blame. The Court of Appeal held that on the special facts of the case, inasmuch as the position and course of the *Oravia* were ascertained before she was hidden by the fog so that the vessels would pass clear port to port, the *Nereus* did not act wrongly in continuing her speed and in not sounding her whistle sooner.

Sir *R. Finlay*, K.C., *Butler Aspinall*, K.C., and *Robertson Dunlop* appeared for the appellants.

F. Laing, K.C., and *D. Stephens*, for the respondents, were not called on to address their Lordships.

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

The LORD CHANCELLOR (Loreburn).—My Lords: I am of opinion that this appeal ought to be dismissed. The question before your Lordships is entirely a question of fact. With regard to the point of signalling, it was argued that the *Nereus* was to blame for going at eight knots without sounding her whistle during the short time between the disappearance of the *Oravia* in the fog and the master coming on to the bridge. Four judges and four nautical assessors have thought that the *Nereus* was not to blame, and the nautical assessors who assist your Lordships have come to the same conclusion. In these circumstances I think that the appeal ought to be dismissed with costs.

Lords ASHBOURNE, MACNAGHTEN, JAMES OF HEREFORD, and ATKINSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Parker, Garrett, Holman*, and *Howden*.

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

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

May 16, 28, *and July* 29, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords JAMES OF HEREFORD, ATKINSON, and COLLINS.)

BOARD OF TRADE *v.* BAXTER AND ANOTHER; THE SCARSDALE. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Voyage — Agreement with crew — Discharge — Voyage to end at such port as may be required by the master—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 114, 115.

A seaman signed articles for "a voyage not exceeding one year's duration to any ports or places within" certain degrees of latitude, "commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port . . . as may be required by the master." The ship proceeded to Malta and thence to the Black Sea, where she loaded a cargo of grain for Southampton. She discharged her cargo at Southampton, and the seaman then claimed his discharge, but the master refused to give it to him, telling him that he was required to proceed with the ship to Cardiff. He then instituted proceedings against the master to recover the wages and compensation which he alleged were due to him.

Held (affirming the judgment of the court below), that he was not entitled to recover, and that the master was justified in refusing to discharge him, as by the terms of the agreement the master was empowered to fix the termination of the voyage, within certain limits, which included Cardiff, and the discharge of the cargo was not equivalent to the termination of the voyage.

Held, further, that there was nothing in the agreement contrary to the provisions of sect. 114 *of the Merchant Shipping Act* 1894. *What is a voyage must in each case be a question of fact. The voyage for the ship need not be identical with the voyage for the cargo.*

APPEAL from a judgment of the Court of Appeal (Vaughan Williams, Stirling, and Moulton, L.JJ.)

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

reported 10 Asp. Mar. Law Cas. 235 (1906); 94 L. T. 528; (1906) P. 103, reversing a decision of Bargrave Deane, J.

The facts appear sufficiently from the headnote above, and from the judgments of the Lord Chancellor and Lord Collins.

The *Solicitor-General* (Sir W. Robson, K.C.), Sir *R. Finlay*, K.C., and *Rowlatt* (Sir *J. Lawson Walton*, K.C., A.-G., with them) for the Board of Trade (who had intervened), appellants, argued that if the agreement had the effect for which the master contended it was bad under the Merchant Shipping Act 1894. Agreements under the Act must be either for a single voyage or a "running agreement" for two or more voyages, but a running agreement cannot extend beyond the 30th June or the 31st Dec., whichever is most remote, or, if the ship is then at sea, beyond her return to port. This was an agreement for a single voyage, but the contention of the master that it was to end "at such port" in a given area "as may be required" enables it to be indefinitely extended. The Court of Appeal said that "voyage" was used in its popular sense, but as soon as the last of the cargo is discharged the "voyage" in any sense of the word is ended. The duration of a "voyage" was discussed in

The George Holme, 1 Hagg. Adm. 370;
The Minerva, 1 Hagg. Adm. 347;
The Westmoreland, 1 Wm. Rob. Adm. Rep. 216.

If the view taken by the Court of Appeal is right the legislation in the Merchant Shipping Act for the protection of seamen is nullified. Cardiff was not the ship's home port. She was not registered there, neither did the owners reside there. The question is the construction of these words in the agreement. A voyage must have a *terminus a quo* and *terminus ad quem*, which must be where the ship discharges her cargo. Otherwise she might go on from one port to another indefinitely. The respondent's construction makes the agreement bad under the Act of 1894, under which an agreement must be for a definite voyage, or a running agreement: (see sects. 113, 114, 115, 239, 241, 242, 253, of the Merchant Shipping Act 1894). The earlier Acts all point to the port of discharge as the termination of the voyage. The voyage ended at Southampton, as a matter of fact, and this is the only construction which makes the agreement a valid one.

J. A. Hamilton, K.C. and *Lewis Noad* for the master, respondent, maintained that the only question was whether Baxter was entitled to sue for his wages at Southampton under sect. 164 of the Act. He had not only to show that his wages were earned, but also that they were payable at Southampton, which they were not unless he was entitled to his discharge there. The meaning of the contract is plain. The engagement did not end at Southampton, as the master made his election to go on to Cardiff. The voyage contemplated for the ship need not be identical with that contemplated for the cargo. If it were this ship had made three voyages, for she had discharged three cargoes. There is no ground for saying that this agreement was illegal under the Act of 1894. It falls within sect. 114. The older legislation went on the ground that sailors were a class requiring special protection, which was the principle of the decision in *The Minerva* (*ubi sup.*), but the policy of the later Acts is to frame certain carefully considered rules to protect sailors in making their contracts, and outside those rules to leave complete freedom of contract, only prohibiting what is expressly forbidden by statute.

Sir *R. Finlay*, K.C. was heard in reply.

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

July 29.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: The question in this case is whether or not Charles Baxter, a fireman who served in the steamship *Scarsdale*, is entitled to the sum of 4*l.* 3*s.* 9*d.*, being the balance of his wages, and also a sum of 2*l.* for compensation. A summons was taken out under sect. 164 of the Merchant Shipping Act 1894. The magistrates found the facts, but made no order, and referred the case to the Admiralty Court, under sect. 165, subsect. 3, of the Merchant Shipping Act 1894. Baxter claimed his discharge at Southampton when the *Scarsdale* arrived there on the 28th Sept. 1904. He was engaged on the following terms: That he was to serve "on a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees north latitude and 60 degrees south latitude, commencing at Cardiff, proceeding thence to Malta, thereafter trading to ports in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home-trading limits) as may be required by the master." The *Scarsdale* proceeded to Malta, thence to the Black Sea, where she took in grain, and thence to Southampton, where she arrived on the 28th Sept. The ship there discharged the whole of her cargo, and Baxter claimed his discharge. The master of the *Scarsdale* told him that he would have to go on to Cardiff. He said nothing further, and it is obviously consistent with the master's attitude at the time, as it is with the argument urged before your Lordships, that the real claim on behalf of the shipowners was that Baxter should serve in a succession of voyages, not exceeding in all one year's duration, until the master should think fit to fix upon a particular port as the end of the service. Bargrave Deane, J. decided in favour of the plaintiff, but the Court of Appeal reversed his opinion, and your Lordships now have to decide the question finally.

I ask myself first, What is the meaning of this agreement? It is an agreement for one voyage, not for two or more voyages, and it is an agreement for one year and no longer. If, therefore, any one voyage comes to an end before the expiration of the year, the service is also ended. It is true that the master may choose at what port in the United Kingdom or within home-trading limits, the voyage is to end, but that does not mean that he can prevent a voyage from ending when, in fact, it has ended. It means that he is the person who has to fix upon the port where the voyage is to end, but if he fixes upon a port where, in fact, the voyage does end, although he may not intend that the voyage shall end there, the voyage is none the less ended at that port. I turn now to the Merchant Shipping

Act 1894, and consider the meaning of its provisions in regard to voyages.

It seems to me that under the Act a seaman may agree for a voyage no matter how long it may last, in point of time, provided it is in fact one voyage. A seaman may also agree for two or more voyages (called a running agreement) provided that the service shall in that case end within a short fixed period—namely, the 30th June or the 31st Dec. next following, "or the first arrival of the ship at her port of destination in the United Kingdom after that date, or the discharge of cargo consequent on that arrival." Accordingly, it will be observed that the nature of any authorised agreement hinges upon the meaning of the word "voyage," and yet the Act gives no definition of that word, because it does not admit of definition. There is an indication and no more.

The Legislature apparently attaches importance to the arrival of a ship at her port of destination, in the United Kingdom, and the discharge of her cargo there. It must in each case be a question of fact what is a voyage, and in ascertaining what it is a court may regard the following among other considerations: The duration of the adventure in point of time, and its unity; its geographical limits and direction; whether new cargoes are shipped, or new charters made, or ports visited in orderly succession, and in particular whether there has been a sailing from and afterwards a return to the United Kingdom. Coming back to the United Kingdom in the case of a British ship is not quite the same thing as returning to another port. It is in the nature of a home-coming, and where followed by a complete discharge of cargo it does in a considerable degree denote the termination of a voyage. If, looking at what is done as a matter of business, the court perceives that there is a series of several adventures and not one adventure divided in several stages, then it is not one voyage, but two or more voyages, and the agreement must be a running agreement with its limitations of time attached. It is not lawful to escape the limitations attaching to a running agreement by calling something a voyage which in point of fact is not a single voyage. Looking at the facts here, there is ground for saying that the arrival at Southampton ended a voyage, and, if a voyage, then the voyage for which this man engaged, seeing that he engaged only for one.

If the master had designated Cardiff as the end of the voyage, he was entitled to do this in order that he might take his ship in ballast from Southampton to Cardiff, which was the port where the crew were engaged. Whether he did so or not is a question of fact upon which I am not prepared to dissent. I think it clear that the master could not under these articles have required the men to continue their service after arrival at Cardiff. I am of opinion that the judgment of the Court of Appeal should be affirmed.

Lord JAMES OF HEREFORD.—My Lords: The facts of the case and the course of procedure have been so fully stated by the Lord Chancellor that I need not go through them again. The question then raised and now to be determined is—Did the voyage, under the above circumstances, terminate at Southampton, or was the master within his rights in requiring it to be continued to Cardiff? The contention that the voyage ended at Southampton seems to be based upon the view that the fact of the cargo on board the *Scarsdale* being wholly discharged at Southampton necessarily brought the voyage to an end. In my opinion this contention is untenable.

Looking at the terms of the articles, the voyage is to terminate at such port within the United Kingdom as the master may require. Nothing is said about the cargo or its delivery. The voyage is that of the ship, and not of the cargo. No doubt the Act of 1894 contains provisions framed for the purpose of protecting seamen when entering into these shipping contracts, and I think that your Lordships ought to look jealously to see that those protections are not evaded. In these articles the limit of the voyage to one year is a substantial protection. The counsel for the Board of Trade argued that, whilst the vessel might load at several different foreign ports, it could not, after delivery of a cargo within home trade limits, continue the voyage. But I see nothing in the agreement to support this contention. It seems strained and artificial, and cannot be supported unless, as Sir Robert Finlay admitted, words by implication were read into the articles. I gather that this admission was made from the judgment of Moulton, L.J. I cannot see any hardship or injustice that can be caused by accepting the agreement in its natural sense. It was urged that if the respondents' view were correct, a series of voyages might be undertaken whilst only one was contemplated. Your Lordships need not, when determining this case, enter upon such consideration. It is enough to deal with the existing facts. The captain, after delivery of the cargo, desired to intimate that the end of the voyage was Cardiff. No further venture was undertaken. I desire to add that the question involved in this case must be regarded as one of fact rather than of law. Very good reasons might exist for wishing to bring the vessel home to the port from which it commenced the voyage, and great inconvenience might arise from having to secure a fresh crew at Southampton. It was said that runners could always be obtained to work a vessel. To employ such crews on board a steamship might be inconvenient, if not hazardous. I therefore think that the judgment of the Court of Appeal is correct, and should be affirmed.

Lord ATKINSON.—My Lords: I concur substantially in the result at which your Lordships have arrived. It was contended in the argument on behalf of the Board of Trade that the Merchant Shipping Act 1894 only permitted two forms of agreement—namely, agreements for a voyage and running agreements. I think that the provisions of sect. 127 make that absolutely clear, and that the contention was right. It is impossible to define affirmatively what a "voyage" is. I think that it is a question which must depend in each case upon the particular facts of that case; but it may be possible to approach a negative definition of it by saying that at all events it must be one enterprise. I think that it would not have been permissible for the master of the ship, under articles such as these, to have left a home port, to have traded from a foreign port to a foreign port, to have returned to a home port and there discharged his cargo, and

started afresh upon a new journey to some other foreign port. I think that to do so would have been an abuse of the power conferred upon him of designating the port at which the voyage was to end. Neither do I think that it would have been competent to him under those articles to have added, as it is said, a home coast trading supplement to the foreign voyage. I am far from saying that the final port of discharge is necessarily the end of the voyage, or that it would not have been competent for the master under these agreements to have designated Cardiff as the end of the voyage. My difficulty in this case—for I have a difficulty—is caused by this, that I am entirely unable to find in the evidence of the master any indication that he named the port of Cardiff as the termination of the voyage, or any indication of the purpose for which he desired to go to the port of Cardiff. It would have been absolutely consistent with his evidence, in my view of it, that when arrived at Cardiff he desired to start upon a new foreign voyage, or on a coast trade cruise. I own that the inclination of my opinion would have been, in the absence of all evidence of that character, to hold that the port to which he took a cargo, to which he navigated the ship upon a voyage on which he required the crew to serve, and at which he finally discharged his cargo, would *primâ facie* be taken to be the port which he designated as that at which the voyage should end. But that is a matter of fact upon which different views may be entertained, and I am not so confident of my own opinion as to induce me to differ from your Lordships.

Lord COLLINS.—My Lords: The agreement with the plaintiff in this case, which is in a form approved by the Board of Trade, purports to be "for a voyage not exceeding one year's duration to any ports or places within the limits of 75 degrees N. and 60 degrees S. latitude, commencing at Cardiff, proceeding thence to Malta, or any other ports within the above-mentioned limits, trading in any rotation, and to end at such port in the United Kingdom or continent of Europe (within home trade limits) as may be required by the master." Now, it is not disputed that the master did in point of fact require the voyage of the ship to end elsewhere than at Southampton, the port where the plaintiff claimed his wages, on the footing that the voyage had ended there. Unless, therefore, he can get rid of the express provision of the agreement making the requirement of the master a condition precedent to the end of the voyage, he was never in a position to demand his wages, and the judgment of the Court of Appeal is right.

But the point made for the appellant is that, inasmuch as Southampton, where the ship had arrived, was the port of final discharge of the cargo, the provision in the agreement enabling the master to fix another destination for the ship and crew as the end of the voyage is illegal, and must either be struck out of the agreement as separable, leaving the rest of the agreement standing, or that the whole agreement must be treated as illegal, leaving a claim to the plaintiff as on a *quantum meruit* for work done. The facts which raise the question are so very short that, to avoid any misapprehension as to what is the point of law involved in the case, I will read them as they are stated in the record. Patrick Murphy says: "I signed on board the British ship *Scarsdale* at Cardiff on the 5th Aug. 1904 as fireman. I proceeded in that vessel to Malta, then to the Black Sea, where we took in grain, and then to Southampton, where we arrived on the 28th Sept. last. The ship there discharged the whole of the cargo. The defendant is the master of the said ship. The sum of 3*l.* 19*s.* is due to me for wages as fireman on board the said ship . . . at Southampton I claimed my discharge. On the day the ship arrived at Southampton I went to the captain. I said to him, 'I would like my discharge. He said, 'Go and see the shipping-master.' The reason I asked for my discharge was because the cargo was discharged, and I thought that Southampton was the final port of discharge, and that I had completed my agreement under the articles. Defendant said, 'The agreement is not at an end.' I went to the shipping-master, and afterwards took out this." Cross-examined: "The defendant would not give me my discharge. He told me I should have to go to Cardiff." That is the plaintiff's story in examination and cross-examination. Then comes the master, who says: "Southampton was the final port of discharge for the cargo." The justices then formulate the issue referred to the Admiralty Court. It is the only one that is raised for discussion in this case. "As both sides admitted that the question was a most important matter in the interest of the shipping world, we, the undersigned parties, decided to refer the claims to the Admiralty Division of the High Court, such claims depending upon whether the plaintiffs were entitled to their discharge under the said articles at Southampton or at Cardiff, under sect. 165, sub-sect. 3 of the Merchant Shipping Act 1894, and the said claims are referred accordingly."

The question therefore is between Southampton and Cardiff, not with a view to any possible destination of the ship after Cardiff; that is out of question on the facts. Accordingly this is the issue with which Bargrave Deane, J. purports to deal. The Court of Appeal properly addressed themselves to the same issue; and this case must, I think, be dealt with on the footing that if the voyage was not intended to end at Southampton it was ended at Cardiff. Bargrave Deane, J. says: "Upon this statement of facts the question of law arose, whether the voyage and agreement of the plaintiff with the master terminated at Southampton or Cardiff"; and in deciding the case he says, "I find that it is an agreement within the meaning of sect. 114, sub-sect. 2 (*a*), and sect. 115, sub-sect. 5, that the master by accepting a charter for a cargo from the Black Sea to Southampton, exercised his power of ending the voyage at Southampton, a port in the United Kingdom, as his 'final port of discharge,' making it thereby his 'final port of destination,' and that having so exercised his power he had no right to require the plaintiff to proceed further with the ship, and the plaintiff was entitled to his discharge and his wages at Southampton."

The root of the matter therefore would seem to be whether it was illegal to leave it in the discretion of the master to name within the agreed limits where the voyage of the ship was to end. It is obvious that there might be excellent business reasons which might make it

desirable for the owners to secure the services of the crew to take the ship on to a port other than that at which she had delivered her last cargo. For instance, she might have delivered her last cargo at a continental port within home trade limits, and the owners might well desire to have her back in the United Kingdom, and to have the services of the same crew to take her back, instead of trusting to haphazard selection at the port where she happened to have delivered her cargo. What would be more reasonable therefore, *primâ facie*, than a stipulation securing the possibility of effecting this purpose? But on the argument for the appellant such a stipulation would be illegal, and the voyage would be deemed to have ended at the continental port. I cannot find any foundation in the Merchant Shipping Act for such a contention. The policy of that Act, as pointed out by counsel for the respondents, seems to be to frame certain carefully considered rules to protect the rights of sailors in their agreements, but, within those rules, to leave them freedom of contract, ample security being taken that the terms of their contracts should be fully explained to them. Sect. 114 of the Merchant Shipping Act 1894, which is the most material provision, provides, by sub-sect. 1: "That an agreement with the crew shall be in a form approved by the Board of Trade"; and by sub-sect. 2: "The agreement with the crew shall contain as terms thereof the following particulars: Either the nature, and, as far as practicable, the duration of the intended voyage or engagement, or the maximum period of the voyage or engagement, and the places and ports of the world, if any, to which the voyage or engagement is not to extend." There is no provision more stringent than this, and unless the agreement in question is prohibited by it it cannot be impeached.

Now, it is not disputed that the adventure contemplated by this agreement is properly described as a voyage—see per Bargrave Deane, J., Vaughan Williams and Stirling, L.JJ.—though it covers many distinct subordinate adventures involving the discharging and receiving of cargoes at many different ports "trading in any rotation." The maximum period, namely, one year, is named, and the places or ports of the world to which the voyage or engagement is not to extend are defined. Nor was exception taken to the provision giving discretion to the master to name the port within home trade limits at which the voyage—treating the word as concerned with the transit and delivery of the cargo only—was to end. How then was the suggested element of illegality introduced into the discussion? With the greatest deference to the eminent counsel who argued for the appellant, be it said, simply by begging the question. On the assumption that the voyage ended at the port where the last cargo was delivered, a provision that the master might order the ship on to a fresh destination might involve the commencement of a new voyage, and possibly sin against the statute; but if the voyage did not end till the ship had reached her destination at the home port required by the master, there is nothing upon which to found an imputation of illegality. I agree with the contention of counsel for the respondents, which was adopted by the Court of Appeal, that the voyage contemplated for the cargo need not be co-extensive with that contemplated for the ship, though it very often is so. I think that it is very much to be deprecated that the court should be subtle to find implications of illegality, as it would have the effect of hampering freedom of contract in business matters, where no express prohibition can be found. In my opinion, the contention of the respondents involves no illegality, and the voyage did not end at Southampton. I think that the result of the appellant's contention would be most unreasonable, and such as I cannot suppose the Legislature to have contemplated. Another argument much relied on for the appellant was, if I rightly understood it, that, apart from the illegality of leaving a discretion to the master to name the port at which the voyage was to end, the contract, rightly construed, excluded any further stage in the voyage after Southampton, since all ports within home trade limits were excluded from the ports which she might visit "trading in any rotation." Thus her last cargo, on this contention, would have had to be shipped from some port other than one within home trade limits, if she was to come home otherwise than in ballast, and the possibility of delivering a cargo shipped in the Black Sea at a port within home trade limits, and thence carrying on another for delivery at another port within home trade limits, say in the United Kingdom, was excluded.

This appears to me to be quite arbitrary construction, and one which the contract certainly does not provide for in express terms; on the contrary, it involves a limitation, for which I can see no reason, on the ordinary meaning of the words used. The limits in which the ports must lie to which she may proceed after starting from Cardiff at the commencement of the voyage cover the whole home trade area, as well as a great deal more, and there is therefore express permission to visit ports trading in any rotation within the smaller as well as the larger area. I think that the appellant's contention on this point fails.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitor for the appellants, *The Solicitor to the Board of Trade.*

Solicitors for the respondents, *G. R. Thorne, Robinson,* and *Co.; Botterell* and *Roche.*

May 30, *June* 3, 5, *and July* 29, 1907.

(Before the LORD CHANCELLOR (Loreburn), Lords MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, and ATKINSON.)

PALACE SHIPPING COMPANY *v.* CAINE AND OTHERS. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Seaman — Wages — Contract to serve on commercial voyage—Ship carrying contrabrand of war—Refusal to proceed on voyage involving risk of capture—Claim for wages and maintenance.

Seamen signed articles for a voyage not exceeding three years to Hong Kong and (or) any ports within certain limits, which included Japan, the voyage to end in the United Kingdom or Conti-

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

nent of Europe within home trade limits. At the time of signing, the seamen knew that a state of war existed between Russia and Japan, that the ship was loaded with a cargo of coal, and that coal had been declared contraband of war. When the ship arrived at Hong Kong, the seamen were informed that she was to proceed to a port in Japan within the limits mentioned in their contract of service. The seamen refused to proceed to the Japanese port, on the ground that doing so would involve risk of capture by Russian ships. They were put ashore at Hong Kong by the master, and convicted there of an offence under sect. 225 *of the Merchant Shipping Act* 1894, *and were imprisoned. They were afterwards sent home from Hong Kong as distressed seamen. They sued the shipowners for wages from the time that they were put ashore at Hong Kong and for damages.*

Held (affirming the judgment of the court below), that, the agreement being for an ordinary commercial voyage, the seamen were justified in refusing to incur the further risks which would have been entailed by proceeding to the port of a belligerent with a contraband cargo, and were entitled under sect. 134 *of the Merchant Shipping Act* 1894 *to wages, and maintenance by way of damages for wrongful discharge, up to the date of the judgment of the court.*

Per Lord Atkinson, dissenting on this point: That sect. 134 *of the Merchant Shipping Act did not apply, and that "wages" in that section does not include maintenance; and that they were only entitled to wages and maintenance up to the date of their return to England and obtaining employment again.*

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Cozens-Hardy, and Farwell, L.JJ.), reported 10 Asp. Mar. Law Cas. 380 (1906); 96 L. T. Rep. 410; (1907) 1 K. B. 670, who had affirmed with a variation a judgment of Lawrance, J. at the trial of the action before him without a jury, in favour of the respondents, the plaintiffs in the court below.

The facts, which were not in dispute, appear from the headnote above, and from the judgment of the Lord Chancellor.

J. A. Hamilton, K.C. and *Dawson Miller*, for the appellants, contended that the voyage was a lawful voyage, and the cargo was a lawful cargo by English law. The port of Sasebo was within the limits prescribed by the contract. The rights and duties of neutrals in war time are well settled. See

The Sarah Christina, 1 C. Rob. 237;
The Neutralitet, 3 C. Rob. 294.

There was nothing to entitle the plaintiffs to say that this voyage was not within the terms of their contract, and, in fact, it was not proved that it involved any special risk. In this case the contract was made after the war had begun to the knowledge of the parties, which distinguishes it from *Burton* v. *Pinkerton* (16 L. T. Rep. 419; 17 L. T. Rep. 15; L. Rep. 2 Ex. 340), *O'Neil* v. *Armstrong, Mitchell, and Co.* (8 Asp. Mar. Law Cas. 8, 63; 73 L. T. Rep. 178; (1895) 2 Q. B. 70, 418), and *Austin Friars Steamship Company* v. *Strack* (10 Asp. Mar. Law Cas. 70; 93 L. T. Rep. 169; (1905) 2 K. B. 315). The decisions in *Lloyd* v. *Sheen* (10 Asp. Mar. Law Cas. 75; 93 L. T. Rep. 174) and *Sibery* v. *Connelly* (10 Asp. Mar. Law Cas. 221; 94 L. T. Rep. 198; affirmed on appeal, 10 Asp. Mar. Law Cas. 330; 96 L. T. Rep. 140) are wrong, and cannot be supported. Both parties to the contract knew of the existence of a state of war at the time when the contract was signed, that the ship carried coal, and that both the belligerent powers had declared it to be contraband. The risk of search or capture is a recognised maritime risk in time of war, and a seaman is not entitled to say that he will not go to a belligerent's port without some proof that a substantial risk is incurred in doing so. Mere apprehension of danger, however genuine, will not justify him in disobeying lawful commands. If he does so, he acts at his own peril. As a matter of fact this ship reached Sasebo without any adventures. The earlier cases all turn upon actually joining a belligerent, or upon a substantial increase of the risk after the articles were signed. The real test is whether there is a change in the character of the voyage. Here there was no evidence of any increased risk. There was a "reasonable dispute" within the meaning of sect. 134 of the Merchant Shipping Act 1894, and there was no claim for wages till a "final settlement" was reached. The section does not apply unless the men were lawfully leaving the ship at the end of their engagement, which was not the case here, as they contended that their engagement still continued. The Court of Appeal misunderstood the position. The master was entitled to take out a summons, and the men cannot recover damages for malicious prosecution or false imprisonment. "Wages" in sect. 134 does not include maintenance. They also referred to

Austin v. *Dowling*, 22 L. T. Rep. 721; L. Rep. 5 C. P. 534;
Frost v. *Knight*, 26 L. T. Rep. 77; L. Rep. 7 Ex. 111;
The Rainbow, 5 Asp. Mar. Law Cas. 479 (1885); 53 L. T. Rep. 91.

S. T. Evans, K.C., *A. Neilson*, and *M. Morgan*, for the respondents, maintained that the master was not within his rights in requiring the men to proceed to the port of a belligerent with a contraband cargo. The principle of the decisions in *Burton* v. *Pinkerton* (*ubi sup.*) and *O'Neil* v. *Armstrong, Mitchell, and Co.* (*ubi sup.*) applies. The character of the voyage was changed and the danger was increased. After the ship reached Hong Kong, the undertaking ceased to be an ordinary commercial voyage. The risks were increased and changed in character. As a fact, ships were captured and sunk by the Russians close to Hong Kong. They based their case on sect. 134 of the Act, as the commercial voyage terminated at Hong Kong. See *Re Great Eastern Steamship Company* (53 L. T. Rep. 594; 5 Asp. Mar. Law Cas. 511), which was decided on a section of the Act of 1880 which is reproduced in sect. 134 of the Act of 1894. The men are entitled to maintenance, as "wages" includes "emoluments" of all sorts. See

Reg. v. *Postmaster-General*, 32 L. T. Rep. 559; 1 Q. B. Div. 658;
The Non Pareil, 33 L. J. 201, Adm.;
Sivewright v. *Allen*, 10 Asp. Mar. Law Cas. 251 (1906); 94 L. T. Rep. 778; (1906) 2 K. B. 81.

J. A. Hamilton, K.C. in reply.—This case is quite distinct from *Burton* v. *Pinkerton* (*ubi sup.*).

In that case the sailors signed on in time of peace, while in this case they signed on in time of war for an ordinary voyage under such circumstances, with the ordinary risks of war time. This was not a "wrongful act or default" of the master within the meaning of the Act. All that he did was to pay over the wages to the harbourmaster instead of paying them directly to the men. See

Vallance v. *Falle*, 5 Asp. Mar. Law Cas. 280 (1884); 51 L. T. Rep. 158; 13 Q. B. Div. 109.

"Final settlement" in the section has no reference to litigation.

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

July 29.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn). — My Lords: This is an action, bought by nine seamen against the defendant company, as owners of the steamship *Franklyn*, for malicious prosecution, wages and maintenance, and damages. The men agreed by their articles to serve on a "voyage of not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, commencing at Glasgow, proceeding thence to Hong Kong, *viâ* Barry, and (or) any other ports within the above limits, trading in any rotation, and to end at such port in the United Kingdom or Continent of Europe (within home trade limits) as may be required by the master." They sailed from Cardiff with a cargo of coals, and reached Hong Kong on the 20th Feb. 1905. War had been raging between Russia and Japan for more than a twelvemonth. At Hong Kong the men were told for the first time that the *Franklyn* was to proceed with her cargo of coal to Sasebo, a naval base of Japan. Coal had been declared contraband of war by both belligerents, and accordingly a vessel carrying coal to Sasebo was liable to be captured, if the Russians could capture her, and to be sent to a Russian port for adjudication. More than that, under the practice adopted by Russia in that war, she ran the risk of being sunk instead of being taken into port. The right to sink a neutral ship in such circumstances was wholly denied by Great Britain, but it is none the less true that Russia claimed, and in some cases exercised, her supposed right. If, therefore, the men had gone on with the ship to Sasebo they ran the risk of losing their employment and their kit, of being cast adrift in a Russian port during war, and of their ship being destroyed on the high seas, and themselves exposed to whatever danger that might involve. The master asserted that the men were bound to go on to Sasebo. The men refused, but offered to go if the captain would make good their wages and clothes till the time when they arrived in the United Kingdom in the event of the ship being taken or sunk. The master said that his owners would not allow him to do that, and no better evidence can be given to prove that in their opinion there was some real danger. Upon this the master threatened the men that if they refused to proceed he would take them before the harbourmaster, who is also port magistrate. That was done. The men still refusing to sail for Sasebo, the harbourmaster sentenced them to ten weeks' imprisonment, and they were imprisoned accordingly, with circumstances of much hardship and indignity. The wages which they had already earned were not paid to them, but into the shipping office, and applied, it would seem, to defray the cost of maintaining the men in prison. At all events, no part of them was paid to the men. After serving their sentence they were sent home as distressed seamen, and reached London on the 15th July 1905.

In August they brought this action. When this case came before Lawrance, J. he held that the action for malicious prosecution failed (as is now admitted), but awarded to the men their wages up to the time when they arrived in England. The Court of Appeal went further, and ordered payment of wages from the 16th Dec. 1904, the date of the articles, down to "the date of the final settlement or judgment herein"—that is to say, the 21st Dec. 1906. And, further, they gave the plaintiffs maintenance from the 20th Feb. 1905 up to the 21st Dec. 1906. It is manifest that both Lawrance, J. and the Court of Appeal considered that these men had been treated with harshness and injustice. I think the same, but your Lordships will none the less give effect to the legal rights of the parties.

In my opinion, the conduct of the defendants to these men was illegal from beginning to end. It is suspicious that the destination in Japan was never communicated to the seamen till the ship arrived at Hong Kong. And, though statutory provision has been made for the protection of seamen, the ancient power of the Admiralty Court to shelter them from wrong is not superseded. I cannot doubt that your Lordships would apply that jurisdiction in a fitting case. Here it is unnecessary. The master had no right to require these men to sail for Sasebo, for the risk was not a commercial risk, nor the voyage a commercial voyage, such as the articles contemplated. The contention that there was in fact no danger of capture is not established. I cannot doubt that the owners themselves thought that there was danger and the men thought so also, and with reason. It is nothing short of preposterous to expect that seamen in a strange port shall speculate on the movements of belligerent war vessels and weigh nicely the chances of capture. I will not say that the proceedings of the harbourmaster, purporting to act judicially, were vitiated by a departure from the safeguards of justice, for he is not before your Lordships. But I think that his action in this case and his communications with the master of the *Franklyn* are a proper subject for further inquiry by those who have control in such matters. Undoubtedly the sentence was wrong and unjust; for no offence had been committed. And the refusal to pay the wages already due was illegal. The handing of the money to the shipping office was also illegal. I regard the whole transaction as a piece of calculated oppression, designed to force into a hazardous enterprise, partaking of the risks of war, seamen who had agreed to serve on a peaceful voyage. I hold that the master wrongfully discharged and left behind these seamen under sects. 187 and 188 of the Merchant Shipping Act 1894, for he procured their imprisonment on an unlawful ground. He obtained a certificate which recited the discharge, and he was bound under sect. 189, sub-sect. 3 of the Merchant Shipping Act 1894 to pay to these men themselves the

wages due to them. This he failed to do. Accordingly, I am of opinion that sect. 134 of that Act applies. The men left the ship lawfully, for they were compelled by law to leave it against their will. Their engagement was, in fact, ended, and they brought their action on the footing that it was ended a few weeks after their return to London. The delay in payment of their wages was not due to the act or default of the seamen, nor to any reasonable dispute as to liability, for the liability for past wages was never disputed. It was due solely to the wrongful act or default of the owner or master. And therefore the seamen's wages continued to run and be payable until they received them, which was not till the judgment of the Court of Appeal. "Final settlement" in sect. 134 means, in my opinion, payment or other such settlement as that section prescribes. It is not easy to imagine a case more appropriate for the infliction of the sharp penalty provided by that section, the object of which is to require prompt payment and to prevent evasion of this duty either by carelessness or dishonesty. The Court of Appeal awarded also a sum for maintenance, apparently regarding that as included in the term "wages." I should prefer to treat it as damages for the wrongful discharge. In the result it comes to the same thing; for the men were deprived of their provisions, and that was an item of their loss. We were reminded in argument that the men, or some of them, had earned something in other service after their return to England. If any deduction was to be made from the damages on that score, it ought to have been established by the shipowners in evidence. There is nothing which enables us to form any proper estimate of this deduction, and therefore I disregard it altogether. I will say no more than that I share the regret expressed by Cozens-Hardy, L.J. that I cannot award damages for the sufferings endured by these men at Hong Kong. They would have been exemplary.

Lord MACNAGHTEN.—My Lords: I concur in the judgment that has just been delivered by the Lord Chancellor. It seems to me that there are three questions for our consideration: 1. Were the seamen justified in disobeying the order to proceed on the voyage from Hong Kong to Sasebo? 2. Up to what time are the seamen entitled to wages? 3. Are they entitled to maintenance either as included in the claim to wages or as damages for breach of agreement? On the first question I agree entirely with the view taken by the Court of Appeal. Although an expedition to Sasebo with contraband of war was not illegal, and although that port is to be found within the vast area described in the agreement as the intended scene of future operations, I think that the voyage was not a voyage of the character contemplated by the agreement according to its fair meaning. A voyage to Sasebo, a naval base belonging to one of the two belligerents, would necessarily involve risks to life and property different from and in excess of those incident to the employment of seamen engaged in peaceful commerce. The next question is, up to what date are the seamen entitled to wages? It seems to me that this question is determined by reference to sub-sect. (*c*) of sect. 134 of the Merchant Shipping Act of 1894. At the time of the hearing before the Court of Appeal the men's wages had not been paid or settled as mentioned in that section. Inasmuch as the delay was not due to the act or default of the seamen, or to any reasonable dispute as to liability, or to any cause but the wrongful act or default of the owner or master of the *Franklyn*, the wages continued to run and be payable until the time of final settlement. There was no final settlement until an arrangement was come to in the Court of Appeal, and sanctioned by that court after judgment was pronounced. Sub-sects. (*a*), (*b*), and (*c*) are connected by the common preface which limits their application to foreign-going ships; otherwise sub-sect. (*c*) is, I think, as much a distinct and independent enactment as if its provisions were contained in a separate section. There is more difficulty about the question of maintenance. I do not think that the term "wages," as used in the Merchant Shipping Act of 1894, can include an allowance for maintenance. But I do not think that the judgment of the Court of Appeal ought to be disturbed, because it seems to me that the claim for maintenance may be sustained under the head of damages for breach of agreement. It is quite true that it appears that some at least of the seamen obtained other employment between the date of their wrongful dismissal and the final settlementfof their wages. Wages earned in that employment might perhaps have been put forward as a ground of set-off against the claim for damages, but I agree with the Lord Chancellor in thinking that no case has been proved in this action which can fairly be taken into consideration in diminution of damages. I am therefore of opinion that the appeal ought to be dismissed with costs.

Lord JAMES OF HEREFORD.—My Lords: I accept the statement of facts in the judgment delivered by the Lord Chancellor, and I do not propose to repeat them. With the judgments delivered in the courts below I agree. The main point to be determined is, Were the men justified in refusing to continue the voyage beyond Hong Kong to Sasebo? I think that they were. They shipped for an ordinary commercial voyage to a neutral port, a voyage subject only to the incidents of peace. Any other destination was kept back from them. It is true that coals had to their knowledge been proclaimed to be contraband of war; but there was no risk of seizure whilst on a voyage to Hong Kong. But when they were required to proceed to a naval base port of Japan their voyage became subject to the incidents of war, for they knew that their ship would be a fair object of seizure by any Russian vessel which she might encounter when carrying contraband to Japan. It may well be that they were told that a portion of the Russian fleet was in Port Arthur, and that the Baltic fleet was still at Madagascar. Their general knowledge would tell them that Russia had many ships afloat, and that any one of them cruising off Sasebo might capture and carry the ship to a Russian port to be condemned according to the Russian proclamation. In determining what amounts to a justification for seamen refusing to proceed to sea, I do not think that they are called upon to prove by positive and legal evidence that there was an actual probability of capture; their decision has to be formed upon such general information as is at the moment at their disposal. Doubtless their decision must not be based on merely arbitrary

grounds. Good faith is a necessary element, and such good faith would not exist unless some reasonable grounds for the refusal can be alleged. In this case I certainly should, for the reasons which I have given, find as a fact that such reasonable grounds existed. The authorities that were quoted at the Bar, and in the courts below, seem to sustain this view. I particularly refer to *Burton* v. *Pinkerton* (*ubi sup.*), *O'Neil* v. *Armstrong, Mitchell, and Co.* (*ubi sup.*), and *Sibery* v. *Connelly* (*ubi sup.*). The suggestion that the conviction at Hong Kong amounted to an estoppel against the reasonableness of the men's refusal being alleged was, I understood, not persisted in—at any rate it cannot be maintained. The alleged tender of the wages at Hong Kong was accompanied by a demand that the seamen should in effect abandon all further claim for wages. They rightly refused to do so. I am well aware of the difficulty that there is in dealing with the exigencies of service in the mercantile marine in distant ports, and therefore I refrain from saying more than that I deeply regret that it was found necessary to sentence these men, who were acting in perfect good faith, to ten weeks' imprisonment—an imprisonment accompanied by much indignity. The amount to be recovered and the method of recovering it are matters of some practical difficulty. It suffices for me to say that I concur with the views expressed by the Lord Chancellor on this subject. I submit that the appeal should be dismissed with costs.

Lord ROBERTSON.—My Lords: While I share some of the difficulties which are expressed in the judgment of Lord Atkinson, I do not disagree with the affirmance of the judgment under appeal.

Lord ATKINSON.—My Lords: I have the misfortune to differ from my noble and learned friends who have preceded me, but only as to the amount to be recovered and the principle on which it is to be recovered. The main questions for decision in this case are, in my view, whether the crew of the ship *Franklyn* were, under the terms of the contract contained in the articles which they had signed, justified in refusing to serve in the ship on the voyage from Hong Kong to Sasebo; and, if so, were they entitled to recover damages for their illegal dismissal on the ordinary principles applicable to such a cause of action, or to recover the penalties imposed by sect. 134 of the Merchant Shipping Act 1894 plus compensation for loss of maintenance? There is no doubt that the carriage in time of war in a neutral ship of contraband of war is not in itself an illegal act. It merely subjects the ship to the risk of being captured by one of the belligerents and treated as a lawful prize of war. It is, I think, equally clear that this risk of capture is not one of the risks ordinarily attending a commercial voyage or adventure of a peaceful nature. The risk of capture may be so remote that it leaves the character of such a voyage practically unchanged, or so proximate and imminent as to entirely change its character. It must be a question of degree to be determined in each case on its own special facts; but it would certainly appear to me that a voyage with a contraband cargo across seas which are admittedly the theatre of war to a port belonging to one of the belligerents which is itself a naval base, and therefore likely to be the object of such surveillance and attack as the other belligerent is able to subject it to, or direct against it, is *primâ facie* not an ordinary commercial voyage of a peaceful nature. It was, however, for an ordinary commercial voyage of a peaceful nature that the crew in this case engaged to serve. And, in my opinion, the burden of rebutting the *primâ facie* presumption above mentioned, and establishing that the risk of capture was so remote that the character of the voyage remained practically unchanged from that which the crew supposed it to be when they signed the articles, rested upon the owners of the ship, or their agent, the master. I do not think that they or he discharged that burden simply by proving that at the port from which the voyage across the theatre of war was to commence it was the opinion of officials in a position to judge that, owing to the crippled condition of the naval forces of that belligerent by whom capture, if it was to take place, was to be apprehended, there was no real risk or danger of capture at all.

On the facts of this case I am therefore of opinion that the crew of the *Franklyn* were justified in refusing to serve on the voyage from Hong Kong to Sasebo, on the ground that that voyage was attended with other and different risks, and was of a different character from the risks and character contemplated by the contract into which they had entered, and that by so refusing they had not committed any breach of their contract or any offence under sect. 225 of the Merchant Shipping Act 1894. What took place at Hong Kong at the instance of the master of the ship amounted to a breach by the owners of the contract entered into by them with their crew. Each member of the crew could, on his return to this country, have sued the owners to recover damages for this breach of their contract, and the measure of such damages would have been the loss of wages and maintenance from the time when they left their ship till they had, on their return to this country, obtained employment in their calling, or until a reasonable time had elapsed to enable them to obtain it, whichever was the shorter period. Their treatment at Hong Kong could not, in my opinion, be legitimately taken into account in measuring their damages for the breach of contract. The crew might have taken another course—namely, that taken by the crew in the case, which was much relied upon, of *Re Great Eastern Steamship Company* (*ubi sup.*). They might have accepted their discharge, terminated their engagement, and thus brought themselves within the provisions of sect. 134 of the above-mentioned statute, and recovered the penalties imposed by it, if the wages earned by them up to the time when their engagement terminated had not been paid to them. There was no dispute about the amount of these wages. The dispute, such as it was, arose out of an entirely different matter—namely, "their obligation to serve on the voyage to Sasebo." The crew, however, did not take that course. They refused to sign off the ship and thereby terminate their engagement. They, on the contrary, insisted that their engagement continued. They were within their rights in so insisting (*Frost* v. *Knight*, *ubi sup.*); but, having insisted that their engagement continued notwithstanding their illegal removal from their ship under compulsion of legal process, they cannot

now in my view be permitted to contend that they "lawfully left their ship at the end of their engagement" so as to bring themselves within the words of sub-sect. (*a*) of sect. 134 of the Merchant Shipping Act of 1894.

In my opinion, sect. 134 does not apply to the case at all. I have been unable to persuade myself that sub-sect. (*c*) of that section applies in any case not falling within sub-sect. (*a*) or (*b*) of that section. The words of sub-sect. (*c*), "in the event of the seamen's wages or any part thereof not being paid or settled as in this section mentioned," must, I think, be interpreted as meaning as mentioned in the two preceding sub-sects. (*a*) and (*b*), as those sub-sections, and those alone, contain provisions as to how the wages properly so-called are to be paid, sub-sect. (*c*) dealing with the infliction of penalties for nonpayment, and with that alone. If the damages were awarded by Lawrance, J. on the assumption that this section did apply, as they appear to have been, they were, in my opinion, awarded on a wrong principle; but, as I find that he stated that he would give judgment "up to such time as the men came back to this country and got work again," I think that the amount awarded is such as the seamen would have been entitled to recover as damages for illegal dismissal, irrespective altogether of the provisions of sect. 134. I am therefore of opinion that his judgment for this sum should be allowed to stand.

The Court of Appeal have not only awarded wages from the 10th Dec. 1904, the date of the articles sued upon, down to the date of this order, but have also allowed maintenance from the 20th Feb. 1905 down to the same date, on the ground, apparently, that "wages" in sect. 134, sub-sect. (*c*), includes maintenance, and that this order on appeal is the "final settlement" mentioned in that sub-section. With all respect to the learned Lords Justices, I think that their conclusion on this point is erroneous. It is obvious that the word "wages," as used in sub-sects. (*a*) and (*b*) of sect. 134, cannot include maintenance, as *primâ facie* wages are earned while the seamen are serving on the ship and are presumably maintained. There is no reason for giving to the word a different meaning in sub-sect. (*c*) of the same section. And, besides, it is, I think, impossible to read the fasciculus of sections from 134 to 167, both inclusive, and especially sects. 159, 160, 161, without coming to the conclusion that the word "wages" is not used in the statute to cover maintenance, and that the "emoluments" which the word "wages" covers by sect. 742 of the statute are not applicable to maintenance. I accordingly am of opinion that the judgment of the Court of Appeal should be reversed in that respect, and the appeal allowed.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Botterell* and *Roche*, for *Weightman, Pedder*, and *Weightman*, Liverpool.

Solicitors for the respondents, *Chivers* and *Co.*

Supreme Court of Judicature.

COURT OF APPEAL.

Tuesday, March 12, 1907.

(Before Lord ALVERSTONE, C.J. and MOULTON, L.J. and Elder Brethren.)

THE TACTICIAN. (*a*)

Collision—Compulsory pilot—Duty of officers to give assistance.

There is a duty on the officers of a ship to give a pilot all information which will be of assistance to him in navigating the ship, and, if the action of the pilot shows that he is drawing wrong inferences from that information and is bringing about a position of danger, there is a duty on the officers to call his attention to the fact that the inferences he is drawing are not justified.

Unless the pilot receives such assistance, a plea of compulsory pilotage cannot be sustained.

APPEAL by the owners of the *Tactician* from a decision of Bargrave Deane, J. by which he held them alone to blame for a collision which occurred between their steamship and the steamship *Leander*.

The collision occurred about 10.30 p.m. on the 24th Nov. 1905, at the entrance to the river Thames, to the southward and eastward of the Black Deep Lightship. The wind was from the southward and westward, fresh to moderate; the weather was fine and clear, and the tide was about high water.

The case made by the plaintiffs, the owners of the *Leander*, was that the *Leander*, a steamship of 1793 tons net and 2793 tons gross register, manned by a crew of twenty-six hands all told, was lying at anchor in the Thames estuary, near the Black Deep Lightship, in the course of a voyage from London to the River Plate with a general cargo. The *Leander* was heading about S.W., her regulation forward and aft anchor lights were duly exhibited and were burning brightly, and a proper anchor watch was being kept on board of her. In these circumstances the two masthead lights and the red light of the *Tactician* were seen about three miles off, and bearing a little abaft the port beam. The *Tactician* approached, keeping on about the same bearing, and showing the same lights, but, when about from 200 to 300 yards distant, her green light opened, and, coming on at great speed and shutting in her red light, with her stem she struck the port side of the *Leander* near the break of the forecastle, doing her great damage, so that her forehold filled, and she had to accept salvage services from several tugs before she could be brought into a place of safety.

The plaintiffs charged the defendants with not keeping a good look-out; with neglecting to keep out of the way of the *Leander*; and with neglecting to slacken their speed or stop or reverse their engines.

The case made by the defendants and counter-claimants was that the collison and damage, so far as they were occasioned by any fault on board the *Tactician*, were occasioned solely by the fault or neglect of the pilot who was compulsorily in

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

charge of her. The defendants alleged that the *Tactician*, a screw steamship of 4765 tons net register, was proceeding up the Edinburgh Channel, at the mouth of the river Thames, on a voyage from Calcutta to London. Her course was N.W. by W. westerly magnetic, her speed was about eleven knots, and she had on board a general cargo; she was manned by a crew of eighty-two hands all told, and was in charge of a duly licensed pilot. A good look-out was being kept on board of her, and her regulation lights were being duly exhibited and were burning brightly. In these circumstances those on board the *Tactician* saw a little on the starboard bow the white lights of the *Leander* about two and a half miles off. The pilot judged the lights to be those of a vessel proceeding down the channel, and soon after the glimmer of another light, which proved to be a dull white light, was seen by those on the *Tactician*. Shortly after the lights of the *Leander* were seen, the helm of the *Tactician* was starboarded to pass between her and the North Shingles Buoy, and, when she was discovered to be stationary, the helm of the *Tactician* was put hard-a-starboard and her engines were put full speed astern, but the stem and starboard bow of the *Tactician* struck the port bow of the *Leander*, causing damage to both vessels. Just before the collision the helm of the *Tactician* was put hard-a-port. The defendants further alleged that all the orders given by the pilot were promptly carried out by those on the *Tactician*, and that those on the *Leander* contributed to the said collision by omitting to make any sound or other signal of warning when the *Tactician* was seen to be approaching so as to involve risk of collision, and counter-claimed for the damage the *Tactician* had sustained.

The case was heard on the 21st Dec. 1905, and judgment was reserved and given on the 16th Jan. 1906.

Rufus Isaacs, K.C., *Laing*, K.C., and *Dawson Miller* appeared for the plaintiffs.

Pickford, K.C., *Aspinall*, K.C., and *F. E. Smith* appeared for the defendants.

Jan. 16, 1906.—BARGRAVE DEANE, J.—This is a collision which took place on the night of the 24th Nov. 1905, at the mouth of the river Thames, about 10.30 p.m., between the *Leander*, which is a vessel of 2793 tons gross register, and the *Tactician*, a steamer of 4765 tons net and probably between 7000 and 8000 tons gross register; and the sole question in the case is whether, in addition to the pilot, there is any blame to attach to the officers of the *Tactician*. I will clear away at once the only point which is made against the *Leander*, which is that they might have done something to avoid the collision. It is entirely a question of seamanship as far as I understand, and, as I said I would do, I consulted the Elder Brethren, and they are of opinion that there was nothing which ought to have been done by those on board the *Leander* which they neglected to do. It is suggested that they might have sounded the whistle. The Elder Brethren think that might have been misleading, and, with regard to sounding the bell, that is not one of the things that they would recommend, and they say in their opinion no blame attached to the *Leander* for not making some signal. She was at anchor.

The pilot of the *Tactician* is undoubtedly to blame, and therefore I will not trouble myself to deal with him at all. The *Leander* was at anchor, as I find as a fact, somewhere about three or four cables lengths to the eastward and southward of the Black Deep Lightship. It does not very materially matter exactly where she was, but in our opinion she was well away on the starboard side of the fairway of vessels coming up Channel heading S.W., with her two riding lights burning. The *Tactician* was bound on a voyage from Calcutta to London, and she passed the Edinburgh Lightship, leaving it on her starboard hand, and she proceeded on, and the first question which occurs to me as material is, the place where after passing the Edinburgh Lightship she first starboarded.

Those on board of her say she starboarded from one to two cables lengths after passing the Edinburgh Lightship. I do not believe she did. I think that she kept on her proper course, keeping on the starboard side of the channel, and that she did not starboard, as they say she did, so as to pass close to the Gas Buoy, which is on the south side of this channel. It would be taking her out of her proper course, and, for a reason I will give at once, I think it is clear she did not at that time starboard. Soon after passing the Edinburgh Lightship, according to the evidence of the second officer, who was on the bridge of the *Leander*, the *Tactician* was noticed coming up from the Edinburgh Lightship; he noticed her when she passed the Edinburgh Lightship, because he says her funnel had crossed the light for a moment, and he kept observing and seeing her port light, and he kept her port light in view until very shortly before the collision. Those on board the *Tactician*, the pilot and master and third officer, who were all on the bridge, agree in this, that when the lights of the *Leander* were reported to them, and they saw them, the light of the Black Deep Lightship was between the two white lights of the *Leander*, and that the lightship's light kept there. Now, the best test that can be made as to where I am to find the truth in this story is that fact. If those on board the *Tactician* thought that the vessel whose two lights they saw was a vessel moving, as they thought, across their bows, they must have been going on a right angle course, approximately to that vessel, to have kept the lightship's light between the two lights of the vessel they saw; otherwise, if they were moving away to the port side of that vessel under a starboard helm so as to pass green to green, it is impossible that that lightship's light could have kept in that position. You must have the two vessels going approximately about the same speed, and at an angle like that, to keep a light exactly in the same position between the two lights of a vessel across them. And therefore, in my opinion, the story told by those on board the *Tactician* is not accurate, when they say that they were keeping an observation on this vessel, and they are not to be believed when they say they saw the vessel and kept her lights in this particular position with regard to the Black Deep light. In my opinion, the *Tactician* did not see those lights when she says she saw them. In my opinion, the *Tactician* kept upon her proper course, after passing the Edinburgh Lightship, a great deal further to the northward and westward than she

says she did, and she did not notice the lights of the *Leander* until she got a great deal closer to her. And when I look at the story told here and the story told in the pleadings and in the deposition of the master and in the log, it is very difficult to believe that the story that has been told here, about a green light and about the conversation with regard to it, is a story which was not brought into being somewhere about the time that the pilot came to London and communicated with the master, and the master went and had a conversation with him, or he came and saw the master, and they had a conversation in London. It is a very unpleasant incident in this case that this meeting should have been arranged; it was arranged by appointment, before this case came into court and before the evidence was given. However, there it is. The second officer of the *Leander* says "this vessel's port light continued in view to me until very shortly before the collision," and "we were on his port bow until he starboarded and very nearly cleared us." The story of the *Tactician* is an impossible story. If, when they saw the *Leander's* lights, starboarding, as they say they did, shortly after passing the Edinburgh Lightship, they never could have touched the *Leander*, never could have gone near her; therefore this story is an impossibility, and I am driven back to the story told by the *Leander*, which is consistent with the facts of the case as now known—viz., that the *Tactician* never had the *Leander* on her starboard bow until she starboarded shortly before the collision.

That being so, the question arises, What were the master and third officer of the *Tactician* doing? I have got the story of this dim light that was seen; I have got the fact, told by them, that they noticed that, on the course they were going, the two lights of the *Leander* did not move as regards the Black Deep Lightship, and they say that went on for some minutes.

The Elder Brethren, who advise me in this matter, say that there was a very strong duty on the part of the master, not, perhaps, on the part of the third officer, because he was subordinate, but on the part of the master, to have brought the attention, pointedly, of the pilot to the fact that he must be mistaken in thinking that the glimmer of these lights which he saw were the lights of a crossing vessel or moving vessel, and the master should have pointed out that these lights were not shifting, and that by the fixed light of the Black Deep it was perfectly certain that the vessel was at anchor; and it does not do for a captain to say as he did say, in his evidence, this—I will read his words: "I was anxious about these lights; I had no power to interfere with the pilot." That is a wrong view of his duty.

The captain cannot be heard to say: "When a pilot is in charge of my vessel I am free from the necessity of calling his attention from time to time to things which, in my opinion, are material and important to him." As the officer in charge of this vessel, it was his duty to call the attention of the pilot from time to time to what he believed to be an error of judgment, and he is not entitled to fold his arms and say: "I have no responsibility towards the pilot in charge of my ship." In this particular case it is quite clear that the captain saw grounds for anxiety. He has chosen to say: "I thought the pilot was in charge, and I have no right to interfere with him." I think he is wrong, and I think, if the captain had done his duty in this particular case, he would have forcibly called the attention of the pilot to the fact that the lights were clearly stationary lights, and that they were not the lights of a vessel that was moving. If he had done that, the pilot would have starboarded very much earlier, and there would have been no collision. Therefore, on this ground, I am of opinion, and the Elder Brethren agree with me in this matter, that the master of the *Tactician* was very much to blame in not calling the attention of the pilot more than once to the fact that these lights were stationary lights, and that the pilot was mistaken in his judgment. If he had done so, and the pilot had still insisted, the matter would have been different. He did not do his duty; he neglected to call the pilot's attention to these lights, and therefore did not give the pilot that assistance which the pilot was entitled to have from this master on this particular occasion. That is the real main point in this case, but there are one or two other matters which have been mentioned which I will deal with. One is the question whether this vessel, the *Leander*, was in the usual place, and whether those on board the *Tactician* might not have been misled by what they saw. The Elder Brethren advise me in this matter again, that in no part of the river Thames are you certain to find vessels not at anchor. Anything may happen to a vessel proceeding out to sea or coming up from sea which may cause her to anchor in any particular place. You must never be surprised in an estuary like the Thames to find vessels at anchor in any particular spot; and one of the Elder Brethren has told me that he himself has often, from necessity, been obliged to anchor in one of these channels where vessels are constantly passing. But this collision was in the vicinity of a lightship. Very often vessels are brought up near a lightship for purposes connected with the Trinity House; there might have been a Trinity vessel anchored close to this lightship on duty. You have no right to assume, in coming up a channel like the Thames or any of these channels, if you see a light, that it is or is not a vessel at anchor because you are accustomed or not accustomed to see a vessel at anchor in that particular spot. Therefore the arguments which counsel for the defendants have used with some force, in our opinion have no effect in this particular case. The case I think, as far as I am concerned, is clear. In my opinion this collision was caused by the default of the pilot, but it also might, in my opinion, have been avoided if the master of the *Tactician* had done what I conceive to be his duty in giving his advice and his opinion to the pilot on this particular occasion, and that by failing to do that he did not do his duty, and did not assist the pilot as the pilot ought to have been assisted, and therefore I find that the master is to blame as well as the pilot.

On the 17th Feb. 1906 the defendants gave notice of appeal asking that the judgment might be varied, and that it might be adjudged that the collision was occasioned solely by the fault or default of the pilot.

Sir *R. Finlay*, K.C., *Aspinall*, K.C., and *F. E. Smith* for the appellants.—The plea of compul-

sory pilotage put forward on behalf of the *Tactician* should succeed. The learned judge thought the pilot was to blame, but has held that the pilot ought to have received more assistance from the master, and so has held the ship to blame. The judgment is open to the objection that it tends to encourage interference with the pilot, and the danger of a *divisum imperium* has been long ago pointed out:

The Peerless, 2 L. T. Rep. 25; Lush. 30, 103;
The Christiana, 7 Moo. P. C. 160, at p. 171.

A master has no right to interfere with the pilot except in cases of great necessity:

The Argo, Swa. 462, at p. 464;
The Duke of Manchester, 6 Moo. P.C. 90.

The evidence shows that the master expressed his opinion in a conversation he had with the pilot; he did all that he was bound to do. It rests with the pilot to form an opinion on the suggestion made by the master, and the latter cannot be blamed for the pilot's wrong inference from the facts:

The Oakfield, 54 L. T. Rep. 578; 5 Asp. Mar. Law Cas. 575; 11 P. Div. 34.

Rufus Isaacs, K.C., *Laing*, K.C., and *Dawson Miller*, for the respondents, were not called on.

Lord ALVERSTONE, C.J.—Notwithstanding the very able argument of counsel for the appellants, I do not see my way to interfere with the judgment of Bargrave Deane, J. I think the cardinal principle to be borne in mind in these cases, that do raise difficult questions of law and very often difficult questions of fact, is that the pilot is in sole charge of the ship, and that all directions as to speed, course, stopping and reversing, and everything of that kind, are for the pilot; and I entirely agree, if I may say so, with great respect, with the opinions of the very learned judges, from Dr. Lushington downwards, to which attention has been called, as to the danger of a divided command, and the danger of interference with the conduct of the pilot; and that if anything of that kind amounts to an interference or a divided command serious risk is run of the ship losing the benefit of the compulsory pilotage. I do not wish to put it any stronger than it is put in the passages that have been cited by counsel for the appellants, and I do not think he has in any way over-stated the importance of that principle.

But side by side with that principle is the other principle that the pilot is entitled to the fullest assistance of a competent crew, of a competent look-out, and a well-found ship. I agree with counsel for the appellants that the cases in which the master has to interfere at all with the pilot are very rare and very few, but I think the passages he has cited from the cases show there is a distinction, or may be a distinction, between interference and bringing to the pilot's notice anything which the pilot ought to know.

The pilot has a good many things to attend to, particularly in a place like the Thames, and certainly it is not putting the case too high to say that he is entitled to full information with regard to any surrounding fact which it is important he should know. I do not quite take the view that the lights—the further light—of this vessel were reported. If there really was a green light visible, that green light was not reported, and very great difficulty would have arisen if there had been any green light in view. Of course, it is perfectly obvious that there never was a green light. In those circumstances I think the first thing we have to consider is, Was the captain informed by the pilot that he had seen a green light and was confident that the vessel was going down channel? Looking at the judgment of Bargrave Deane, J., I am not at all satisfied that he believed that part of the story. He comments pointedly upon the absence from the statement before the Receiver of Wreck of any reference to a green light at all, or any reference to the pilot having seen a light which he thought was a green light. Speaking for myself, I must say I should have had much more doubt about the case if I had believed the story that the pilot had said he saw a green light, and there was such a state of things as was consistent, for any appreciable time, with the pilot having seen a green light. I should take the view, however, on this evidence, that the captain's story that the pilot told him he had seen a green light, and was confident it was a green light, was not true. I cannot conceive such a thing. I cannot but think that that part of the case was unproved before the captain gave his evidence in court.

Now, quite apart from that, one must for a moment look at what are the admitted facts of the case. The course which counsel for the appellants has marked upon the chart, and which is the course I had in my mind marked off, is substantially straight for the Black Deep Lightship, afterwards starboarding a little. The idea of the pilot was to go fairly close to the Shingles Buoy before shaping a course up into the river Thames. This was a vessel going eleven knots. The tide, apparently, had not very much effect upon her. It does not make much difference because the admitted facts are that for a period of nine to ten minutes at least two white lights were seen forming a rough triangle on either side of the Black Deep light. Whatever variation there was in those lights, it is said never to have been enough to take the Black Deep light outside either of those two lights. She keeps on her course, it may have been for over a mile, and all the time she had the Black Deep light inside those two white lights. We are advised, and we have both come to the conclusion by our unassisted knowledge of the matter, that a very small portion of those nine minutes would be sufficient to satisfy any competent man that the idea that those two lights were on a moving vessel, bound in any direction, must be a mistake.

Under those circumstances the only thing that is put against that fact being called to the attention of the pilot is that there was some conversation as to the light which the pilot thought was a green light and the captain thought was not. Even if it took place it falls far short of the pilot saying, "I am confident it is a green light."

Then, would it have been a breach of the principle laid down in the various authorities to have said to the pilot, without strong language or with it, "You must be mistaken. Look, those lights have kept ahead of us for three or four minutes." I think that is what Sir James Hannen recognised when he pointed out in *The Oakfield* (*ubi sup.*) that notice—I will not use a word so high as "remonstrance,"

because it might be thought that remonstrance involved interference—that notice and suggestion are not that interference of which the danger has been pointed out by Dr. Lushington. Though I do not know that I should have framed my judgment quite in the same way, in substance I entirely agree with the judgment of the learned judge. I do not know that I should have spoken of "responsibility towards the pilot," but in my opinion the pilot did not have all the assistance he was entitled to have from the competent man beside him; and any competent master would have appreciated that it was not a moving vessel, and ought to have called the attention of the pilot to the fact. If he had, he would not be in any way interfering with the pilot's command. This appeal, therefore, must be dismissed.

Moulton, L.J.—I am of the same opinion, and for the same reasons. I do not think this case raises in any way the question of the duty of the master to interfere with the authority of the pilot, but I think that just as the pilot is entitled to the assistance of the master and crew of the ship in obtaining information as to the surrounding circumstances, so in the present case he was entitled to the assistance of the master in calling his attention to the fact that the inferences he was drawing from the surrounding circumstances were such as a competent mariner ought not to draw. It was impossible for the captain to see the Black Deep light between the two white lights of the steamer stationary for so long without realising, if he was a competent mariner, that the ship must itself be stationary; and inasmuch as the action of the pilot showed he was not drawing that conclusion, I think it was the duty of the master at all events to call his attention to it and put prominently before his mind the very questionable character of the course that he was pursuing.

Solicitors for the appellants, *Pritchards* and *Sons*, agents for *Simpson, North, Harley*, and *Co.*

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

March 25 *and* 26, 1907.

(Before Sir Gorell Barnes, P., Moulton and Kennedy, L.JJ.)

The Commonwealth. (*a*)

Collision — Insurance—Total loss—Owners part insurers—Payment by insurers under a valued policy—Recovery from wrongdoer of less than agreed policy value—Division of amount recovered between owners and insurers.

A vessel sunk by a collision had been insured with a mutual insurance association for 1000*l. under a valued policy, the value of the vessel being agreed at* 1350*l. The insurance association first paid* 500*l. to the owners in respect of the loss, and then, settling for a total loss, paid a further* 500*l. The owners of the defendant steamship admitted liability. The registrar assessed the value of the ship at the time of the collision at* 1000*l., and that amount was paid into court by the defendants in the damage action.*

The owners of the sunken vessel asked that the money paid into court in respect of the value of the hull should be paid out to them and the insurance association in the proportions of $\frac{350}{1350}$*ths and* $\frac{1000}{1350}$*ths respectively on the ground that, as they were their own insurers to the extent of* 350*l. on an agreed value of* 1350*l., they were entitled to participate in any salvage recovered from the wrongdoer, and they also claimed the same share in the interest paid into court by the wrongdoer in respect of the value of the hull.*

Held (*affirming the decision of Bargrave Deane, J.*), *that the owners of the sailing vessel, being in part their own insurers, were entitled to participate in the amount recovered from the wrongdoer in the proportions claimed by them.*

Held, further (*reversing the decision of Bargrave Deane, J.*), *that the owners of the sailing vessel were also entitled to the same share in the interest paid into court in respect of the value of the hull.*

Summons for an order for payment of money out of court.

On the 3rd May 1901 the schooner *Welsh Girl* was sunk by a steamship in a fog.

The *Welsh Girl* was insured in the Dee Shipowners' Mutual Insurance Association for 1000*l.* by a policy in which she was valued at 1350*l.*

On the 21st April 1902 the insurance association paid 500*l.* on account of the loss, and, settling for a total loss, paid a further 500*l.* on the 25th July 1902.

In Oct. 1902 a writ was issued in the name of the owners of the *Welsh Girl* by the insurance association against the owners of the steamship *Commonwealth*, and on the 13th Jan. 1904 the owners of the *Commonwealth* admitted liability, subject to a reference to the registrar and merchants to assess the amount of the damage.

The reference was held on the 20th June 1904, and the registrar found that the following amounts were due from the owners of the *Commonwealth*: (1) Value of the *Welsh Girl*, 1000*l.*; (2) freight, 135*l.*; (3) cost of deposition, 1*l.*; (4) agency and postages, 5*l.* 5*s.*; making in all, 1141*l.* 5*s.*

Disputes then arose between the owners of the *Welsh Girl* and the insurance association as to how this money was to be divided, and on the 11th Dec. 1905 the owners of the *Commonwealth* obtained leave to pay into court 1141*l.* 5*s.* and 207*l.* 1*s.* interest, making in all 1348*l.* 6*s.*, and were discharged from the action.

On the 22nd Feb. 1906 the owners of the *Welsh Girl* issued a summons asking for an order that the sum of 1348*l.* 6*s.* paid into court should be paid out to them and the insurance association in the following proportions: 426*l.* 6*s.* 1*d.* to the owners of the *Welsh Girl*, and 921*l.* 19*s.* 11*d.* to the insurance association.

The owners of the *Welsh Girl* alleged that they should be regarded as their own insurers to the extent of 350*l.*, and therefore claimed 259*l.* 5*s.* 2*d.*, being $\frac{350}{1350}$ths of the 1000*l.* paid into court as the value of the hull. They also claimed the amount paid in respect of the loss of freight, 135*l.*; the amounts, 1*l.* and 5*l.* 5*s.*, paid in respect of the deposition and agency charges; and 72*l.* 13*s.* 4*d.*, being interest on freight and $\frac{350}{1350}$ths of the amount paid into court as interest on the value of the hull, making in all 473*l.* 3*s.* 6*d.*

(*a*) Reported by L. F. C. Darby, Esq., Barrister-at-Law.

The owners of the *Welsh Girl* were ready to allow the insurance association to receive $\frac{1000}{1350}$ths of the 1000*l.*, and the same proportion of the interest on the hull—namely, 740*l.* 14*s.* 9*d.* and 134*l.* 7*s.* 9*d.*, making in all 875*l.* 2*s.* 6*d.*

The owners of the *Welsh Girl* admitted that certain costs amounting to 209*l.* 10*s.* 5*d.* had been incurred in the action against the *Commonwealth* which were not recoverable from the owners of the *Commonwealth*, and they submitted that these should be borne by them and the insurance association proportionately to the amounts due to them out of the fund in court; $\frac{473}{1348}$ths of 209*l.* 10*s.* 5*d.*, or 73*l.* 10*s.* 4*d.*, to be paid by the owners of the *Welsh Girl*; and $\frac{875}{1348}$ths of 209*l.* 10*s.* 5*d.*, or 136*l.* 0*s.* 4*d.*, to be paid by the insurance association. As the owners of the *Welsh Girl* had paid 26*l.* 3*s.* 1*d.* towards these costs on the 25th July 1902, it left them a balance to pay of 46*l.* 17*s.* 3*d.*

The ultimate proportions due to the owners of the *Welsh Girl* and the insurers were as follows:

	£	s.	d.	£.	s.	d.
Owners of *Welsh Girl* to receive	473	3	6			
Less costs	46	17	3			
Balance to receive ...	426	6	3	426	6	3
Insurance association to receive	875	3	6			
And costs from owners of *Welsh Girl*	46	17	3			
				921	19	9
				£1348	6	0

The insurance association contended that, when the second 500*l.* was paid under the policy, the managing owner of the *Welsh Girl*, Mr. Bennett, had agreed that any sums recovered from the wrongdoer should be received for the benefit of the insurance association alone, and that, as the owners had been paid for a total loss, all the property and rights of the assured devolved on the underwriters, who were therefore entitled to any and all sums recoverable from the wrongdoer.

The summons was by consent adjourned into court, and witnesses were heard on the question of whether the agreement alleged had been made.

Horridge, K.C. and *M. Hill* appeared for the owners of the *Welsh Girl*.

Scrutton, K.C. and *D. Stephens* appeared for the insurance association.

The cases cited were the same as those set out in the arguments below.

BARGRAVE DEANE, J. — This is a summons for an order for payment out of court of a sum found due under a report of the registrar on a reference as to the damages which are to be paid by the owners of the steamship *Commonwealth* in respect of the loss of the schooner *Welsh Girl*. The case is a strange one, because it is one of those cases where a sailing vessel was run down and sunk, and for a considerable time afterwards it was not ascertained what was the name of the vessel that had run her down and sunk her. Eventually it was ascertained that the name of the vessel was the *Commonwealth*, and although when an action was brought against the *Commonwealth* her owners absolutely denied having run into or sunk anything, when the case was ready for trial they admitted liability, and the matter went before the registrar and merchants, for them to ascertain what amount was payable by the *Commonwealth*. There is no doubt that the *Commonwealth* is responsible for the loss, but the question before the court arises from the rather complicated state of the law.

Before the *Welsh Girl* started on her voyage her owners, through the ship's husband, a man named Bennett, insured her for 1000*l.* with an insurance club called the Dee Shipowners' Mutual Insurance Association. The policy, which has been lost, is agreed to have been a valued policy for 1000*l.*; but the vessel was admitted by both sides to be of the value of 1350*l.* The insurance club paid 1000*l.* to the owners of the *Welsh Girl* under the policy, and eventually brought an action against the owners of the *Commonwealth* for the loss of the schooner. A question arose in the course of the case which I decided when I heard this summons, namely, whether by Mr. Bennett the owners of the *Welsh Girl* had abandoned all rights over and above the 1000*l.* — whether they were estopped from making any further claim, such as is made on this summons, against the amount recovered from the *Commonwealth*.

I held that in the first place Mr. Bennett, who had been the ship's husband, had no further power to make any agreement with respect to his co-owners, the schooner being at the bottom of the sea. Beyond that, I was not only satisfied that the co-owners never agreed he should make any such agreement as the underwriters contended, but I was of opinion, having heard the evidence, and ascertained that the minutes book of the insurance club contained no entry of the fact, that no such definite agreement was made. That I decided, and therefore I need not go into that matter to-day.

Then we come to the question of law. The vessel was valued at 1350*l.*, and she was insured for 1000*l.* The club insured her for 1000*l.*, and the plaintiffs, the owners of the *Welsh Girl*, were their own insurers for 350*l.* The vessel was totally lost, and, the club having paid 1000*l.*, the question is what about the further value of 350*l.* A number of cases have been cited as to the difference between a valued policy and an open policy, and the result seems to be this—that where it is a valued policy you take the value in the policy as absolutely fixed. Neither side may go away from that as to the value of the property insured. Also, where the policy contains an agreed statement of the value of the ship there can be no question between the parties as to what is the true value of the ship, even though hereafter it may be ascertained that the value of the ship is less or more than the amount declared in the policy; and as between the parties the value so stated is definite and cannot be altered. The case of *The Balmoral* (87 L. T. Rep. 247; 9 Asp. Mar. Law Cas. 139, 254, 321; (1902) A. C. 511) has been quoted where the ship proved to be worth 40,000*l.*, whereas she was only declared in the policy to be worth 33,000*l.*, and she was held to be worth 33,000*l.* In this present case 1000*l.* has been paid into court by the owners of the *Commonwealth* as the value of the *Welsh Girl*, and the claim put forward by the owners of the *Welsh Girl* is this: They say that you have to deal with that 1000*l.* in the proportion of $\frac{350}{1350}$ths, and that they are entitled to receive $\frac{350}{1350}$ths of that 1000*l.*—namely, 259*l.* 5*s.* 2*d.*

I leave out of account the freight, because the sum paid in respect of loss of freight is entirely due to the owners of the *Welsh Girl*. Then there are two other items—the cost of the deposition 1*l.*, agency and postage 5*l.* 5*s.*—which it is clear have already been paid, by the accounts put in, to the owners of the *Welsh Girl*; therefore they go out. Then there is claimed a proportion of the amount that has been paid into court in respect of interest. The amount is 207*l.* 1*s.*, and the owners of the *Welsh Girl* claim the same proportion, amounting to 72*l.* 13*s.* 4*d.* Then they say that there should be paid to the insurance club $\frac{1000}{1350}$ths of the 1000*l.*, amounting to 740*l.* 14*s.* 9*d.*, and the same proportion of the interest, amounting to 134*l.* 7*s.* 9*d.*, making a total sum of 875*l.* 2*s.* 6*d.* The sums I have mentioned, together with the amounts which go to the owners of the *Welsh Girl* for freight, deposition, agency, &c., make 1348*l.* 6*s.*, which is the total amount which the registrar has found to be payable by the owners of the *Commonwealth*. Besides that, there is a question of costs. With regard to costs, the same principle is in a way adopted, but instead of taking $\frac{350}{1350}$ths, which is the ratio deciding the amount, the owners of the *Welsh Girl*, properly enough, have taken the proportion which the amount of the sum payable to either party bears to the total; so that the owners of the *Welsh Girl* claim to pay $\frac{473}{1348}$ths of the costs, and they say that the insurance club should pay the balance, $\frac{875}{1348}$ths; taking the total amount of the costs awarded—viz., 21*l.* 19*s.* 3*d.*—the owners of the *Welsh Girl* are to pay 7*l.* 14*s.* 1*d.* and the insurance club 14*l.* 5*s.* 2*d.*

I cannot agree to that arrangement, as it seems to me that the matter has been taken on wrong lines. The case I have referred to of *The Balmoral* (*ubi sup.*) is taken exactly in the right way on 33,000*l.*, and the proportion must be so dealt with here. The figures should be—*Welsh Girl* $\frac{459}{1348}$ths and the insurance association $\frac{888}{1348}$ths, or 7*l.* 9*s.* 9*d.* and 14*l.* 9*s.* 6*d.* An American decision, *The Livingstone* (130 Fed. Rep. 746) has been referred to, but with regard to that I have to say that where American and English decisions conflict I have, of course, to adopt the English decision. The American decision is absolutely at variance with the leading case in these courts—namely, *North of England Iron Steamship Insurance Association* v. *Armstrong and others* (3 Mar. Law Cas. O. S. 330 (1870); 21 L. T. Rep. 822; L. Rep. 5 Q. B. 244). I adopt the English decision, and find as a matter of fact that the claim of the owners of the *Welsh Girl* is well founded. I give judgment accordingly for their figures as stated in their amended statement of claim.

Certain questions as to the costs of the motion and the amounts of the solicitor and client costs to be paid by each party and the division of the interest on the sum recovered in the action against the *Commonwealth* stood over.

These questions were further argued on the 26th May 1906, and on the 16th July the learned judge decided that the costs not recovered by the plaintiffs from the owners of the *Commonwealth* should be borne by the owners of the *Welsh Girl* and the insurance association proportionately to the amounts received by each; that each party should bear their own costs of the summons; and that the interest recovered from the owners of the *Commonwealth* on the amount of the damages should be apportioned as follows: The whole interest on freight to be paid to the owners of the *Welsh Girl*; the whole interest on the 1000*l.* recovered in respect of the value of the hull to be paid to the owners of the *Welsh Girl* up to the date when the insurance association paid them 500*l.* in respect of their loss. From that date up to the date the second 500*l.* was paid the interest was to be shared equally, and after the date of the second payment the whole of the interest was to be paid to the insurance association.

The result of the judgment was worked out and embodied in the order of the court in the following schedule:

Amount paid into court:—	£	s.	d.
1. Value of *Welsh Girl*	1000	0	0
2. Freight	135	0	0
3. Deposition	1	0	0
4. Agency	5	5	0
	1141	5	0
Interest	207	1	0
	£1348	6	0

Divided as follows:—

1. Owners of *Welsh Girl* receive:

	£	s.	d.	£	s.	d.	£	s.	d.
1. $\frac{350}{1350}$ths of 1000*l.*				259	5	3			
2. Freight				135	0	0			
3. Interest:									
On 135*l.*	24	10	0						
On 1000*l.* till April 21, 1902	35	10	0						
On 500*l.* from April 21, 1902, to July 25, 1902	5	4	1	65	4	2	459	9	5

2. Insurance association receive:

1. $\frac{1000}{1350}$ths of 1000*l.*				740	14	9			
2. Deposition ...				1	0	0			
3. Agency				5	5	0			
4. Interest:									
On 500*l.* from April 21, 1902, to July 25, 1902	5	4	1						
Balance of interest	136	12	9	141	16	10	888	16	7
							£1348	6	0

With regard to the costs, it appeared that a portion of them—21*l.* 19*s.* 3*d.*—had been incurred by the solicitors for the owners of the *Welsh Girl*, and the remainder—184*l.* 2*s.* 1*d.*—by the solicitors of the insurance association. After dividing the amounts in the proportions of $\frac{459}{1348}$ths and $\frac{888}{1348}$ths, and crediting each party with the amounts already paid by them, there was due to the owners of the *Welsh Girl* 21*l.* 11*s.* 5*d.*

The final balance therefore was:

	£	s.	d.	£	s.	d.
Owners of *Welsh Girl* receive	459	9	5			
Less costs	21	11	5			
				437	18	0
	£	s.	d.			
Insurance association receive	889	16	7			
And costs	21	11	5			
				910	8	0
				£1348	6	0

On the 19th Nov. 1906 the insurance association served a notice of appeal asking that the judgment of the court might be set aside or varied in so far as it held that the owners of the

Welsh Girl had not, on being paid the sum of 1000*l.* by the insurance association, surrendered their rights of making any claim against any amount which the insurance association might recover from the owners of the wrongdoing vessel, and that it might also be set aside and varied in so far as it held that the owners of the *Welsh Girl* were entitled to any interest on the value of hull recovered from the owners of the wrongdoing ship.

On the 4th Dec. 1906 the owners of the *Welsh Girl* gave notice of a cross-appeal asking that the judgment of the court below as to the division of interest on the value of the hull might be set aside, and that it might be adjudged that the owners of the *Welsh Girl* were entitled to $\frac{350}{1350}$ths of the interest paid into court by the owners of the wrongdoing ship in respect of the value of the hull, and to the costs of the motion and appeal.

Scrutton, K.C. and *R. A. Wright* (*D. Stephens* with them) for the appellants, the insurance association.—The insurers are entitled to the whole of the 1000*l.*, as that is the true value of the ship. The ship was totally lost, and the insurers have paid 1000*l.*, the total value of the ship at the time of the loss. Accordingly the underwriters are entitled to all the rights of the assured, by the exercise of which the loss against which the assured were insured could be diminished:

Castellain v. *Preston*, 49 L. T. Rep. 29 (1883); 11 Q. B. Div. 380.

The rights of the underwriters are those of the assured (*Simpson* v. *Thomson*, 38 L. T. Rep. 1; 3 Asp. Mar. Law Cas. 567 (1877); 3 App. Cas. 279), and the damages recovered from the wrongdoer are in the nature of salvage and belong entirely to the underwriters:

North of England Insurance Company v. *Armstrong* (*ubi sup.*).

The value of the ship is proved to have been 1000*l.*, and the assured, having been paid that sum by the underwriters, have received a complete indemnity. The judgment of Bargrave Deane, J. gives them more than an indemnity, and the insurers less than they are entitled to by subrogation. This is contrary to the principle laid down in

Castellain v. *Preston* (*ubi sup.*);
The Livingstone, 130 Fed. Rep. 746.

The value agreed on in the policy is not conclusive for all purposes:

Burnand v. *Rodocanachi*, 47 L. T. Rep. 277; 4 Asp. Mar. Law Cas. 576 (1882); 7 App. Cas. 333.

The assured should never get more than an indemnity.

Horridge, K.C. and *Maurice Hill*, for the respondents, the owners of the *Welsh Girl*, were not called on to argue the appeal, and were stopped when they had opened the cross-appeal.

The following cases were also referred to:

Irving v. *Manning*, 1 H. L. Cas. 287;
Lewis v. *Rucker*, 2 Burr. 1167.

Sir Gorell Barnes, P.—The appeal in this case is from a decision of Bargrave Deane, J., which, upon the principal point which we have to decide, seems to me to be substantially right. In this case an insurance had been effected by the owners of the *Welsh Girl* with their underwriters for the sum of 1000*l.*, by a valued policy in which the vessel was valued at 1350*l.* The *Welsh Girl* was sunk in collision with the steamship *Commonwealth*, and after some trouble, apparently, the *Commonwealth* was made responsible and a sum of 1000*l.* in respect of the loss of the *Welsh Girl* was recovered in an action between the owners of the *Welsh Girl* and of her cargo and freight and her master and crew, and the owners of the *Commonwealth*. In that action this motion was made. In addition to what was recovered for the loss of the vessel there appears to have been something recovered for freight and also a certain sum of interest in respect of the loss of the ship. Now, that sum of 1000*l.* having been recovered, it is only necessary to state another fact which gave rise to the difficulty in the case. The underwriters of the *Welsh Girl* appear to have paid, after the loss of the ship, 500*l.* at first and afterwards another 500*l.*, making therefore the total sum of 1000*l.*, which they were liable to pay under their policy. Then, this money having been paid into court in the case between the two ships, the motion has been made to ascertain the proportions in which the money in court should be divided between the owners of the *Welsh Girl* and their underwriters.

Bargrave Deane, J., as I understand his decision, has found that the owners of the *Welsh Girl* were entitled to receive, out of the money paid into court in respect of the loss of their ship—out of this 1000*l.*—350-1350ths of that sum, leaving the other fraction to be received by the underwriters. The appeal from that decision is brought by the underwriters, who have argued through their counsel that they are entitled to take the whole of the money which has been paid into court in respect of the loss of the ship, because, he says, they have paid 1000*l.*, and that is the sum at which the value of the ship was fixed in the Admiralty proceedings. I take it that they mean that that must be treated as the true value of the ship as compared with the value in the policy—namely, 1350*l.* The argument appears to be based upon this, that the underwriters, who have only partially insured this ship, are entitled when the ship has been lost and money recovered in respect of her loss against the wrongdoer, if they have paid an amount equal to the value of the ship so recovered in that action, to keep the whole of that money, and that no portion of it ought to be accounted for to the owners of the ship.

A considerable number of cases have been cited to us which to my mind do not really affect the question which we have to determine. Those cases were the cases of *North of England Insurance Company* v. *Armstrong* (*ubi sup.*), *Burnand* v. *Rodocanachi* (*ubi sup.*), *The Livingstone* (*ubi sup.*), and the *Balmoral Steamship Company* (*ubi sup.*). None of those cases appear to me really to touch upon the question we have to determine. We are not here called upon to criticise the *Armstrong* (*ubi sup.*) case and to decide whether it is right as to what is the position of the underwriters and of the assured where more has been recovered than the amount of the policy, though, by the way, it should be pointed out that *North of England Insurance Association* v. *Armstrong* (*ubi sup.*) does not show the facts in which the case occurred.

What we have to determine is whether, where there has been a partial insurance—that is to say, an insurance where the amount which the underwriters are liable for is less than the amount which is expressed in the policy as the value of the ship—the underwriters are to take all that is recovered, provided it does not exceed the amount they have paid, or whether the owners and underwriters are to be treated as if there was to be a proportionate division of any benefits which are recovered.

I do not think it necessary to discuss the matter at any length, because the points put in the course of the argument really sufficiently deal with the matter; but it seems to me that it is desirable I should say this: That there is no authority whatever which has been cited to us which directly bears upon the question, and therefore as far as this court is at present concerned it seems to me the matter should be dealt with on principle.

First of all there is some authority as to the position where there has been an abandonment to underwriters, which I think has a bearing upon the present case. In Arnould on Insurance, vol. 2, at sect. 1187, I find this: "It appears equally clear that where a ship is only partially insured, so that her owners remain to some extent 'their own underwriters,' the effect of a notice of abandonment will be to make the owners and the underwriters joint tenants of the property, in the proportion which the amount uninsured bears to be insured." Again, in sect. 1215, the heading to which is "In Cases of Double or Over-Insurance," there is this passage: "On the other hand, the assured is considered to be his own insurer to the extent of the sum not covered, and as consequently entitled to that extent to his proportionate share in the proceeds of the salvage. Thus, suppose A. to have insured goods, the real value of which is 1000*l.*, for 800*l.*, of which sum B. subscribes for 500*l.*, and C. for 300*l.*; A., it is plain, stands his own insurer for 200*l.* A constructive total loss takes place, and A. abandons. If the proceeds of the salvage amount to 100*l.*, *i.e.*, a tenth part of the whole insurable value of the goods, this must be distributed among the parties to the insurance in the proportion of a tenth of their respective interests, *i.e.*, to A. 20*l.*, to B. 50*l.*, and to C. 30*l.*"

That seems to me to state very clearly the principle that ought to be applied to a case where there has been an abandonment and salvage, and it seems to me that is the principle upon which the doctrine of subrogation is applicable to the present case. The effect of the argument for the appellants is that the assured in having received the amount of 1000*l.* has in effect placed the underwriters in the position of being subrogated to the whole of their rights, which were fixed by the registrar's report at 1000*l.*

It seems to me, however, that when the underwriter pays the assured he is subrogated to his rights having regard to the risk he has taken—that is to say, in the present case, when the assured's name is used for the purpose of enforcing an action against the wrongdoer the remedy is sought for the underwriter to the extent to which he had insured, and for the assured to the extent to which he had left himself uninsured. That being so, it seems logically to follow that when the money which is recovered is in hand it ought to be divided in proportion to the respective interests. That seems to me reasonable in principle, and, although there is no authority for it, it also seems to me to be analogous to the case of salvage where there is abandonment. That being so, it follows that the proportions which ought to be recovered in a case of this kind are easily ascertained. One thousand pounds was recovered from the wrongdoers, partly for the owner and partly for the underwriter, and therefore the proportion becomes 350-1350ths in the one case and 1000-1350ths in the other. It only remains for me to say this, that I regard this case as one in which the position is precisely the same as if the assured had effected full insurance upon the ship, but with different underwriters; as if, for instance, he had insured his ship for 1000*l.* with the underwriters in question on a value of 1350*l.*, and had taken out another policy with another set of underwriters for 350*l.* on the same valuation. I cannot conceive myself what possible answer there could have been to the question what is the division of the amount recovered from the wrongdoer between those two sets of underwriters, except that it must be in proportion to their respective interests. Is there any difference if the assured remains his own insurer with regard to the 350*l.*? I think not. He is entitled to his proportion just as much as his underwriters would have been if they had undertaken such a risk. That being so, I think the judgment of the court below was right, and that the sum of 1000*l.* brought into court in respect of the loss of the ship must be divided in the proportions I have mentioned. As to the interest brought into court on the 1000*l.*, that must be divided in the same way. For these reasons I am of opinion that the appeal must be dismissed with costs, and the cross-appeal must be allowed with costs.

Moulton and Kennedy, L.JJ. concurred.

Solicitors for the appellants, *W. W. Wynne* and *Sons*, for *Forshaw* and *Hawkins*, Liverpool.

Solicitors for the respondents, *Thomas Cooper* and *Co.*, for *Hill, Dickinson*, and *Co.*, Liverpool.

Tuesday, April 23, 1907.

(Before Vaughan Williams, Moulton, and Buckley, L.JJ.)

Queens of the River Steamship Company Limited *v.* Easton, Gibb, and Co. and the Conservators of the River Thames. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Thames Conservancy—Duty to keep the river Thames free from obstructions to navigation—Negligence—Evidence.

The plaintiffs' steamer, while navigating the river Thames near Kew Bridge, was damaged by a baulk of timber which had been at one time apparently used as a pile, and which was afterwards found to have its blunt end stuck in the bed of the river and its pointed end slanting upwards and only a few inches below the surface of the water.

Held, upon the facts, assuming, as was the fact, that a duty lay upon the Thames Conservators to use reasonable care to keep the river Thames free from obstructions to navigation, that there was no evidence that the conservators had been

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

guilty of any neglect of such duty causing the damage to the plaintiffs' steamer.

Judgment of Kennedy, J. (95 *L. T. Rep.* 104 (1906)) *affirmed.*

APPEAL by the plaintiffs from the decision of Kennedy, J. at the trial of the action without a jury.

The action was brought to recover damages for negligence on the part of the defendants.

On the 5th Sept. 1904 the plaintiffs' river steamer *Queen Elizabeth*, whilst navigating the river Thames on the upper side of the central arch of Kew Bridge, had her side pierced by the pointed end of a baulk of timber.

This piece of timber, which measured 12in. by 12in. by 13ft., had apparently been once used as a pile. It was found after the accident with its blunt end sticking in the bed of the river, and its pointed end slanting upwards and covered by only a few inches of water.

The action was brought against Messrs. Easton, Gibb, and Co., who had been contractors for the rebuilding of Kew Bridge, and against the conservators of the river Thames.

At the trial of the action before Kennedy, J. without a jury the learned judge said that upon the facts before him he could not find any ground for a charge of negligence in the contractors causing the injuries to the plaintiffs' steamer; and with regard to the conservators he held that, though the plaintiffs had a legal right to expect that the conservators would take reasonable care that the steamship should not be exposed to danger from obstruction to the navigation, yet that there was no evidence of any breach of duty by the conservators causing the damage complained of.

The learned judge therefore gave judgment in favour of both defendants

The case is reported 95 L. T. Rep. 104 (1906).

The plaintiffs appealed against this judgment so far as it was in favour of the conservators.

Scrutton, K.C. and *Balloch* for the plaintiffs.

Bankes, K.C. and *C. B. Marriott* for the conservators.

VAUGHAN WILLIAMS, L.J.—I think that this appeal must be dismissed. I think that the judgment of Kennedy, J. was quite right, and that the questions which he propounded to himself were proper questions to propound. Kennedy, J. showed in the course of his judgment that he took as the basis of the possible liability of the conservators the principles laid down by Blackburn, J. when advising the House of Lords in the case of *Mersey Docks and Harbour Board* v. *Gibbs* (2 Mar. Law Cas. O. S. 353 (1866); 14 L. T. Rep. 677; L. Rep. 1 H. L. 93). The headnote of that case says: "The principle on which a private person, or a company, is liable for damages occasioned by the neglect of servants, applies to a corporation which has been intrusted by statute to perform certain works, and to receive tolls for the use of those works, although those tolls, unlike the tolls received by the private person or the company, are not applicable to the use of the individual corporators or to that of the corporation, but are devoted to the maintenance of the works and, in case of any surplus existing, the tolls themselves are to be proportionably diminished"; and then further on: "If knowledge of the existence of a cause of mischief makes persons responsible for the injury it occasions, they will be equally responsible when, by their culpable negligence, its existence is not known to them."

The second passage that I have read from the headnote is really taken from the opinion delivered by Blackburn, J. In that case the action had been tried before Pollock, C.B., and Blackburn, J. said that "the Chief Baron told the jury, in effect, that it was not necessary to prove knowledge on the part of the defendants or their servants of the unfit state of the docks, and that proof that the defendants by their servants had the means of knowledge and were negligently ignorant of it, would entitle the plaintiffs to the verdict." Then a little further on Blackburn, J. said: "If this proposition is correct, the direction of the Lord Chief Baron excepted to was right, for a body corporate never can either take care or neglect to take care, except through its servants; and (assuming it was the duty of these trustees to take reasonable care that the dock was in a fit state) it seems clear that if they, by their servants, had the means of knowing that the dock was in an unfit state, and were negligently ignorant of its state, they did neglect this duty, and did not take reasonable care that it was fit."

It seems to me that the judgment of Kennedy, J. was based on the very principles laid down in that case. He assumed that a duty was thrown upon the conservators to take reasonable care that the waterway of the Thames was not left in a dangerous state, and then he came to the conclusion that there was no evidence either of their knowledge of the danger arising from this oak beam and the curious position in which it was, or that it was in fact there, and he also held that there was no evidence of any neglect of examination or supervision by the servants of the conservators which led to their being negligently ignorant of the danger which was there. There is a curious lack of evidence as to where this pile came from, and as to any reasons which the conservators might have for expecting that a pile would be found in the position in which this pile was. There was nothing whatever to my mind which should have led their officers and servants to expect to find anything of the sort in the circumstances of the case. Nobody would have expected to have found a pile there. Under these circumstances I think that Kennedy, J. was right in holding that there is no evidence of the neglect by the conservators of any duty of theirs which, if performed, would have prevented or rendered less likely the happening of this accident—that is to say, the collision of this steamer with this pile. I think, therefore, that the appeal must be dismissed.

MOULTON, L.J.—I am of the same opinion. I will accept without discussing it the plaintiffs' definition of the duty of the conservators—viz., that the conservators were bound to take reasonable care to keep the bed of the river Thames in proper condition for navigation. In the present case it is common ground that the accident that occurred was of the most extraordinary and unaccountable kind. Even with the knowledge that it actually had occurred, and with the close examination of the place and conditions of the accident that has taken place since, it is

impossible to explain how this beam of wood got fixed in the extraordinary position which enabled it to do the damage. It is a square-headed baulk of timber, 12in. by 12in, and 13ft. long, pointed at one end, with no iron upon it, and it was found with the square head driven some 2ft. or 3ft. in the soil and firmly planted there with the pointed end slanted upwards. Now, if the occurrence of such a thing as that is to us now so unaccountable that no reasonable hypothesis of its happening can be suggested, it is obvious that no negligence can be imputed to the conservators in not having anticipated the possibility of such a thing and taken precautions against it. The very fact that it is so unusual shows that is not reasonable to expect that it could have been anticipated and guarded against. The only way in which the plaintiffs could have sustained their case against the defendants under those circumstances is, in my opinion, that they should have shown that this beam had been in that position for so long a time that the defendants knew, or would, if they had exercised reasonable care, have learned, that it was there and was a danger to navigation.

Now, the onus of proving that is unquestionably upon the plaintiffs, and, in my opinion, there is no adequate evidence to sustain their case. I am satisfied that there is no evidence which would justify a court in finding against the conservators that this pile had been there for such a period that they ought to have known about it. Even if we take it that it had been there at the last spring tide, it is clearly not the duty of the conservators to make every fortnight such a close examination as would have told them of the existence of anything so thoroughly unexpected and unlikely as this pile in this position. I am therefore of opinion that the plaintiffs have failed to sustain that issue. In my opinion their case only assumes a plausibility through a confusion in the use of the word "pile." It was contended that the vessel ran on a submerged pile at a place which the conservators ought to have known was bristling with piles. The fact of the case is that it is only in an historical sense that the instrument of mischief was a pile at all. It was not acting as a pile when it did the mischief. The shape which it had leads us to conclude that at some period of its existence it had been used as a pile, but it was not a pile *in situ*. It was merely a floating, water-logged beam of wood that had got into this strange position. The piles with which the place was bristling were piles *in situ*—that is to say, driven into the ground and permanently fixed there. There is no connection whatever between the one use of the word "pile" and the other, and, in my opinion, this place was no more likely a place to find water-logged beams that had once been used as piles than any other place in the river.

Buckley, L.J.—I am of the same opinion. The short outcome of the extraordinary facts of this case seems to me to be this, that there is no reason to suppose that this baulk of timber had been for any length of time in the exact position in which it caused the damage to the plaintiffs' vessel. It is quite impossible to say how long it had been there. The next material outcome of the facts seems to me to be this, that it cannot possibly be attributed to the conservators as negligence that they did not anticipate that this baulk of timber would be found in this extraordinary position with its head downwards and its point upwards in the position in which it was.

There is no negligence on the part of the conservators, it seems to me, in not looking for the pile where no human being could have anticipated, or have any reason to suppose, that this extraordinary phenomenon would present itself to a vessel going through the centre arch of Kew Bridge. The appellants seek to put their case in some such form as this, that this place had so bad a character and so bristled with piles that the conservators ought to have investigated it, not because of the existence of this pile, which nobody could have expected them to know of, but because there were other piles. The argument may be put in a more concrete form thus: there was not negligence in not looking for pile A, but there was negligence in not looking for piles X and Y, which in point of fact have done no damage at all. The contention is that if the conservators had looked for X and Y, they would have found A, and that because they did not look for X and Y, they were negligent in not looking for A., although they had no reason to suppose that A was there.

It seems to me to be impossible to maintain that. In the first place, we are not trying the question—there is no means of trying it—whether the conservators were negligent in not looking for piles X and Y. The appellants seek to evolve from the fact that under different circumstances damage might have resulted from some different act of negligence the conclusion that the conservators were negligent in not doing something which they were not bound to do—viz., look for the particular pile A which caused the damage. It seems to me that no negligence on the part of the conservators has been shown. I think, therefore, the appeal fails.

Appeal dismissed.

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

Solicitor for the conservators, *W. S. Bunting.*

June 12, 13, 14, *and* 25, 1907.

(Before Vaughan Williams, Moulton, and Buckley, L.JJ.)

Nelson and Sons Limited *v.* Nelson Line, Liverpool, Limited; and *Re* Arbitration between the Same. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Charter-party—Lay days—Sundays and holidays excepted from working days—Loading on holidays—Days saved in loading—Dispatch money—Agreement to load a two-weekly service of ships—Regularity not a condition precedent.

By an agreement for the carriage of frozen meat from the River Plate to Liverpool it was agreed that, for a period of one year, the shipowners should provide a two-weekly service of ships, sailing at intervals of fourteen days, and that the charterers should fill the insulating chambers with frozen meat.

Held, by Vaughan Williams and Buckley, L.JJ. (Moulton L.J. dissenting), that, upon the terms of the agreement, the exact observance by the shipowners of the period of a fourteen days interval between each ship was not a condition

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

precedent to the duty of the charterers to load within the time agreed upon after a ship's readiness to load had been notified to them, and non-observance only gave rise to a claim for damages.

It was further agreed that "seven weather working days (Sundays and holidays excepted)" should be allowed for loading, and that an agreed amount of dispatch money was to be paid by the owners to the charterers "for each clear day saved in loading."

The charterers did part of the loading of a ship on two holidays, but there was no evidence of any express agreement under which the loading was so carried on, nor at whose suggestion it took place.

Held, by Vaughan Williams and Buckley, L.JJ. (Moulton, L.J. dissenting), that there was an implied agreement between the parties that these two holidays should be counted as "working days" within the charter-party.

The charterers loaded a ship in two days less than the number of lay days that were allowed by the charter-party, one of such days being a Sunday.

Held, by Vaughan Williams and Buckley, L.JJ. (Moulton, L.J. dissenting), that the Sunday was not a day "saved in loading" which entitled the charterers to be paid dispatch money.

Branckelow Steamship Company *v.* Lamport and Holt (10 Asp. Mar. Law Cas. 472 (1897); 96 *L. T. Rep.* 886*n.*; (1907) 1 *K. B.* 787*n.*) *and* The Glendevon (7 Asp. Mar. Law Cas. 439; 70 *L. T. Rep.* 416; (1893) *P.* 269) *approved.*

THESE were appeals from the judgment of Channell, J. at the trial of the action without a jury (10 Asp. Mar. Law Cas. 472, note (*b*) (1907), and from the judgment of Bray, J. upon a special case stated by an arbitrator (10 Asp. Mar. Law Cas. 390 (1907). The plaintiffs were charterers and the defendants were shipowners.

By an agreement dated the 18th June 1904 the Nelson Line, Liverpool, Limited, described therein as "the owners," agreed to carry frozen meat for James Nelson and Sons Limited, described therein as "the charterers," from the River Plate to Liverpool or London.

The agreement recited that the owners had services of cargo and live stock steamers which they were running, or proposed to run, as a two-weekly line from the River Plate to the port of Liverpool and as a monthly line from the River Plate to the port of London, and that the charterers had agreed to ship their output to the United Kingdom of frozen meat and offal by the said lines, and that the owners had agreed to carry the same on the conditions thereinafter contained. It then provided (*inter alia*):

Clause 1. The owners engage as from the date when their respective vessels arrive in the River Plate and are ready to load outwards to place the vessels of the line . . . from time to time sailing in the lines herein specified . . . or other vessels of equal capacity at the disposal of the charterers for the carriage from the River Plate . . . of frozen meat . . . and the charterers agree to ship in each vessel so much frozen meat and offal as will fill such insulated chambers. . . .

Clause 2. . . . the service of the lines hereunder is, subject as hereinafter provided, to be a two-weekly one to the port of Liverpool and a monthly one to the port of London, having the sailings at intervals of fourteen days and thirty days respectively, and to last for one year from the 1st Jan. 1904, and to be subject to continuance as hereinafter provided.

Clause 6. On arrival of each steamer at the loading berth in the River Plate, notice shall be given to the charterers or their agents in writing of her readiness to load; such notice shall not be given until the temperature of the insulated chambers for frozen meat . . . shall have been reduced to at least 22 degrees Fahrenheit, and the temperature shall be maintained thereat, or lower, up to the time of shipment commencing. . . . The aforesaid notice of readiness shall be left at the office or place of business of the charterers in the River Plate between the hours of 10 a.m. and 4 p.m. Twelve hours after the receipt of such notice the lay days of the steamer shall commence, provided the aforesaid temperature of 22 degrees Fahrenheit shall have been maintained in the insulated chambers set apart for frozen meat . . . since the beginning of such notice or as soon thereafter as the temperature may have been maintained at that temperature for a period of twelve hours. Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* (forty pounds) per day, and so in proportion for any part of a day, payable day by day. For each clear day saved in loading the charterers shall be paid, or allowed by the owners, the sum of 20*l.* The charterers shall be at liberty to send the meat alongside and the vessels of the line shall receive it by night, if required by the charterers to do so, they (the charterers) paying all extra expenses caused to the owners through so doing. . . .

On the 5th March the *Highland Heather*, a vessel of the defendants' line, having arrived at the plaintiffs' factory at Las Palmas, in the River Plate, notice was given at 2 p.m. that she was ready to load.

On the 7th, 8th, 9th, 10th, 12th, and 13th March loading took place, and finished at 8.30 a.m. on the 14th March.

The 11th March was a Sunday, and on that day no loading took place.

The 13th and 14th March were public holidays, but loading took place on those two days; there was no evidence to show at whose suggestion the loading took place, nor whether there was any agreement in relation thereto.

On the 11th March the *Highland Enterprise*, another vessel of the defendants' line, arrived; and notice of her readiness to load was given on the 14th March. Her loading began on the 21st and finished on the 27th March.

The action was brought to recover the sum which the charterers had paid to the owners under protest, in respect of demurrage, and for 40*l.* dispatch money, the charterers contending that two days had been saved in loading, in respect of which they were entitled under the agreement to 40*l.* dispatch money.

The owners contended that the holidays counted as working days because loading had taken place on them, so that the number of lay days allowed under the agreement had been exceeded; and they claimed demurrage for fourteen and a half hours, or, alternatively, six and a half hours.

At the trial of the action, Channell, J. gave judgment for the owners: (10 Asp. Mar. Law Cas. 472, note (*b*) (1907); 96 L. T. Rep. 887n.; (1907) 1 K. B. 788n).

In the second case a dispute had arisen between the parties which, under an arbitration clause in the agreement, had been referred to arbitration.

The charterers contended that, in certain cases in which they had loaded ships in less time than the number of lay days allowed by the agreement, they were entitled to dispatch money, although the days which they maintained they had saved were Sundays or holidays.

The owners contended that the only kind of days which under the agreement the charterers could save, so as to claim dispatch money, were working days.

The arbitrator decided in favour of the owners' contention, but stated his award in the form of a special case.

Bray, J. affirmed the decision of the arbitrator: (10 Asp. Mar. Law Cas. 390 (1907).

June 12, 13, *and* 14.—*Rufus Isaacs*, K.C., *Atkin*, K.C., and *Leslie Scott* for the charterers.

J. A. Hamilton, K.C. and *Maurice Hill* for the owners.

The following cases were cited:

Commercial Steamship Company v. *Boulton*, 3 Asp. Mar. Law Cas. 111 (1875); 33 L. T. Rep. 707; L. Rep. 10 Q. B. 346;
Laing v. *Hollway*, 3 Q. B. Div. 437;
The Glendevon (*ubi sup.*);
The Katy, 7 Asp. Mar. Law Cas. 510, 527 (1894); 71 L. T. Rep. 709; (1895) P. 56;
The Moorcock, 6 Asp. Mar. Law Cas. 357, 373 (1888); 60 L. T. Rep. 655; 14 P. Div. 64;
Houlder v. *Weir*, 10 Asp. Mar. Law Cas. 81 (1905); 92 L. T. Rep. 861; (1905) 2 K. B. 267;
Whittall and Co. v. *Rahtken's Shipping Company Limited*, 10 Asp. Mar. Law Cas. 471 (1907); 96 L. T. Rep. 885; (1907) 1 K. B. 783;
Branckelow Steamship Company v. *Lamport and Holt*, 10 Asp. Mar. Law Cas. 472, note (*a*) (1897); 96 L. T. Rep. 886n.; (1907) 1 K. B. 787n;
Nielsen and Co. v. *Wait and Co.*, 5 Asp. Mar. Law Cas. 553 (1885); 54 L. T. Rep. 344; 16 Q. B. Div. 67;
Yeoman v. *The King*, (1904) 2 K. B. 429.

Cur. adv. vult.

June 25.—Vaughan Williams, L.J. read the following judgment:—The one judgment I am going to deliver will apply to both cases. There are two points in this case: one relates to the sequence of sailings, the other relates to the exception of Sundays and holidays from the lay days.

The contract was contained in a charter-party, and related to the carriage by the defendants, who are called the owners, of frozen meat of the plaintiffs from the River Plate to Liverpool or London, as the case might be. The plaintiffs' claim is for dispatch money due under the charter-party, and for the return of a sum of money paid under protest by the plaintiffs to the defendants in respect of demurrage. The contract begins with a preliminary statement, the terms of which I will read hereafter. This charter-party agreement, dated the 18th June 1904, provided (*inter alia*), first, that the owners, the defendants, engage as from the date when their respective vessels arrive in the River Plate and are ready to load outwards, to place the vessels of the line from time to time sailing in the lines named in the schedule thereto or other vessels of equal capacity at the disposal of the charterers for the carriage from the River Plate of frozen meat; and by clause 2: "The installation and machinery are, subject as hereinafter provided, to be of sufficient power to cool the frozen meat chambers and keep them at a temperature of 22 degrees Fahrenheit. The service of the lines hereunder is, subject as hereinafter provided, to be a two-weekly one to the port of Liverpool and a monthly one to the port of London, having the sailings at intervals of fourteen and thirty days respectively, and to last for one year from the 1st Jan. 1904, and to be subject to continuance as hereinafter provided." The contention of the plaintiffs is that this stipulation that there was to be an interval of fourteen days is a condition precedent to the obligation of the plaintiffs, the charterers, to load as provided in clause 6 of the contract; and the plaintiffs contend that, if the vessel did not arrive in time to enable them, using the stipulated lay days period, to load it for a sailing date, they could refuse to load.

They contended that they were not bound to commence loading until such date as, using the stipulated lay days period, would make the ship to sail fourteen days from the previous ship's sailing. It was under this claim that the plaintiffs, in the case of the *Highland Enterprise*, which arrived at the plaintiffs' wharf on or about the 11th March 1906, being seven days only from the commencement of loading the preceding ship, the *Highland Heather*, claimed to be entitled to begin to load the *Highland Enterprise* on the 21st March 1906, and continue loading on the 22nd, 23rd, 24th, and 26th March, finishing on the 27th March at 9 a.m. The plaintiffs claim under these circumstances two days' dispatch money, and deny that they have incurred any demurrage. The defendants, on the other hand, insist that the loading ought to have commenced twelve hours after the presentation of the notice of readiness to load on the 14th March; and by a threat to exercise a lien over the cargo they compelled payment of 171*l.* 13*s.* 4*d.* by way of demurrage, which is the money the return of which is claimed by the plaintiffs in this action.

In my judgment Channell, J. was right when he held that the observance of the period of interval of fourteen days was not an absolute condition constituting a condition precedent to the obligation of the plaintiffs to load, and that the late arrival or non-arrival of a vessel at the proper time is not a justification for refusing to load the next vessel when she arrives, but can only form at the most a ground for claiming damages, and that the inconvenience which may arise as to the loading of the next vessel will be part of the damages consequential upon the late arrival, presuming the late arrival to constitute a breach of the charter-party, if the damages are recoverable at all. The obligation to load upon the charterers receiving notice in writing of the steamer's readiness to load is by clause 6 absolute, subject only to the performance of the condition as to temperature in that clause. The provisions of clauses 3 and 7, and the last part of clause 5, seem to me inconsistent with the intention that it should be a condition precedent to the obligation to load that each steamer should arrive at a fixed date or at a date approximately ascertainable. The date seems to me clearly flexible, and not a fixed date. I am by no means certain that the steamer arrived so late as to constitute a breach of the charter-party, or, having regard to the fact that it is obvious that the charterers must have contemplated when they entered into

the charter-party the possibility that Liverpool steamers and London steamers might overlap at Las Palmas, that the charterers did not take the risk of such overlapping, especially as there was only one loading berth. The dates for arrival, to use the expression of Lord Lindley in *Potter and Co.* v. *Burrell and Sons* (8 Asp. Mar. Law Cas. 200 (1896); 75 L. T. Rep. 491; (1897) 1 Q. B. 97), are not "cardinal dates." The plaintiffs say that, if you look at the whole charter-party and read the latter part of clause 2 and the recital, you will find that the arrival at intervals of fourteen days is a condition precedent to the obligation to load.

I do not agree; not only because a rigid period of fourteen days is inconsistent with the clauses to which I have called attention, but because, in my opinion, the preliminary recital and the latter part of clause 2, upon their true construction, were not intended to constitute arrival of the ships at fortnightly intervals a condition precedent to the obligation to load.

The preliminary recital runs thus: "Whereas the owners have services of cargo and live stock steamers which they are running, or propose to run, as a two-weekly line from the River Plate to the port of Liverpool and as a monthly line from the River Plate to the port of London, and the charterers have agreed to ship their output for the United Kingdom of frozen meat and offal by the said lines, and the owners have agreed to carry same on the conditions hereinafter contained." And the latter part of clause 2 runs thus: "The service of the lines hereunder is, subject as hereinafter provided, to be a two-weekly one to the port of Liverpool and a monthly one to the port of London, having sailings at intervals of fourteen and thirty days respectively."

The object of the words which I have quoted is, in my opinion, not to make the sailings at such intervals, or the arrivals at Las Palmas, conditions precedent to the obligation to load, or that there should be sailings or arrivals at fixed dates, but merely that generally the sailings and arrivals should be, so far as may be consistent with the clauses thereafter appearing in the charter-party, at regular intervals in the one case of fourteen, and in the other case of thirty, days. I find nothing in the charter-party to lead me to the conclusion that the sailings of the ships were intended to be determined absolutely by the arrival of previous steamers; and I find nothing in the facts to lead me to the conclusion that the various arrivals, in fact, were such as to frustrate the commercial venture. This determines the first point.

The next point is about the holidays. The words are: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For any time beyond the periods above provided the charterers shall pay to the owners demurrage at the rate of 40*l.* per day, and so in proportion for any part of a day, payable day by day. For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.* The charterers shall be at liberty to send the meat alongside, and the vessels of the line shall receive it by night, if required by the charterers to do so, they (the charterers) paying all extra expenses caused to the owners through so doing." The charterers loaded in the case of the *Highland Heather* on the 13th and 14th March, although those days were holidays. There was no express agreement, nor was there any evidence, as to on whose suggestion or on what terms the work was done. The plaintiffs allege that the 13th and 14th March could not count as lay days, and they claimed 40*l.* dispatch money in respect thereof, and denied that any demurrage had been incurred. The defendants allege that the 13th and 14th March counted as lay days as they were worked on; they also allege that the lay days began at 2 a.m. on the 6th March and ended at the close of working hours—namely, at 6 p.m. on the 13th March; or, alternatively, that the lay days ended on the 14th March at 2 a.m. They therefore claimed that demurrage in respect of fourteen and a half hours, or, in the alternative, six and a half hours, had been incurred on the footing that a day in the charter-party meant a calendar day, and not a period of twenty-four hours. No dispatch money, they allege, had been earned.

Now, there can be no doubt but that the charterers' allowance of lay days is an allowance of seven weather working days (Sundays and holidays excepted) for loading—that is to say, seven weather working weekdays, not being holidays, for loading. It follows from this that unless some fresh agreement is made, the charterers are entitled to seven working weekdays, not Sundays or holidays, for loading, and that demurrage will not begin until seven such working weekdays, not Sundays or holidays, have been exhausted, and the charterers will be entitled to dispatch money if the seven weekdays are unexhausted at the date when the loading is completed.

The whole question is whether any agreement can be found that, if a holiday is worked on, such day must count as a working weekday—that is, as one of the seven days allowed for loading. It is clear that there was no express agreement, and therefore a fresh agreement must be an agreement inferred from the fact that loading was done on these holidays which could only have been by the acquiescence of the shipowners and charterers. The decision of Lord Russell of Killowen in *Branckelow Steamship Company* v. *Lamport and Holt* (10 Asp. Mar. Law Cas. 472 (1897); 96 L. T. Rep. 886n.; (1907) 1 K. B. 787n.) is a clear authority that in a case where Sundays and holidays are excepted from the lay days—that is, where the allowance of lay days is an allowance of days which are neither Sundays nor holidays—and the charterers have asked the master to allow them to load on Sunday, and they do so load, it may fairly be inferred therefrom that both parties have agreed to treat that day as a working day; and he says that the same observations would apply to a recognised holiday. Except for the absence of the express request by the master, that case is a distinct authority in the present case, but of course it does not bind us in the Court of Appeal. *The Katy* (*ubi sup.*) is so far an authority in the present case, and it seems to me to decide that if the lay days are counted, not according to the calendar but as periods of twenty-four hours, that if for the convenience of all parties a portion of a day not a working day—that is, a day on which the shipowner was not bound to receive the cargo to be loaded—is used, it may be counted as a

lay day; and in arriving at this conclusion it followed the decision in *Commercial Steamship Company* v. *Boulton* (33 L. T. Rep. 707; 3 Asp. Mar. Law Cas. 111 (1875); L. Rep. 10 Q. B. 346) in respect of the charter-party of the *Boston*. It is to be observed that in that case the question was whether a portion of a day was to be deducted from the loading time, and the jury found, and were held to be justified in finding, that the time of loading was to be deducted even though the loading took place in consequence of pressure put upon the charterers by the master. In *The Katy* (*ubi sup.*), which was a case of unloading which had to commence not at a fixed period, but at a reasonable time after the ship arrived, the court were of opinion that if nothing had happened on the Saturday, the day when the ship arrived, but on which she was not cleared till 10 a.m., when the master gave notice to the consignees of the cargo that the vessel was ready to discharge, the lay days would not have commenced until the Monday, but nevertheless, as the consignees chose to treat Saturday as an unloading day, Saturday must be treated as an unloading or lay day. The shipowner was not bound to deliver, and the consignees were not bound to receive, on the Saturday; either might have refused, and the consignees did at first refuse; but, instead of waiting until the Monday, the parties came to an agreement involving the waiver by one side of their strict rights, and the unloading did in fact begin at one o'clock in the afternoon of the Saturday with the consent of the consignees, possibly owing to considerations as to the nature of the cargo. This is the statement by Rigby, L.J. at the end of the case. He infers an agreement involving the waiver of the strict rights of the parties, and does so in a case in which the consignees, whose strict rights were held to have been waived by unloading on Saturday, did so at the instance of the master of the ship.

I have no doubt myself but that an agreement to treat a holiday as a loading day may be inferred from the conduct of the charterers in a case where the charterers have a right by the terms of the charter-party to a given number of lay days which are not holidays, and I do not think that such an inference is excluded by the absence of evidence as to on whose suggestion and on what terms the work was done. I think that the judgment of Channell, J. should be affirmed. I think that the holidays worked on were rightly counted amongst the lay days; and, with regard to the dispatch money in the arbitration case, I agree with the judgment Buckley, L.J. is about to deliver.

Moulton, L J.—These two cases arise out of a contract which is of a very peculiar character, and is very complicated in its nature. Two of the points raised are points of general importance by reason that this contract includes as part of its stipulations which are so much of the nature of a charter-party that the points are common to a vast number of ordinary charter-parties, which are not linked together in the complicated relationships of the contract in question. I shall deal with these two points of general interest first. They relate to rules of interpretation which, as I have said, will affect a very large number of charter-parties, and the contention of the respondents here that there is, in respect of each of them, direct authority binding on courts of first instance, but which we are entitled to review, is, I think, broadly speaking, supported; for if the cases to which the respondents refer us were rightly decided, it is difficult to distinguish the present case from them.

I shall therefore commence by considering these authorities, and then I shall pass to the exact case before the court in order to discover whether, if I am of opinion that these cases were wrongly decided, there is anything special in the present case which will justify our treating it as an exception. The two points in question relate to provisions for loading contained in clause 6 of this contract. They read as follows: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. . . . For each clear day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l*." In the present case the charterers and the shipowners, though not required to do so by the contract, did, as a matter of fact, work on two holidays, and the ship was loaded within the period allowed it by the above provisions; but the respondents claim that, as a matter of law, the court must presume that the working on the two holidays was in virtue of a contract that those holidays should be counted as working days, and should be taken out of the period allowed under clause 6, so that the owners are entitled to payment for two days' demurrage, although the ship was in fact loaded within the specified time. There is no pretence that any such contract was in fact made, and, although witnesses (including the captain of the vessel) were called at the trial by the shipowners to give evidence as to the circumstances of the ship's loading, no questions were asked them as to any terms whatever having been arranged in connection with the conjoint working of the charterers and the shipowners on the days in question. The case for the shipowners, the respondents in this court, is based on the decision of the late Lord Russell of Killowen in *Branckelow Steamship Company* v. *Lamport and Holt* (*ubi sup.*) and the cases that followed it, and they also contend that the Court of Appeal in the case of *The Katy* (*ubi sup.*) laid down the same rule of law. I am of opinion that the decision in *The Katy* does not warrant the interpretation put upon it by the respondents for reasons that I will presently give, but that the decision in the case of *Branckelow Steamship Company* v. *Lamport and Holt*, and the subsequent decisions that follow that case, do support the contention of the respondents.

I propose, therefore, to consider whether they can be supported in law. They lay down that where a charterer is allowed a certain number of lay days (Sundays and holidays excepted), and work is actually done on excepted days, the court must presume, in the absence of evidence to the contrary, that it was upon terms that these days should count as working days, and that the period allowed for loading should be correspondingly shortened. In my opinion this proposition cannot be supported.

It will be observed that the question has nothing to do with the interpretation of the contract contained in the charter-party. By the terms of that document the charterers are allowed a certain period for loading, and that

period is calculated in a way prescribed by the terms of the document—namely, that without counting Sundays and holidays there are to be a certain number of lay days. This defines the rights of the charterers, and, accordingly, the period allowed to them for loading is fixed from the moment the loading commences and remains unchanged unless some extraneous and independent contract between themselves and the shipowners be made which takes away those rights. This proposition is not contravened by the decision under examination. But that decision lays down that the courts must assume from the fact that work has been done on a day on which neither party was compelled to work that such an independent and extraneous contract of a special form must be presumed to have been made.

I can see no warrant for such a doctrine. I quite agree that neither the charterers nor the shipowners could be required to work at the loading of the vessels on any one of the excepted days, and that if the work was done it must have been done by the mutual consent of both parties. But it is evident that the working on that day might be, and probably would be, to the mutual advantage of both parties. The shipowners would get their ship away a day earlier, which might be of much more importance to them than any question of demurrage or dispatch money, and the charterers would also get forward in their work and lessen the risk of having to pay demurrage. The consent of one party to work was abundant consideration for the consent of the other to work, and, in my opinion, where two parties combine to do something which is for their common interest, the law will not in general presume, in the absence of proof, that there was any extrinsic consideration moving from or to either party.

In cases where the whole of the burden falls on the one party and the whole of the benefit goes to the other, cases may arise where the law will presume that it was done for an outside consideration, and will bring in the doctrine of *quantum meruit*, or some other analogous doctrine, in the absence of facts showing that the party taking upon himself the burden did so as a volunteer. Probably the same presumption might be made in a question where the advantage to one side and the burden to the other was so overwhelmingly greater than in the case of the other party that it would be incredible that the matter should not have been one in which some extrinsic consideration was intended to come in. But these must be very exceptional cases. A good example of this principle can, I think, be obtained by considering a case closely analogous to the one before us.

Suppose that a charterer has a certain number of lay days under a charter-party. Upon those lay days, in the absence of a specific provision, there would be no obligation upon the shipowner or the charterer to work more than the ordinary working hours. Let us assume that as a matter of fact overtime was worked on one or more of those days. Could it be contended that the law would be justified in assuming that a contract was made between the parties that either should pay to the other any sum, or forfeit any advantage as consideration for working overtime? In my opinion it would be perfectly unjustifiable for the courts to enter into any speculations on the subject. If a contract was in fact made whereby the consent of the one was purchased by something more than the consent of the other, it must be proved in the ordinary way. For my own part I cannot distinguish such a case as this from the case before us. If appears to me that there is no legal difference between working during hours when working is not compulsory and during days when working is not compulsory. In both cases we have concurrence in something which may be, and probably was, to the advantage of both parties. If that fact be before the court and nothing more, there is nothing which can justify the court in presuming the existence of a contract by which either party agreed to purchase the consent of the other at some hypothetical price which the court may think a probable one, and still less in presuming the existence of such a contract in a case where evidence of fact has been called and not only does not prove but does not even suggest the existence of such a contract. In the present instance, therefore, I can see nothing which justifies our presuming any other agreement than the agreement on both sides to work on a day when neither need have worked.

The doing so only increases the burden on either party by the amount of extra inconvenience, if any, in working at the substituted hours. It neither affects the amount of work nor the incidence of the cost of working. We are not entitled to balance nicely the probabilities as to whether this was done by either party as a favour to the other, or as promoting its own interests; but if I were to allow myself to go into the probabilities, I should think it in the highest degree unlikely that the charterers would put themselves to the extra trouble of working on a holiday (when it was probably somewhat inconvenient for them to work) on the terms that the moment when they would become liable to demurrage should thereby be advanced a day. On the other hand, there seems, in my opinion, to be no improbability that the shipowners would be glad to get their ship away a day earlier, even though they would not get demurrage for the day that would be otherwise lost to them, or would have to pay the comparatively small amount of dispatch money in respect of a day gained. This is especially true in the present case, for it must be remembered that under the provisions of clause 6, the shipowners are liable to have the loading period prolonged if bad weather sets in before it is completed, and, therefore, a day saved (even though they have to pay dispatch money) lessens the risk of bad weather intervening and postponing at their expense the day on which their ship will be free.

I am therefore of opinion that, notwithstanding the fact that work was done on days when neither party was obliged to work, the charterers remained entitled to the full period originally allowed them by the charter-party for loading, and that in the present case the lien which was insisted upon by the shipowners in respect of the two days which were yet unexpired of the period granted by the contract for unloading was wrongfully exercised, and the respondents are entitled to have judgment for the money paid by them under protest.

I will now deal for a few moments with the case of *The Katy* (*ubi sup.*), which properly understood, so far as its decision is concerned, is, in my opinion,

in support of the proposition which I have laid down. In the case of *The Katy*, fourteen running days were to be allowed to the freighters for loading and unloading. The ship arrived at a port and was ready for unloading about the middle of the day. Now, it was perfectly clear that the charterers might have refused to commence unloading on that day because they were entitled to fourteen full days, and they could not be obliged to take half a day instead of one of these full days. But nobody contested that if they did take part of a calendar day—and I may say the court also found this—that must be counted as one of the running days. Negotiations went on between the parties, and the charterers agreed to commence unloading in the middle of the day—that is to say, they commenced unloading on that calendar day. They then set up that it must be taken that they agreed to unload on that calendar day on the terms that it should not count as a running day. Who had to prove the extraneous contract? Not the shipowners. The shipowners said: "You began your unloading on such a day; count from that day, and your time was up at such and such a date." It was the charterers who had to set up the extraneous contract,, saying, "True, we did work on that day, but it must be taken to have been on the terms that that day was not to reckon as a running day."

The court simply found that there was no such contract. In the absence of a contract, the charterers were in the wrong, and that is what the court found. There was evidence of what had occurred, and I admit that Lord Esher reviewed that evidence and came to the conclusion that evidence had in fact been given of the existence of an agreement that that day should be counted as one of the running days. But the important passage in his judgment is, in my view, that where he says: "Therefore, on the Saturday, if they chose to take it as a lay day, they must take the whole of it, and the fact that they did not take delivery until one o'clock does not prevent them from having to treat the Saturday as a lay day."

I may say that the principle that the court is not to create contracts which have not in fact been made, on the ground that parties have mutually agreed to do something, seems to me to be supported by that case, and not to be negatived by it.

I will now pass to the second point, which is also one of general importance. The period granted by the contract to the charterers for loading was, as I have said, seven weather working days (Sundays and holidays excepted). Its minimum length was therefore eight days, though it might be longer. By expedition in working, the loading was completed two days before the period had expired. The charterers claim 20*l.* for each of these days in accordance with the terms of the charter-party, but the shipowners reply that one of these days was, say, a holiday, and that the charterers are not entitled to be paid for that day. It is, of course, not denied that the shipowners had the benefit of the ship being free two days earlier than provided by the charter; but it is contended that by the decision of the Divisional Court in the case of *The Glendevon* (*ubi sup.*) it was decided that the charterer could not claim in respect of excepted days.

I am of opinion that this decision can only be very doubtfully distinguished from the case before us, and that substantially it bears out the contention of the respondents. The first question, therefore, is whether that decision can be supported. In my opinion it cannot; both on the ground that it was wrong in law and also on the ground that the opposite principle had been laid down by the Court of Appeal in the case of *Laing v. Hollway* (*ubi sup.*), which is binding upon us and was binding on the Divisional Court in *The Glendevon* (*ubi sup.*). I will first consider the interpretation to be put upon the provisions in question apart from the decision in *Laing* v. *Hollway* (*ubi sup.*), and for this purpose I will just consider the more general case (which is less in favour of the charterers) where the number of lay days is specified without any reference to the weather, and I will subsequently consider whether the fact that the lay days are described as "weather working days" in the present case affects the conclusion to which we ought to come. I shall therefore assume that the language is "seven working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading, and for each day saved in loading the charterers shall be paid or allowed by the owners the sum of 20*l.*" As in the point with which I have already dealt, we have here a definite period allowed to the charterers for loading—namely, such a period as will contain seven days which are neither Sundays nor holidays. The charterers are entitled to spread their loading over the whole of that period, but if they perform the loading more quickly, so that the ship is free on an earlier day, they are entitled to dispatch money. One would naturally expect that this dispatch money would be proportionate to the advantage derived by the shipowners from the extra speed in loading, just as in demurrage the payment is proportionate to the loss of time caused by the dilatoriness in loading, and the language appears to me to be clearly chosen to express this intention.

In construing it we must consider between whom the contract is made, or, if I might use the phrase, who are speaking in the contract. In this case they are the charterers and the shipowners. The shipowners are willing to pay 20*l.* for each clear day saved in loading. That cannot, in my opinion, refer to the rapidity with which the goods are at any moment put on board, but it must refer to the shortening of the total period occupied by the loading, because it is only by the shortening of that period that the shipowners are benefited. If these words had occurred in a contract between charterers, or shipowners, and stevedores paid by the day, I can understand that the court might have put on the words the meaning "each day by which the time occupied in actually putting the meat on board the vessel is shortened"; but then the stevedores would be entitled to their bonus whether they had rendered it unnecessary to work on the first day or the second day or any other of the working days allowed. Any day saved in loading in that sense would have equally relieved their employers from the necessity of paying a day's wages, and might fairly be called a day saved. But such an interpretation would be absurd in a contract between a shipowner and a charterer where the whole advantage to the shipowner is measured by the extent to which the total period of loading is shortened.

I am of opinion, therefore, that this is the meaning of the phrase "each clear day saved in loading," and it makes no matter whether that day is a day on which the parties or either of them could have been compelled physically to put meat on board the vessel or not. If, for instance, the period allowed for loading expired on Thursday evening (Wednesday being a holiday) and by diligence in loading the charterers filled the vessel or completed their work by Tuesday evening, the number of days saved in the total period of loading would be two, and the shipowner, in return for getting his ship free two days earlier, must pay dispatch money in respect of each of them.

It further appears to me that this is exactly what was laid down by the Court of Appeal, consisting of Baggallay, Bramwell, and Brett, L.JJ. in the case of *Laing* v. *Hollway* (*ubi sup.*). Bramwell, L.J., in delivering the judgment of the court, said: "It is admitted on both sides and is clear that 'time saved' means if the ship is ready earlier than she would be if the charterers worked up to their maximum obligation only. All the time by which she is the sooner ready is time saved within the meaning of the charter-party." And later on he points out that dispatch money and demurrage ought to run exactly in the same way.

I am of opinion, therefore, that as a general rule days saved out of the total period allowed for loading must be reckoned in favour of the charterers, whether those days were within the period by virtue of their being working days or by virtue of their being Sundays or holidays.

If this be so, it remains to consider whether the fact that in the present contract the allowance is more favourable to the charterers, in that it is "seven weather working days," prevents the rule applying. This is used in a very ingenious way by counsel for the respondents. He suggested that the extra two days might have brought the ship into a period of bad weather when the days would not count, and the consequence would be that the number of days saved would be far greater than the two in question. This is treated by counsel for the respondents as a *reductio ad absurdum*. Although I agree, for reasons which I shall presently give, that the charterers could not claim in respect of such a possible future prolongation of the term, I cannot say that I feel that there would be anything absurd if they were held to be so entitled, because the shipowners would, even in that extreme case, only pay for exactly the time that was saved to them by the diligence of the charterers. *Ex concessis*, had the charterers taken their full period, they would have been entitled to keep the ship until the end of the spell of bad weather, and the owners would have lost its use for the whole of that time. But although I am of opinion that the shipowners would in fact benefit to this extent, I do not think that it is necessary to interpret the phrase "days saved" as including such possible future prolongations of the period allowed for loading, because I think that the services and the payment for them must be determined at the moment when the ship is freed by the charterers and put at the disposal of the shipowners, and that the payment must be determined *rebus sic stantibus* for the services rendered. Accordingly the period must be taken as it stood at the moment when the vessel was given over to the shipowners at the termination of the loading, and the charterers must be paid for the unexpired portion. The chances of the future no longer affect them, because they agree that the period of loading shall then terminate with all the rights that it brings with it. Their right to payment, therefore, is measured by the number of days that the period taken falls short of what at the time they can show they were entitled to. On this point, therefore, I am of opinion that the appeal should be allowed.

I now come to the much more complicated and difficult question which turns on the special nature of the contract. It is a contract of the very greatest importance probably to both parties, and certainly to one—namely, to the charterers; and in interpreting it, inasmuch as from its complicated nature and from the fact that it is to last for a year and then for, I think, as many years afterwards as the shipowners are in a condition to perform their share of it, the provisions that have to be made for future contingencies are numerous and relate to divers subjects. But the fact that it is thus complicated makes it, in my opinion, more important that we should ascertain in the first instance what substantially is its nature, and that, in dealing with all the special provisions of the contract, we should keep that substantial nature clear in our minds, in order that we may see the relation of the special provisions to what I may call the substance of the contract.

Now, the substance of the contract was of this nature. There was out in South America, on the River Plate, a packing factory which prepared carcases for shipping to England by means of ships fitted with refrigerating machinery which could keep the meat either chilled or frozen throughout the whole of the transit; and this agreement is an agreement between the owners of the factory and the owners of a line of steamers trading between the River Plate and England whereby the charterers undertook to ship the whole of their output by the ships of the shipowners, and not only to do that, but to fill the ships which were sent out to receive the output. It is perfectly obvious that an essential to that contract is the definition of what ships could be sent out to the charterers for them to fill. They must be sent out often enough, because the whole of the charterers' output had to be sent by them. They must not be sent too often, because the charterers bound themselves to fill the ships that were sent out; and therefore one is not surprised to find that in the forefront of the contract, both in the preamble and in the earliest of the provisions, there is a strict description of the character of the service of ships which the shipowners are to furnish. It is defined as being a two-weekly service to Liverpool; but that is not sufficiently accurate to protect the charterers, for you might as well have a two-weekly service in which the service of one fortnight, we will say, started on the Tuesday, and the next fortnight started on a Friday, so that the space between the ships would be unequal—a thing most disadvantageous to a factory which was presumably one having a regular output, that regular output being of a character requiring special forms of storage, and therefore not capable of being accumulated. So that the unequal periods would be very disadvantageous to it, and we find, therefore, as we might

have expected between men of business, that the character of the service is not only to be a two-weekly service, but the sailings are to be at intervals of fourteen days; two-weekly, in order that it might take the whole of the charterers' output, and at intervals of fourteen days in order that the charterers might always be ready to perform their other obligation, which was to fill up the space on board the ship. That is what, in my opinion, is the essence of this contract.

But of course every business man knows that obligations like these cannot be carried out to the moment, for there are far too many chances in life to render that possible. The consequence is that a large portion of the rest of the contract consists in what I may call apportioning the risks; that is to say, making irregularity arising from certain causes risks that are to be borne by the charterers, and irregularity that comes from other causes risks that are to be borne by the shipowners.

Now, to my mind, provisions of that kind do not in the least affect the fundamental stipulation that there is to be a regular service at intervals of fourteen days, because they mean that the deviations from that regularity which will no doubt occur are to fall on one party or the other; and if the shipowners are late, only because of an excepted cause, they are from the point of view of the contract in time. This introduces no laxity into the contract nor does it weaken the claim of the substantial provisions to be held to be conditions precedent because the contract contemplates they cannot be literally carried out, and apportions the consequence of that failure to carry them out between the different parties.

We must therefore examine the contract from this point of view. It has some conditions which are fundamental. It will undoubtedly deal with cases which will relate to the imperfect performance of these fundamental conditions, and of course it will have a large number of clauses which will deal with details of the performance — as, for instance, how loading is to take place — and other clauses which will deal with who is to bear the risk of damage to the goods by perils of the sea or other matters which may reasonably be anticipated. Now, if one keeps that in one's mind as one reads the contract, one finds that all the parts of the contract fall into their natural positions. It begins in this way: "Whereas the owners have services of cargo and live stock steamers which they are running, or propose to run, as a two-weekly line from the River Plate to the port of Liverpool and as a monthly line from the River Plate to the port of London, and the charterers have agreed to ship their output to the United Kingdom of frozen meat and offal by the said lines, and the owners have agreed to carry the same on the conditions hereinafter contained." That preamble shows exactly what was the subject-matter to which this contract was directed. The first clause is: "The owners engage as from the date when their respective vessels arrive in the River Plate and are ready to load outwards to place the vessels of the line named in the schedule hereto, and from time to time sailing in the lines herein specified"—that refers to the two-weekly lines so far as Liverpool is concerned—"which the charterers admit to have," &c. "And the charterers agree to ship in each vessel so much frozen meat and offal as will fill such insulated chambers." Therefore by that clause the charterers agree to fill the insulated chambers. Then the remainder of the clause deals with matters exactly of a similar character with regard to chilled meat instead of frozen meat. There is the obligation so far as filling all these ships is concerned. The obligation on the charterers to send the whole of their output is contained in clause 32, which says: "The charterers hereby covenant and agree that during the continuance of this contract they, the charterers, will not directly or indirectly ship or cause to be shipped, or knowingly permit or suffer to be shipped, or directly or indirectly sell for shipment to the United Kingdom otherwise than by the owners' steamers under this contract."

The effect is that these producers are tied hand and foot by being obliged both to ship the whole of their output and to fill the whole of the ships of this line tendered to them.

Now we come to clause 2, which provides: "The installation and machinery are, subject as hereinafter provided, to be of sufficient power to cool the frozen meat chambers and keep them at a temperature of 22 degrees Fahrenheit." It is not contested that that is a condition precedent. The charterers are not bound to ship their output if they do not get a ship of that description. It has been again and again held by the courts that where you have a description of that kind in a contract it is a condition precedent that that which is tendered to you and which you have to accept must comply with that description. There are many cases that could be referred to, but probably the case of *Bowes* v. *Shand* in the House of Lords (3 Asp. Mar. Law Cas. 461 (1877); 36 L. T. Rep. 857; 2 App. Cas. 455) in reference to a sale is the best known of them.

Then the clause goes on: "The service of the lines hereunder is, subject as hereinafter provided"—that means, subject to those exceptions where the failure of regularity is not to be borne by the shipowners, except perils, if I might call them—"to be a two-weekly one to the port of Liverpool and a monthly one to the port of London, having the sailings at intervals of fourteen and thirty days respectively, and to last for one year from the 1st Jan. 1904, and to be subject to continuance as hereinafter provided." That continuance is to be found set out in clause 23, which says: "Without prejudice to the provisions of art. 10 hereof, this contract shall continue from year to year after the 31st Dec. 1904, if and so long as the owners shall have lines of steamers running from the River Plate to Liverpool and London as aforesaid"—that means two-weekly and monthly, with intervals of fourteen and thirty days—"and the charterers shall be entitled and bound to ship in each such year to the various ports covered by this agreement by such steamers such quantity of frozen meat and offal," &c.; that is to say, their output and the whole of their output, and they are still liable under the contract to fill all the vessels. Therefore the date and time of sailings of these vessels are, looked at in their nature, absolutely fundamental to this contract, and I can see no possible reason why this court should say that the first part of clause 2 contains a description which creates a condition precedent

as to the vessels which the charterers are obliged to fill, and that the second part of clause 2, which is quite as vital and quite as important to them and is similarly a description of the line of steamers which they have to fill, should be held to be no condition precedent at all, and in fact, so far as I can gather from the argument of the respondents, to be a mere ornament to the contract, bringing no substantial liability at all.

In the argument I put it to Mr. Hamilton whether he contended that, supposing the respondents send two vessels at the same time and tendered them for loading, the charterers were required to load them; and he said that the obligation under clause 6 was absolute, and that they must load the ships independently of whether they were in time or not, and that the only ground on which they could object would be that the failure to keep the dates was so utter and complete as to spoil the commercial effect of the arrangement—if that did not occur, it was apparently no breach of contract on the part of the respondents not to keep up the dates of the sailings or the intervals between the ships. In my opinion that is not so.

It may give the courts very great difficulty, in working out the consequences of this contract, to hold that this is a condition precedent; but the contract is a complicated one, and the very gravest interests of both parties depend upon it; and if one is convinced that it was at the root of the contract that the times of sailing should be respected—and that, in my opinion, both as to the form of the contract and the nature of the stipulation is the case—we must face the difficulty and must not evade it by depriving the charterers of their rights under this contract. I am therefore of opinion that the description of the line of steamers and of their dates of sailing was a condition precedent to the charterers being required, under the clauses to which I have referred. to ship their output by these lines and fill up the ships that were tendered to them.

Now here let me make one remark about a matter which has been dwelt upon in argument, but which, in my opinion, has no bearing on the decision. It has been pointed out that there is a fortnightly sailing to Liverpool and a monthly sailing to London, so that at times the charterers will be, as it were, feeding a double line of steamers, and at times a single line of steamers. That is a difficulty which, if they had notification, they must meet, and I cannot find any objection raised on the part of the charterers based on any difficulty that may cause. They have met it, so far as we can learn from what was told us in the argument, by the simple way of having cold storage for about two cargoes, so that if they had to load at the same time a ship for London and a ship for Liverpool they might be able to draw on their accumulations. Whether that is so or not appears to me wholly immaterial. They have undertaken to perform their contract and they must do so; and I am bound to say that in the whole of the argument in this case I cannot find that on either side it has been suggested that the charterers have raised any contention based on a difficulty that does not arise from a breach of contract on the part of the shipowners; and to that I am now going to pass.

Whether it be a condition precedent or a class of obligation under the contract, the owners unquestionably ought to have had a two-weekly line of steamers to the port of Liverpool, and they ought to have had sailings at fourteen days' intervals. If they kept their contract no difficulty whatever would arise. The whole of the questions that arise here depend upon what the charterers are to do when the shipowners have broken their contract by not sending their ships at two-weekly intervals or at the precise intervals of fourteen days. The whole difficulty arises from breaches of contract by the shipowners, and it is not an unsound proposition to start with, when you are dealing with the rights of persons under a contract, to consider that where one party to a contract does not perform his obligations, he has not only got to bear the loss suffered by the other party, but he must also allow to the other party the right to choose reasonably his way out of the difficulties and perplexities that arise from the breach of contract. In this part of the case there is no one thing here which could have been a subject of complaint, if it had not been for the breaches of contract on the part of the shipowners; and I confess that I think that we have got to look on this from the point of view of the charterers, and to consider what they were bound to do under the contract in the face of these breaches. So far as I can see from the dates that are given us, the shipowners have made little or no attempt to keep their contract. We have a variety of dates of sailings given us in the special case for the first six months of this contract, and, looking at the dates of sailings for the Liverpool boats, I find that instead of intervals of fourteen days, which was so important for the output of any manufacture of that kind, it begins like this: 6, 17, 1, 2, 13, 24, 25, 6, 28, 4, 30. If those had arisen from excepted perils, from risks which fall, by the provisions of the contract, on the charterers, nothing could be said. But from all I have heard it is not pretended that these things arise from risks of that kind; nor have the charterers in their argument in any way suggested that they are not bound to bear the risks which they have taken upon themselves. The argument is whether or not capriciously the shipowners can send their ships at intervals of from seven days in one case and forty-two days in another, and still require the charterers to ship their whole output by these steamers, and to fill all the steamers just as they are submitted to them. Now, in my opinion the shipowners are not so entitled, because it is a condition precedent that this order of sailing should be preserved. It is a well-known law, exemplified by such a case as *Croockewit* v. *Fletcher* (1 H. & N. 893), that provisions in a charter-party fixing the dates at which there are to be sailings are a condition precedent. In that case the words were "to sail from thence for Liverpool on or before the 15th March next." It was held that if the ship was not there before the 15th March, then the charter-party was at an end, and the charterer was not obliged to take the ship. In my opinion the same conditions come in here, where these dates are not observed. But this contract is of so complicated a nature and the alliance between the two parties is so close and intricate under it that that does not settle the question entirely, because there are provisions whereby the charterers undertook to

give a preference to the ships of the shipowners for shipping not only the whole of their produce, but any goods which they wished to ship. So that in my opinion the line which has been taken by the charterers appears to me, I must confess, to be thoroughly reasonable throughout—namely, that they were perfectly willing although the ships arrived late to fill them with their produce, and only objected to being required to fill them completely, when the ships arrived at less than fourteen days' interval. That appears to me to have been the right course under the contract.

I think that the fact that the ships arrived at the wrong time did not release the charterers from their obligation to send their goods by those ships, nor did it entitle the shipowners to charge more than the fixed freight, because if they chose to charge more than the fixed freight on the ground that no freights were fixed—and goods under those circumstances were taken at the ordinary rate of freight and not at the special rates under the contract—the charterers could have immediately recovered the difference from them by way of damages for their breaches. The consequence is that the charterers seem to me to have worked out this contract in a businesslike and proper way in strict accordance with their rights when they shipped on board these ships all that they had, but protested that they were not bound to ship a full cargo if the shipowners did not send their ships at the proper dates.

Now, let me take the sailings for this particular year in order to illustrate the case put forward by the two parties. The first sailing is on the 30th Jan. The next sailing is on the 28th Feb., an interval of twenty-nine days instead of fourteen days, which, so far as I can see, was not done by arrangement in any way with the charterers. but was done at the wish of the shipowners. The next sailing is on the 14th March, which is at a proper date. The next sailing is the 27th March, thirteen days later. It was not intended that there should be an absolute regularity, but that the ships should be sent reasonably at the particular dates; and one would not have objected to the 27th March being the next sailing after the 14th March. But upon this sailing of the 27th March there is a claim by the shipowners of, I think, four days' demurrage because they tendered their ship seven days after the immediately previous ship had been tendered, and according to them they were entitled to have a sailing on the 23rd March; that is only nine days after the last ship had been sent off. The consequence is this quarrel as to whether the charterers are obliged to accept and load a ship to the full when it comes at an interval of less than fourteen days.

In my opinion if the shipowners do not keep their times they are in mercy, and all that they can claim is that the charterers shall minimise the damage by acting in a reasonable way. They are not entitled to inflame the damage.

They were perfectly right in loading as well as they could; but the shipowners cannot insist on their pound of flesh under the contract when they are habitually failing to keep the dates which they stipulated for and which they put into the contract as a description of that line of steamers to which the charterers undertook to confide the whole of their fortune, the whole of their output. That description was that there should be a two-weekly sailing to Liverpool at intervals of fourteen days and a monthly sailing to Lond on at intervals of thirty days.

Therefore in the present case I come to the conclusion that the shipowners are in default, and that the charterers were not obliged to load these vessels and to fill them, and that the shipowners cannot tender to them vessels at any time they like and call upon them to load these vessels within the number of days referred to in clause 6. Clause 6 only applies to vessels complying with the condition precedent to be found in clause 2.

I have only a few more words to add with regard to the question of the exception which releases *pro tanto*, and *pro tanto* only, the shipowners of the necessity of this rigid regularity. A very good example is to be found in clause 5, by which the shipowners reserved to themselves the right of salvage services. Those salvage services may no doubt delay them in coming to the River Plate to take the cargo. But it will be noticed that it is provided that "if by reason of the service having been rendered the actual sailing of the vessel when laden hereunder, is delayed beyond the date when it would in the ordinary course have taken place and the the charterers thereby suffer loss, they shall be entitled to share in the salvage to an amount which unless agreed shall be settled by arbitration." It is true that being engaged in salvage services may *pro tanto* excuse a delay, but only on the terms that the charterers if they suffer loss shall receive payment out of the salvage money. Then the shipowners in the same clause reserve to themselves when outward bound to be "at liberty to trade on owners' account as and to such ports and places as they may in their discretion see fit," but there is a provision that this is not "so as to affect the due date of sailings from the River Plate." If the shipowners' ships are late through salvage services, the charterers are to have their share of salvage money; but if the ships are late because the shipowners choose to use them to trade for their own benefit, that is to be no excuse for the ships not coming up to time. That is a very good example of the way in which certain things are allowed to be excuses for want of regularity and other things are not; but apart from that and only so far as the excepted risks excuse want of regularity, regularity is, as I have said, a condition precedent under this contract. There is one other point. It has been pointed out that these dates are dates of sailing, and it is suggested that that cannot affect the right of the shipowners to tender their ship at any moment they choose and call into operation the provisions of clause 6. In my opinion that is quite unwarranted under the contract. In clause 9 it is provided that "as soon as each steamer is loaded the captain shall proceed with all convenient speed (subject to any exceptions or liberties contained in this charter) to her port of discharge." They are bound, therefore, to leave at once, always allowing for exceptions made in the contract, which I am leaving on one side. It follows from this that the shipowners are not entitled to tender their ship at a date which would make the time when it was their date of sailing other than that time which is specified in

the contract—namely, a fortnightly period fourteen days from the last. I am of opinion, therefore, that none of these provisions against accidents which undoubtedly might happen, and the incidents of which on the different parties is regulated by the contract, in any way weaken the character of the provisions of clause 2 and the condition precedent. In my opinion, therefore, the appeal ought to be allowed on this as well as on the other two points.

Buckley, L.J. read the following judgment:—There are in this case three points for decision, but they are separate points. Each of them turns upon the true construction of certain provisions in the agreement of the 18th June 1904. The first arises thus: A ship, the *Highland Heather*, occupied seven days in loading, but two of them were holidays. The charterers claim two days' dispatch money upon the footing that the two days are not to be counted. This question turns upon the true meaning of the words in art. 6 of the agreement: "Seven weather working days (Sundays and holidays excepted) to be allowed by owners to charterers for loading. For each clear day saved in loading the charterers shall be paid or allowed by owners the sum of 20*l*." For the decision of this point it is necessary to determine the true construction of the words "seven weather working days (Sundays and holidays excepted) to be allowed." To clear the ground I point out that the words of exception are not exception from the allowance; the excepted days are additional to the allowance. The first words define a certain class of days, and the exception is by way of exception from that class. The phrase means, I think, to express that seven days of a certain quality are to be allowed, but that Sundays and holidays are to be taken as not being of that quality. To express my meaning I paraphrase the language thus: "Seven weather working days are to be allowed, but Sundays and holidays are to be taken as not being within that category." The same meaning would be expressed if the words in the brackets be written, "but not including Sundays or holidays."

Next I think that the expression "weather working days" is one in which the words "weather working" are not to be read together so as to mean days on which the weather allows you to work, but that the word "weather" as an adjective controls the composite noun "working days." So that the expression means seven working days on which the weather is favourable, or, quite shortly, seven fine working days.

Then "working days" means days on which, according to the custom of the port, work is ordinarily done. The purpose of the words in the brackets is, I think, to emphasise that idea and means "in the expression 'working days,' mark you, Sundays and holidays are not included." This being so, it seems to me that upon the true construction of art. 6, a Sunday or a holiday is excepted whether work is, or is not, done upon it; in other words, upon the construction of the agreement of the 18th June 1904, I am on this point against the respondents. But on this point it is necessary to add further facts. The cargo was to be supplied by the charterers, but under art. 17 the loading was to be effected by the owners at their expense. So that loading required the concurrence of the charterers and the shipowners. As a matter of fact loading was effected on the two holidays. It must have been done by common consent of the charterers and the owners; neither party was bound to load on those days. Which of the two requested and which assented to the loading on these holidays is not known, and is not, I think, material. From the above facts it is not disputed that an agreement to load on the holidays is to be inferred. The decision of *The Katy* (*ubi sup.*) is in point upon this question; and, apart from authority, Mr. Leslie Scott, who replied for the appellants, admitted that the facts were such that an agreement to load on the holidays was to be implied.

The question, however, remains what must be taken to be the terms of the implied agreement. Was it merely an agreement to work on the holiday or was it an agreement to make the holiday a working day for the purpose of art. 6? It is contended that *The Katy* (*ubi sup.*) decided that the latter must be taken to be the terms of the implied agreement. In my opinion that is not so. The day upon which the question arose in *The Katy* (*ubi sup.*) was not a Sunday or a holiday. The point was that the charterers were invited to begin loading when a large portion of a weekday had expired, and that ultimately they did load on that day. The decision was merely that by loading on that day, although late in the course of it, that day was by agreement constituted a working day as to its entirety. That has no bearing upon the question of what would have been the result if it had been a holiday and therefore a day excepted from working. The charterers were entitled to so many working days. The decision is that by working on a day which they might have declined to utilise they constituted it a working day, not as to part of it, but as to the entirety of it. The charterers worked three hours on that working day. A decision to the contrary would have involved that the charterers would have got that three hours on a working day for nothing. To answer the question what in the present case is the proper agreement to be implied, regard is, I think, to be had to the considerations which would reasonably weigh with the persons who were entering into the implied agreement. When the owners were considering whether to agree they would naturally consider whether it was worth their while to agree, and a relevant consideration would be whether, by agreeing, they were obtaining something for their own benefit. They would do so if the agreement was that the holiday on which they agreed to work should be taken to be a working day within the meaning of art. 6, with the consequence that the ship would be in a position to leave one day earlier without the owners having to pay for the advantage; they would gain nothing, but, on the contrary, would probably be losers by having to pay higher wages on the holiday if the agreement was not to that effect. In my judgment we ought to imply that that was the bargain between the parties. In my judgment, therefore, the holidays are to be taken to be working days within art. 6, not because upon the construction of art. 6 they become such by the act of working upon them, but because the new agreement to be implied from working upon those days ought to be taken to be an agreement to treat them as working days for the purpose of art. 6. This conclusion is in accordance with the

decision of Lord Russell, C.J. in *Branckelow Steamship Company* v. *Lamport and Holt* (*ubi sup.*), with which I agree, adding that no difference, in my opinion, arises, because in that case the work was done at the instance of the charterers, and in accordance also with *Whittall and Co.* v. *Rahtken's Shipping Company Limited* (*ubi sup.*), which followed that case.

The second point arises on the second appeal, but I deal with it next because it is germane to the point with which I have just dealt. The point is as follows: Suppose that a vessel begin to load on a Wednesday and completes her loading on the Saturday, and thus occupies four days, how many clear days have been saved in loading? The appellants say that they have utilised four out of the seven, and have saved the remaining four. In this lies a delightful touch of humour. It is as if an Irishman were to say that, having only half a crown in his pocket, he had spent two shillings out of it and saved the remaining shilling. Of course the appellants do not put their contention in this bald form. They adopt the not uncommon device of forgetting or seeking to distract attention from the language of this contract, and arguing that if the language had been different that would have been the result. They say, and quite truly, that the departure of the ship has been accelerated not by three days, but by four, because she got the benefit of the Sunday; that the charterers might have occupied until the end of the next Wednesday in loading, and that, had they done so, the ship would have left four days later than in fact she did. If this contract had been that the charterers should have so much a day for each day saved to the ship, this would have been right; but it does not so provide. The provision is that they shall have so much for each clear day saved in loading. The respondents argue, and quite rightly and pertinently I think, in the case in debate, that a man cannot save that which he never had; but, according to the common use of the English language, that is not quite accurate, in the sense that it is not exhaustive. I can properly speak of someone as having saved me trouble. The fallacy of the appellants' argument may be indicated by following out this suggestion. By finishing their loading on the Saturday the charterers saved the shipowners delay, but there was no day saved in loading so far as the Sunday was concerned. The relevant words are "seven days to be allowed for loading," and "for each clear day saved in loading" the charterers shall be paid. In this language no trace is to be found of saving delay to the ship. The appellants are to be paid for any saving effected in the seven days allowed for loading. This conclusion is in accordance with the decision of *The Glendevon* (*ubi sup.*), which in my opinion was rightly decided. The argument was advanced that that decision was inconsistent with the decision of the Court of Appeal in *Laing* v. *Hollway* (*ubi sup.*). I think not. *Laing* v. *Hollway* has, in my opinion, no bearing upon the point. The point in *Laing* v. *Hollway* was that 10*s.* an hour was allowed on any time saved in loading. The charter provided that the cargo should be shipped at the rate of 200 tons per running day. The cargo was 1800 tons, and it thus resulted that nine days would be the time in which the cargo was to be shipped. The loading was completed in five days, leaving four days to the good. The question was whether those four days were to be taken to be days of twenty-four hours or days of, say, twelve hours as being working hours. The argument of the judgment is that whether the charterer loads for twelve hours on Monday and twelve hours on Tuesday or loads for twenty-four hours on Monday, he is equally employed for twenty-four hours in loading, and has saved no time so far as loading is concerned, but that the same is not true as regards the shipowner. In the former case the ship would be kept two days and in the latter only one day for the purpose of doing twenty-four hours' work. In that state of facts the decision was that it was right to say that the "10*s.* an hour on time saved" meant time saved to the shipowner, and therefore the question was by how many hours was the ship the sooner ready. The reasoning seems to be absolute and unanswerable upon the problem there to be solved, but to have no bearing at all upon the question we have to decide. The language of that contract pointed, and, as the court thought, necessarily pointed, to saving the shipowner's time. This contract by its express language, as it seems to me, points to a saving of the charterers' days.

The third point arises thus: The *Highland Heather* having begun loading on the 7th March, the charterers were called upon to begin loading the *Highland Enterprise* on the 14th March. They declined to begin loading until the 21st, asserting that the notice of readiness to load authorised by art. 6 was subject to a condition precedent found in art. 2, that there should be an interval of fourteen days. I pause to point out an imperfection in this reasoning which occurs at the outset —namely, that the contract says nothing about intervals between commencing loading, but only intervals between sailings.

The contention of the appellants upon this part of the case is that the sequence of the vessels was to be governed as a condition precedent by this: that the sailings must not be less but may be more than fourteen days. The words as to intervals of fourteen days in art. 2 are, they say, redundant unless read as being emphatic and state a condition precedent. I proceed to consider what are the relevant provisions of the contract in this matter. The contention is principally founded upon art. 2. Taking certain words from that article I find that one service is to be a monthly service having sailings at intervals of thirty days. It is said, and I think with truth, that the latter part of this phrase if possible ought to be so construed as not being redundant and not being mere repetition of that which preceded it. It is not, I think, redundant. A monthly service may mean a service in which a vessel sails in each month of the year, so as to be satisfied if one sails at the beginning of January and another at the end of February; or a question may arise whether "monthly" means at intervals of twenty-eight days, being a lunar month, or at varying intervals —namely, twenty-eight, thirty, or thirty-one days according to the length of the several calendar months. It is necessary to provide against uncertainty in these respects, and for that purpose the contract says that the service shall be monthly, having sailings at intervals of thirty

days. The latter words are not redundant, but are explanatory in order to render the previous words certain. The other words of art. 2 are those with which we have to do. The service of the line is to be a two-weekly one, having the sailings at intervals of fourteen days. "Two-weekly" is a strange expression. One would more naturally expect "fortnightly," but again the difficulty might arise whether "two-weekly" might be satisfied by one sailing in the first half of the month and another in the second half of the month, although the one might be early and the other late in those respective periods; whether, in short, it meant one vessel in each successive period of two weeks. Accordingly that is made certain by adding the words, "having sailings at intervals of fourteen days." Next let me look at the matter from a reasonable business point of view. The owners have to arrange that vessels coming from England shall be provided so as to satisfy art. 2. The date of sailing of any one particular vessel is not within the owners' control. The charterers may load her very quickly and get her away and claim dispatch money, or may, if it be worth their while, keep her on demurrage and send her away late. The owners can never say with certainty when, having regard to the charterers' control under the agreement, a particular vessel will be allowed to sail. They are at the mercy of the charterers, at any rate within reasonable limits; "yet," say the charterers, "it is the owners' duty to provide the next vessel so that she shall sail again at an interval which shall not be less than fourteen days from the date on which that pevious vessel in fact sailed."

It seems to me impossible to give the contract such a construction. According to its true meaning, the contract, I think, provides that within reasonable limits the sequence of the vessels shall be so arranged that a fourteen days' interval in their sailing shall be maintained. If a vessel arrives so early or so late as to fail to satisfy the commercial object of the venture the charterers would be entitled to damages. The charterers, according to their contention, assuming that a vessel arrives late, may reject her, but may if it suits their purpose accept her. If they accept her, they are then entitled to require that the next vessel shall sail at not less than fourteen days after this one. Whether the charterers are going to accept that late vessel or not depends upon something which happens in the River Plate; yet the shipowners are, so the appellants contend, bound so to arrange the dispatch of their vessels from this country as that there shall be a ship ready to come into the service at fourteen days' interval if the charterers do take up that first ship; a contention which seems to me to be one which renders the contract absolutely unworkable. Further, art. 6 defines that certain conditions are to be satisfied before the owners give notice to load. They are that the temperature shall be the defined temperature; that she shall have given a certain notice, and that a certain time shall have expired after giving it. The charterers want to introduce another condition precedent—namely, that seven days shall have elapsed since the previous vessel finished her loading, so that fourteen days shall have elapsed before the vessel sails. My first observation is that there is no such provision in the contract, and the second is that the provisions of the contract render it impossible. The number of days which are to elapse between the notice to load and the sailing is not a fixed number, but a number which will operate according to, first, the day of the week on which the notice is given; secondly, the contingency whether the weather is fine during the next ensuing days; and, thirdly, the question whether the charterers take less or more than the stipulated number of days to load. As to the first, if the notice be given so as to expire late on the Saturday, there will be two Sundays in the lay days; as to the second, the lay days may be extended indefinitely by the state of the weather; and as to the third, the charterers may accelerate the sailing of the ship by loading quickly or may keep the vessel on demurrage and thus advance or retard the due date for the sailing of the next ship.

The conclusion to which Channell, J. arrived, that the service was to be approximately and substantially a service at intervals of fourteen days, was in my opinion right. The maintenance of that regularity was no condition precedent to the notice to load given under art. 6; any irregularity not so great as to defeat the commercial object of the venture would be a ground for damages to be recovered against the owners. Having dealt now with all the three points in the case, I am of opinion that in the action Channell, J., and in the arbitration Bray, J., were right, and that both these appeals should be dismissed with costs.

Appeals dismissed.

Solicitors for the plaintiffs, *Charles Russell* and *Co.*, for *Lightbound, Owen,* and *MacIver*, Liverpool.

Solicitors for the defendants, *Rawle, Johnstone,* and *Co.*, for *Hill, Dickinson,* and *Co., Liverpool.*

July 23, 24, 25, 26, *and* 31, 1907.

(Before Vaughan Williams, Moulton, and Buckley, L.JJ.)

McDougall and Bonthron Limited *v.* London and India Docks Company.

Page, Son, and East Limited *v.* London and India Docks Company. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Dock dues—Exemption—Lighters entering docks to discharge into a "vessel lying therein"—Lighters "bonâ fide engaged in discharging goods"—London and St. Katharine Docks Act 1864 (27 *& 28 Vict. c. clxviii.*), *s.* 136.

The London and St. Katharine Docks Act 1864 *provides by sect.* 136 *that all lighters entering the docks to discharge or receive goods to or from on board of any "ship or vessel lying therein" shall be exempt from the payment of rates, so long as the lighter is "bonâ fide engaged in so discharging or receiving" the goods.*

A lighter entered the dock, laden with goods to be discharged into a particular ship then lying in the dock. This ship completed her loading and left the dock without receiving any of the goods on the lighter. The lighter remained in the dock.

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

The next day, being four days after the lighter had entered the dock, another ship came in, into which the lighter discharged the goods and then left the dock.

Held, by Vaughan Williams and Buckley, L.JJ., Moulton, L.J., dissenting, that the lighter was exempt from the payment of rates under sect. 136, *although the ship she discharged her goods into was not lying in the dock at the time when the lighter entered the dock.*

A lighter entered the dock, laden with goods which were discharged into a ship then lying in the dock. The discharge of the goods into the ship was completed about 5 p.m, on Saturday, and the ship left the dock on the midnight tide. The lighter remained in the dock till Monday and left on the early morning tide.

Held, by Vaughan Williams and Buckley, L.JJ., Moulton, L.J., dissenting, that although the lighter had not left the dock by the first available tide after discharging the goods, yet the delay was not so unreasonable as to negative the contention that the lighter was "bonâ fide engaged in discharging" the goods within sect. 136, *and that the lighter was therefore exempt under that section from the payment of rates.*

Judgment of Walton, J. (10 *Asp. Mar. Law Cas.* 334 (1906); 96 *L. T. Rep.* 13) *affirmed.*

Appeal by the defendants from the judgment of Walton, J. at the trial of the two actions together without a jury.

The actions were brought to recover the sums of 1*l.* 10*s.* 6*d.* and 19*s.* respectively, these sums being the amount of dues imposed by the defendants on the plaintiffs' lighter and paid to them under protest by the plaintiffs in each action.

In the first action the plaintiffs, McDougall and Bonthron Limited, were the owners of the lighter *St. Thomas.*

On Friday, the 24th Nov. 1905, the *St. Thomas*, being laden with bales of Manila hemp, entered the St. Katharine Dock, owned by the defendants, with the object of discharging into the steamship *Pladda*, which was then lying in the dock.

On Saturday, the 25th Nov., the *St. Thomas* completed the discharge of her cargo into the *Pladda* at about 5 p.m., and the *Pladda* left the dock on the next tide, which was about midnight.

Throughout Sunday, the 26th Nov., the *St. Thomas* lay in the dock, her owners alleging that Sunday was not a working day.

On Monday, the 26th Nov., the *St. Thomas* attempted to leave the dock on the early morning tide, but was stopped by the defendants, who demanded 1*l.* 10*s.* 6*d.* as dues, this sum being calculated (under the scale of rates made by the defendants which came into operation on the 1st Nov. 1905) at 6*d.* per ton upon the tonnage of the *St. Thomas.*

This sum the plaintiffs paid under protest, and brought the present action to recover it from the defendants.

In the second action the plaintiffs, Page, Son, and East Limited, were owners of the lighter *Jew.*

On Thursday, the 23rd Nov. 1905, the *Jew*, being laden with cargo, entered the Royal Albert Dock, owned by the defendants, with the object of discharging into the steamship *Matiana*, which was then lying in the dock.

On Saturday, the 25th Nov., at noon, the *Matiana* completed her loading and left the dock the same day.

For want of space the cargo which was on the *Jew* was shut out, but the *Jew* remained lying in the dock.

On Monday, the 27th Nov., the steamship *Somali* entered the dock, and the *Jew* went immediately to the *Somali*, and began discharging cargo into her.

On Tuesday, the 28th Nov., the defendants demanded payment from the plaintiffs of the sum of 19*s.* as dues payable at the rate of 6*d.* per ton in respect of the tonnage of the *Jew.*

On the 5th Dec. the *Jew* completed the discharge of her cargo into the *Somali*, and then, being empty, went alongside the steamship *Rappahannock* and received timber from her.

On the 10th Dec. the *Rappahannock* left, and the steamship *Maryland* came in, and the *Jew* went to her to receive more cargo.

On the 20th Dec. the *Jew*, having finished receiving cargo from the *Maryland*, left the dock, the plaintiffs having paid under protest the 19*s* which the defendants had demanded on the 28th Nov.

The action was brought to recover this sum of 19*s.*

The London and St. Katharine Docks Act 1864 (27 & 28 Vict. c. clxxviii.), which was an Act for amalgamating the London Dock Company and the St. Katharine Dock Company, provides:

Sect. 132. The amalgamated company from time to time may demand and take in respect of every vessel for entering into any of their docks, basins, cuts, locks, or entrances, and for lying therein and for departing therefrom respectively, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the amalgamated company from time to time appoint.

Sect. 133. Provided that the tonnage rate which the company from time to time may demand and take in respect of any lighter, barge, or other like craft shall not exceed the rate or sum which from time to time is charged in respect of vessels trading coastwise between the port of London and any port or place in the United Kingdom.

Sect. 134. The amalgamated company may take or receive for every article of goods, wares, or merchandise brought into or landed or deposited within, or delivered or shipped from, the docks and works such reasonable rates, rents, or sums as the amalgamated company from time to time appoint. . .

Sect. 136. All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt from the payment of any rates, so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods, and also all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever.

The East and West India Dock Company's Extension Act 1882 (45 & 46 Vict. c. xc.), which was an Act authorising the construction of a new dock at Tilbury, provides:

Sect. 25. The company may from time to time demand and take in respect of every vessel for entering their new dock, lock, or tidal basin, or for lying therein or departing therefrom respectively, exclusively of the charge for loading or unloading, such reasonable rate, rent, or sum for every ton, according to the registered tonnage of the vessel, as the directors shall from time to

time appoint, not exceeding the dock tonnage, rates, rents, or sums specified in part 1 of the schedule to this Act. . .

Sect. 26. The tonnage rate which the company may from time to time demand and take in respect of any lighter, barge, or other like craft entering their new dock, lock, or tidal basin, and for lying therein, shall not exceed the rate, rent, or sum which from time to time is charged by them in respect of vessels trading coastwise between the port of London and any port or place in the United Kingdom: Provided always that any lighter, barge, or other light craft entering the new dock, lock, or tidal basin, to discharge or receive ballast or goods to or from on board of any vessel lying therein, shall be exempt from the payment of any rate, rent, or sum, so long as such lighter, barge, or other like craft shall be *bonâ fide* engaged in discharging or receiving such ballast or goods as aforesaid: Provided, also, that all such ballast or goods so discharged or received shall be exempt from any rate or charge whatever.

The London and St. Katharine and East and West India Docks Act 1888 (51 & 52 Vict. c. cxliii.), which was an Act to authorise a working union of the dock companies, provides:

Sect. 57. The rates, rents, or sums to be demanded and taken by the joint committee in respect of vessels for entering into any of the docks, basins, cuts, or entrances of the London company, and for lying therein and for departing therefrom respectively, shall not exceed the rates specified in part 1 of the schedule to the East and West India Dock Company's Extension Act 1882, and sect. 25 of the last-mentioned Act shall extend and apply not only to and in the case of the docks authorised by that Act, but to and in respect of all the docks and basins of the East and West India Company.

Walton, J. at the trial of the actions without a jury held that in neither case were the defendants justified under these Acts in demanding the dues which the plaintiffs paid under protest, and he, therefore, gave judgment for the plaintiffs in each of the actions.

The case is reported 10 Asp. Mar. Law Cas. 334 (1906); 96 L. T. Rep. 13.

The defendants appealed.

July 26.—Sir *R. B. Finlay*, K.C., *J. A. Hamilton*, K.C., and *George Wallace* for the defendants.

Scrutton, K.C. and *Cranstoun* for the plaintiffs.

Cur. adv. vult.

July 31.—VAUGHAN WILLIAMS, L.J.—In the case of the lighter *St. Thomas*, which on the morning of the 24th Nov. 1905, entered the St. Katharine Dock with a cargo for the steamship *Pladda*, which was lying in the dock, she had by 5 p.m. on Saturday the 25th Nov. discharged her cargo into the steamship *Pladda*. The steamship *Pladda* left on the next tide, which was about midnight of the 25th Nov., but the *St. Thomas* lay in the dock throughout Sunday, the 26th Nov. her owners alleging that Sunday was a non-working day. On Monday, the 27th Nov. the *St. Thomas* attempted to leave the dock on the early morning tide, but was stopped by the defendants, who demanded 1*l.* 10*s.* 6*d.* as dues. The 1*l.* 10*s.* 6*d.* was paid under protest, and this action is brought to recover back the money so paid.

There is no question but that the *St. Thomas* was an exempt barge within the meaning of sect. 136 of the London and St. Katharine Docks Act 1864—that is, exempt from any rate or charge whatever so long as she was *bonâ fide* engaged in discharging or receiving ballast or goods to or from on board any ship or vessel lying in the docks; and this court held recently (*London and India Docks Company* v. *Thames Steam Tug and Lighterage Company Limited*, 97 L. T. Rep. 357 (1907) that these words applied not only to the time during which the barge or lighter was engaged in the physical act of discharging or receiving goods or ballast into or from a vessel lying in the docks, but also to the time during which she was going to the ship to lie alongside, or returning from the ship for the purpose of departure from the docks.

The *St. Thomas*, in my judgment, when she left the dock on Monday, the 27th Nov. was doing an act which was part and parcel of her entry into the docks to discharge goods into the *Pladda*. The question that we have to decide in this case arises from the fact that the *St. Thomas* did not leave the dock on the next available tide after the *Pladda* left, but lay in the dock throughout Sunday, the 26th Nov. her owners alleging that Sunday was a non-working day. Walton, J. has decided that Sunday was a working day, and that however prudent it may have been from the point of view of the master of the *St. Thomas* for him not to depart from the dock during the only two or three hours before midnight, during which a barge of her draught and class could leave the dock, being bound down the river Thames, and therefore able to proceed only on an ebb tide, and however reasonable it might be from his point of view for him to keep the barge within the dock for the Sunday, yet it was not reasonable that the barge should have the convenience of lying in the dock for Sunday without the obligation to pay the dock company for affording the barge that convenience. Walton, J. would have found in favour of the dock company had it not been that he arrived at the conclusion that the rate charged by the dock company when they obtained payment of the 1*l.* 10*s.* 6*d.* from the master of the barge was a rate which the bargemaster was not liable to pay—in other words, was a bad rate. He begins by referring to the unreported case of the *London and India Docks Company* v. *Union Lighterage Company*, before the Lord Chief Justice, and Kennedy and Ridley, JJ. (Div. Court, May 23, 1905) — a transcript of the shorthand writer's note of the judgments herein has been supplied to us—in which it was decided that where a lighter has come into a dock with cargo for a steamer lying in the dock, or to receive cargo from a vessel lying in the dock, and the lighter remains in the dock for a longer time than is reasonably necessary, the dock company cannot make a charge in respect of such unreasonable delay unless they have made some rate fixing the amount to be paid. Walton, J. goes on to consider whether the rate charged in this case is a bad rate, and comes to the conclusion that the rate charged is a bad rate.

Before discussing the grounds on which Walton, J. arrived at this conclusion, I feel bound to say that I am not satisfied that an exempt lighter can be charged for unreasonable delay so long as she is *bonâ fide* engaged in discharging or receiving goods or ballast to or from a ship lying in the dock. I doubt whether the dock company

can charge any rate so long as the delay is a delay which is not inconsistent with the barge being *bonâ fide* so engaged. Surely if there is any work to be done by those in charge of the lighter in the physical act of receiving or discharging from or to the vessel, the exempt vessel could not be charged a rate for lying in dock unless the receiving or discharging were so conducted as to negative the lighter being *bonâ fide* engaged in receiving or discharging from or to a vessel lying in the docks; so I think in a case of delay in departure no rate can be charged unless the delay negatives the lighter being *bonâ fide* engaged in such loading or discharging. I think, therefore, one must test reasonableness from the point of view of the master of the craft which, in order to be exempt, has to be *bonâ fide* engaged.

In my judgment, the *St. Thomas* was *bonâ fide* engaged in such work, both when she did not depart during the two or three hours before the midnight high tide and also during Sunday.

The ground on which Walton, J. decides that the rate is a bad rate is this. He says: "The dock company have got a right to make a rate for the time during which the lighter remains in dock beyond the time that is reasonably necessary for discharging or receiving the goods; but if the lighter is an exempt lighter, and does remain longer than is necessary, I do not think that entitles the dock company to impose a rate upon such a lighter for departing from the dock. The dock company may impose these charges for entering, lying in the dock, and departing therefrom; but if the lighter is an exempt lighter, it certainly is exempt in respect of entering, and I think it is exempt in respect of departing, and it is exempt in respect of lying in the dock, so long as it does not lie longer than is reasonably necessary for the purpose of discharging or receiving cargo. Therefore if by this rate the dock company imposed a charge upon this lighter, which was an exempt lighter, for departing from the dock, then I think it is a bad rate. If it were treated as a charge merely for the time occupied beyond what was reasonably necessary, as a charge for lying in the dock, then I think that it is a bad rate, because if it is good, it must be good within the terms of sect. 25 of the Act of 1882, and Part 1 of the schedule. Part 1 of the schedule, which gives the maximum rate, is this: 'Vessels entering to load or discharge cargo, 1*s.* 6*d.* per ton register.' This lighter was exempt for entering. Then as to rent, and this is the only rate for rent which is given in the schedule: 'Rent to commence from date of entrance, or at such time thereafter as may be from time to time fixed by the company, 2*d.* per week per ton register.' I am of opinion that for lying in the dock longer than is necessary the dock company cannot charge more than 2*d.* Therefore I think this rate is bad." Taking the view that I do, it is not necessary for me to determine the point that is raised in the passage that I have read from the judgment of Walton, J., but if it were necessary to raise it I agree with that view.

I will now deal with the case of the *Jew*. The *Jew* went into the Royal Albert Dock on the 23rd Nov. 1905, in the morning, with goods for the steamer called the *Matiana*. The *Matiana* finished her loading on Saturday, the 25th, about noon. The *Matiana* left the dock without taking the goods which had been brought for her on board the *Jew*. They were shut out. The *Jew* did not leave the dock; she remained in the dock just as the *St. Thomas* remained in, through Sunday and until Monday morning. On the Monday morning, the 27th, the lighter was ordered not to leave the dock, but to transfer her cargo to the steamship *Somali*, which was expected, and which arrived in dock about noon on Monday. The *Jew* thereupon went to the *Somali* to put the goods which she had on board the *Somali*. The payment in question which the plaintiffs are seeking to recover back was demanded on the 28th, and was paid under protest. So far the case of the *Jew* is the same as the case of the *St. Thomas*, except that the *St. Thomas* discharged her cargo into the *Pladda* in accordance with the intention with which she entered the dock, whereas the *Jew* did not load the *Matiana* as she intended when she entered the dock, but loaded the *Somali*, a ship which was not lying in the dock when the *Jew* entered the dock. Walton, J. has held that the dock company cannot charge in respect of the 23rd, 24th, or 25th Nov. He says, and I think rightly, that his decision follows from the decision of Kennedy and A. T. Lawrence, JJ. in the *London and India Docks Company* v. *Thames Steam Tug and Lighterage Company* (95 L. T. Rep. 506 (1906); affirmed 97 L. T. Rep. 357). I agree that the effect of that case is that the lighter does not lose its privilege because the cargo which it brought in for some vessel was shut out.

The contention urged before us on behalf of the dock company has been that, according to the true construction of sect. 136, the words "lying therein" mean lying therein at the time of the entry of the lighter entering into the docks, and that as the *Somali* was not lying therein at the time of the entry of the *Jew* into the dock, the exemption which arose for the purpose that the *Jew* should discharge goods into the *Matiana* is not available, since she proceeded to discharge into a vessel, the *Somali*, which was not lying in the dock when she entered. Now the words of sect. 136 are these: [His Lordship read the section].

In my judgment the words "lying therein" mean lying therein at the time of the discharge of the goods from the lighter into any ship or vessel lying therein, and do not mean at the time of the entry of the lighter into the dock. It is urged that the words "lying therein" upon that construction are surplusage and useless, since the barge which entered the dock could not discharge into, or receive from, a vessel unless the vessel were in the dock. My answer is that the words are not meaningless, for they describe that which is the truth, and that if the construction contended for was intended, "a ship or vessel" would have been more natural than "any ship or vessel." Moreover, it seems to me that if the Legislature intended that the barge or lighter entering the dock should only be exempt if it was going to render a service to a ship or vessel lying in the dock at the time when the lighter entered therein, it would have been very easy to have said so plainly.

In my judgment, in a case like this, in which it is sought to throw upon lightermen, who

at one time were entitled to free water in the docks, a tax on entering unless they were entering to load a particular ship lying in the dock at the time of entry, the dock company must point to plain words, and that if the words are ambiguous the dock company cannot enforce such a tax. Moreover, if a barge loses its exemption if she renders a service to a vessel which was not in the dock when the barge entered, it would seem that the goods would be liable to a rate; which is inconsistent with the concluding words in sect. 136 itself. I think that the observation of Lord Brougham in *Stockton Railway Company* v. *Barrett* (11 Cl. & Fin. 590, at p. 607), that "*in dubio* you are always to lean against the construction which imposes a burden on the subject," applies in this case, and is not excluded by the principles of construction enunciated by Lord Cairns in *Pryce* v. *Monmouthshire Canal and Railway Companies* (40 L. T. Rep. 630 (1879); 4 App. Cas. 197). The present exemption section is not one which moderates and limits a right to payment for services rendered which might otherwise exist. It is really an exemption introduced for the purpose of excepting from the rating power of the docks the right of free water, which belonged to lighters before the Dock Acts were passed, and really is a qualification of a pre-existing right of the subject. I have only to add that, having looked at the ships' entry book (and here, if I am making a mistake, I hope I may be corrected, because I only got the book after the argument, and it may be I have misread it) and the craft book, I do not find that in the craft book there is ever mentioned the name of the ship into which or from which the lighter is going to discharge or receive goods or ballast. This does not look as if the dock company have in practice acted on the construction now put forward by them. It was urged that if the exemption applies to lighters going in which render service to a ship not lying in the dock at the time of the entry of the lighter into the dock, the result would be that lighters might enter to ply for engagements. We have not got to decide this question, but I do not shrink from the idea that this result may have been contemplated by the Legislature. It is for the benefit of the public and of ships coming to the docks that lighters should be ready to render services. I think that this appeal should be dismissed with costs. I have the craft book in my hands, and I have looked at the entries of these two ships. It does not say in either case to what ship lying in the docks the barge was to render service.

George Wallace.—Your Lordship is correct about the book, which is merely a record kept at the pierhead of the actual entry of the ships. The men at the pierhead are not concerned with the lightermen. What is kept is the docking note, which is supplied by each craft as it comes in, which does state in terms the ship for which the lighter is bound.

BUCKLEY, L.J.—That is after the Act of 1902.

George Wallace.—Yes.

VAUGHAN WILLIAMS, L.J. — That I am aware of.

MOULTON, L.J.—These two actions are actions brought for trifling sums of money, but they are, of course, for the purpose of ascertaining the interpretation by the court of the powers of the dock companies to make certain charges, and, so far as I can see, have adequately raised these grave questions of law, of great importance to the mercantile community, which they were intended to raise.

In both cases they relate to charges that the dock companies are entitled to make upon lighters which enter the docks and load or unload ships lying therein, ships which do not, or the consignees of the goods of which do not, choose to avail themselves of the alternative method of overside delivery on to the quays. In the present case we have only got to deal with the St. Katharine Dock, and I think it is important to bear that in mind because these rates are statutory rates, and although a process of assimilating the statutes which relate to the various docks along the Thames has been going on for many years it is not yet complete, and the statutes which regulate the St. Katharine Dock are not the same as those which regulate certain other docks.

I shall, therefore, in the first instance, examine the clauses of the statutes which give power to the company to impose charges or rates upon lighters. They commence with, and are based on, certain clauses in the London and St. Katharine Docks Act 1864, the history of which is not wholly unimportant. If you go into the years that elapsed before that Act (which was more or less, I think, a consolidating Act, although it also effected important changes), you find that various docks had been independently started by different companies, each of them getting a private Act, and that a process of coalescence or combination had gone on, so that the docks had grouped themselves in all cases by an amalgamating Act, and that the terms of that amalgamating Act to some extent followed those of their original creating Acts, but by no means absolutely. The earlier Act, which related to the St. Katharine Dock, had clauses corresponding to those to which I have referred, but by no means in the same terms, and it is clear to me that the language of these clauses was settled very carefully. The words were not chosen lightly to express the powers of charging and the exemption with which we have to do in this case, but I do not like appealing to previous or subsequent Acts for the purpose of construing an Act which is in force. It appears to me as a rule to be dangerous, though the previous Acts throw light on the surrounding circumstances during which the Act in question was passed. The fundamental clause which regulates the power of charging is sect. 132 of the London and St. Katharine Docks Act 1864. [His Lordship read the section.] The sole limit, therefore, to charge, so far as that section is concerned, is that the charge must be reasonable. The first question that meets us there is, what is the meaning of the word "vessel" as used in that clause? For that purpose one has to turn to the interpretation clauses. Sect. 4 contains the not uncommon provision that "The several words and expressions to which by the Acts in whole or in part incorporated with this Act meanings are assigned have in this Act the same respective meanings, unless excluded by the subject or context." On turning to sect. 3, which declares what Acts were incorporated with this Act of 1864, one finds the Harbours, Docks, and Piers Clauses

Act 1847 (10 & 11 Vict. c. 27), which does give a definition of the word "vessel," a definition wide enough not only to include sea-going vessels, but craft of all kinds, including lighters. We therefore have it that the word "vessel" includes lighters unless there is something in the subject or context which excludes it. When one turns back to the charging clause one sees that so far from the context excluding this interpretation of the word "vessel" it specifically points to its being included in all its width, for sect. 133, which, though numbered separately, is a proviso to sect. 132, says: [His Lordship read the section.] That proviso shows that the power of charging extended to lighters, because it is a proviso that the charge to lighters under sect. 132 shall not exceed the charges imposed on coastwise vessels. So that we have it clearly here that under sect. 132 and sect. 133 there is a power of charging lighters and such like craft up to and not exceeding the actual rates in force in respect of coastwise vessels, those rates in their turn being restricted to that which is reasonable; but with respect to lighters there is another clause of prime importance in this case; it is clause 136, which reads as follows: [His Lordship read the section.]

Beyond question, both from the language of that clause itself and from the history of the subject-matter, this was an exemption put in in favour of those who worked lighters on the Thames, and who, previous to the formation of the docks, had been accustomed to assist in unloading or loading vessels that lay in the river. When one turns to the previous Acts which related to this dock one finds that in the earlier Acts there were clauses with like intention, though different in language. I see in the Act of 6 Geo. 4, c. cv., which was, if I remember rightly, the Act under which the St. Katharine Docks were constructed, it was provided by sect. 116 that "all lighters and craft entering into the said docks, basins, or cuts to discharge or receive ballast or goods to or from on board any ship or vessel shall be exempted from the payment of any rate; and also all such ballast or goods so discharged or received shall be exempt from any rate, dues, or charge whatsoever."

Therefore in the previous clause these by no means unimportant words "lying therein" were absent. Shortly after that I find, on looking at the legislation which related to other docks, which also had some peculiarly expressed clauses in their earlier Acts, that the clause thus phrased appears as early as 1831, and has been consistently adhered to ever since. So that I confess that I approach the interpretation of this clause with the feeling that the language has been carefully chosen, and that the language is not merely the repetition in subsequent Acts of Parliament of phraseology consecrated by long usage, but it is one chosen *de novo* for this dock to express what are to be the rights given to the parties in the future.

Now, what is the meaning of this section? For my own part, so far as my own personal opinion is concerned, the meaning is not doubtful. It says, "All lighters and craft entering into the docks, basins, locks, or cuts to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein shall be exempt." Those words describe the qualification that a lighter must have at the moment of entry to justify its being allowed to enter free. The previous clauses, 132 and 133, do give specific power to the dock companies to charge vessels—that is to say, to charge lighters—for entering. An exemption which entitled them therefore to pass without charge must depend on the qualification which they then possessed, and it appears to me that that qualification is expressed in the words I have just read, and that the whole of those words must be taken as going to its description. If that be so, the lighter at the moment of entry must be a lighter entering "to discharge or receive ballast or goods to or from on board of any ship or vessel lying therein," and the ship must, in order that the qualification may be possessed, be a ship then lying therein. Otherwise these words "lying therein" are absolute surplusage. Now, I think it is not unjustifiable to point out that although words which have been used in a clause previous might perhaps be dropped out because they were realised to be complete surplusage, I cannot think that would have been introduced in this way if they were introduced for no purpose whatever; so that the history of the Acts would make me lean to giving some substantial meaning to these words. But I do not rely upon that. It appears to me that we ought to give a meaning to these words which accounts for their presence there if we can do so fairly and without straining the meaning of the language. So far from our having to strain the meaning of the language to give them this signification, it appears to me to be the natural signification which they bear, and, moreover, the words which follow the part of the section which I have read appear to me to point still more clearly to the fact that a lighter, in order to be entitled to claim this exemption, must be going to a specific vessel.

It says, "so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods." The words "the ballast or goods" point, in my opinion, to specific ballast and specific goods—that is, the ballast to be taken to a vessel, or the ballast to be taken out of the vessel and removed, and similarly with regard to the goods. Therefore the exemption, in my opinion, applies to lighters that are going to take goods to a specific vessel, that specific vessel being a vessel lying in the dock at the time when the exemption is claimed. The last clause (which for other reasons I do not think important to enter into here) I think must have been put in more *ex abundanti cautela* than for any other reason, inasmuch as I cannot find any charges in respect of goods delivered into lighters. But it supports the interpretation I have just given, for it says, "All the ballast or goods so discharged or received shall be exempt from any rate or charge whatever."

Let us take for one moment the two rival interpretations. The dock company say: If you are going to serve a vessel then in our docks you pass exempt, and the goods or ballast that you take to it or take from it are also exempt. The other interpretation is: I am going into your docks for the purpose of staying there on the chance and in the hope of getting ballast or goods from some vessel which may at some time come in.

All I can say is, if reasonableness is to guide us at all in the interpretation of an Act of Parliament, the interpretation that is put on those words by the dock company appears to me far more reasonable. It prevents what in my opinion must, in practical work, be a serious danger to a dock company, and through them to the mercantile public generally from too wide an exemption in favour of the lighters. It prevents lighters loitering in the docks and filling up the dock's space and obstructing the movements of the ships, because that is the sort of place where they are most likely to get a job. I compare it in my own mind to privileges granted to porters, we will say, of going upon a pier to take passengers' luggage, or to receive passengers' luggage. It would make all the difference in the convenience of working that pier whether the privileges were given to the porters who brought luggage with them or came to get the luggage of a specific passenger, and when they had received it had to take it away, or whether there was a general power to persons of that business to place themselves on the pier in the hope that they might get a job of that kind.

I can well believe that if some of the earlier clauses left it doubtful which of those two interpretations was to be taken, the Legislature would feel it its business to limit the interpretation to that which I have described as the more reasonable one, and, if so, would in my opinion have adequately performed its object if it had adopted the language which we find in sect. 136. Those are the clauses on which the power of the dock company to charge rates on lighters are founded. Those clauses have only been modified, so far as I can find, by two Acts. The first of those is the Act of 1888, but before we go to that Act of 1888 one intermediate event must be mentioned, which explains the clause to which I shall have to refer. In the year 1882 the East and West India Dock Company were desirous of building a dock far down the river in order to accommodate large vessels, and accordingly obtained the Act called the East and West India Dock Company's Extension Act 1882, under which Tilbury Dock was built. By sect. 25 of that Act a limitation was put upon the charges which might be demanded from vessels for entering, lying in, or departing from that dock, which was expressed in the first schedule of that Act. It applied, however, only to the Tilbury Dock, and therefore would be, for the purposes of this case, quite immaterial were it not for subsequent legislation. But in the year 1888 an amalgamation was made, called in the statute to which I am going to refer "a working union," between the London and St. Katharine Dock Company and the East and West India Dock Company, the two great groups under which the London docks had at that time arranged themselves. The Legislature had, of course, the right to impose terms as a condition of permitting this amalgamation, which might have important effects upon the mercantile community. One of the most important of the terms imposed as the price of this amalgamation is to be found in sect. 57 of the London and St. Katharine and the East and West India Docks Act 1888, which was the Act to which I have referred, permitting the working union: [His Lordship read sect. 57]. Therefore, the fundamental charging sections which appear in the 1864 Act, which require the charges to be reasonable, but put no other restriction upon them, are now modified by an absolute restriction that these charges shall not exceed those that appear in the first schedule of the Tilbury Docks Act. I have now exhausted the statutory power of toll or charge upon lighters, but I have not exhausted the legislative provisions which bear upon the clauses which we have here to interpret.

The last clause to which I have to refer for that purpose, in my opinion, throws a very strong light on the interpretation which we ought to put upon the clauses which give the statutory power of imposing tolls. I refer to sub-sect. 10 of sect. 16 of the London and India Docks Company (Various Powers) Act 1902 (2 Edw. 7, c. ccxliii.). Between the period of 1888 and the date of this Act, 1902, another step had taken place in the process of consolidation of the London Docks. By the Act of 1888 a working union had been created between the London and St. Katharine Dock group and the East and West India Dock group. In 1900 that became an amalgamation. The Act of 1902 is an Act giving various powers to this amalgamated undertaking. Sub-sect. 10 reads as follows: "The person in charge of any craft entering the dock shall before leaving the entrance lock truly state in writing to the dock-master the name of the ship, quay, berth, or place in the dock for which such craft is bound, and give all other information that may reasonably be required by the company as to the business in respect of which such craft is so entering the dock, in default whereof such person shall be liable to a penalty not exceeding 5*l.* for each offence, and the dockmaster may refuse to allow such craft to enter the dock or may remove or moor and detain the same therein in such position as he may think fit, or may remove the same beyond the prescribed limits, and the reasonable charge for such mooring, detention, and removal shall be recoverable in a court of summary jurisdiction by the company as a civil debt from the owner of such craft."

That is not a clause varying the statutory powers of toll. If it were, I should hesitate very much in using it in any way to interpret a preceding Act of Parliament, but it is a clause for creating machinery for working different existing powers of toll, and it may throw very great light on what the Legislature considered were the existing powers of toll. It seems to me that you cannot read this with regard to the question of ship without seeing that it puts the strongest emphasis on the necessity of the barge being bound for a specific ship or place in the dock before entering the dock. Of course the barge might go for the purpose of lying up; I am not dealing with that, but I am taking the case of where the barge claims the right of entry because it is going to put cargo on board a ship, or to receive cargo or ballast from a ship, and when I find in order to give a machinery which will render those powers effective you can require from the bargeowner, as soon as he enters, the name of the ship, and if he does not give the name of the ship you can refuse to allow him to enter, it strengthens my belief very greatly that the right of entry depended on the bargeowner being able to mention the specific ship which he was going to serve, and

that otherwise he could not claim exemption on entrance. So much for the statutory powers.

We have to consider whether or not the charges made by the dock companies were within those powers, but before one does that, one is obliged to look at the dock rates as published by the dock company, because there is no question that a dock company must duly make a rate—that is, decide upon it and publish it, so that the public can know of it—before it can impose it on vessels making use of the dock. The rates in question are made under a list of rates on shipping, dated the 17th Oct. 1905, and the dues and rent on shipping of the second and third class are the only dues relevant to this case. The dues on the second class relate to vessels from European ports, or vessels loading for European ports, and I only just refer to those because it is to me evident that in cases of vessels that are sea-going the provision that you can charge them for entering or for departing, or for both, might be of considerable importance. It does not at all follow that in the case of sea-going ships the rate that you would impose on a vessel entering would be the same as the rate that you would impose on a vessel departing, and therefore it might be and no doubt would be of great importance to the company to be able to charge respectively for entering, lying-in and departing. It would be of less importance if it was not the question of a sea-going vessel, but still one realises there that you must not look upon entering and departing as if they were necessarily included in one operation, and necessarily to be charged for by one overhead toll.

Then come the dues on vessels trading coastwise and lighters. They set out the rates to be charged on those vessels, and it is quite obvious from the way they appear in the book, as well as from the language with the interpretation that the dock company have put upon this, that in practice the company have required that a lighter should come in for a specific vessel, although they have made what in my eyes was the reasonable condition, that if a lighter came in for a specific vessel not more than one tide before the vessel arrived, they were content to treat it as if it had gone to serve a vessel lying therein. There is also here under "Vessels trading coastwise and lighters" the provision that the rates apply only to cases where "the lighter shall have departed from the dock by the first available tide after the completion of the receipt or delivery of the goods from or at the quay, berth or place so named." Inasmuch as the company is charging only half the maximum rates that they could charge, it appears to me that they were perfectly entitled to put that reasonable requirement upon lighters which came under that head. We then come to "lighters with or for ballast or goods for or from a ship or vessel and entering the dock earlier than one tide before the arrival within such dock of such ship or vessel." There is a charge there of 6*d.* for entering and lying therein for a period not exceeding one week from the date of entrance; and for lying in the dock beyond one week from the date of entrance, awaiting the arrival of such ship or vessel per ton register, per week, 2*d.*

With regard to that, it appears to me that it cannot be said that that first charge of 6*d.* is higher than that which was charged to vessels trading coastwise. It is quite true that that charge to vessels trading coastwise was for lying for a period not exceeding two weeks in the dock, but if a lighter under these latter charges was to lie six weeks it would only pay 8*d.* instead of the coaster's 9*d.*; so it is clear to me that that is not higher than the charge that is made to the coaster. Then the next is "Subject as hereinafter provided lighters which having discharged or received ballast or goods to or from on board of a ship or vessel shall remain in the dock beyond the first available tide after such lighter shall have completed the discharge or receipt of the ballast or goods for lying in the dock for any period not exceeding one week, and for departing therefrom, 6*d.* For lying in the dock beyond one week from the tide next following the completion of discharge or receipt of the ballast or goods per ton register, per week, 2*d.*" Were those legal charges?

Once more we must go back to the powers of charge which are the foundation of these charges. There is nothing there about the lighter departing on the first available tide after it has done its work, but we have to consider this: Is that a regulation which the dock company is entitled to make under its charging powers? What are those charging powers limited by? They are limited by the exemption under sect. 136, which says that the lighter or craft shall be exempt so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving the ballast or goods. Supposing that the barge has finished its work, its business is then to go out, and it has to go out promptly. I do not think that a bad definition of "promptly" in an operation of this kind is that it should go out by the first available tide.

This is the practical interpretation, in my opinion, of what I do consider to be provided for in sect. 136; that is to say, that the lighter must do its work and not loiter, and the provision that it must go out by the first available tide appears to me a reasonable and sensible interpretation of the provision that it is to stay in only as long as it is engaged in its work, and that does not cover loitering afterwards.

I am therefore of opinion that the dock company is entitled to consider that a lighter that does not go out by the first available tide after it has done its work of receiving or discharging is during the further period not *bonâ fide* engaged in so discharging or receiving; it is not engaged in it at all; it is engaged in loitering, and therefore it fails to qualify from the moment that it does not proceed with reasonable promptness to get out. It is no longer exempt from the charges which can be made upon lighters—that is to say, charges as high, if necessary, as can be made upon coastwise going vessels. I therefore see nothing that is *ultra vires* in the two rates to which I have referred, so that I come to the conclusion that in these respects in which the rate book has been challenged the rate book is right.

Now, I come to the question whether these two particular lighters under the particular circumstances of the case, come within the imposition of these rates, which, in my opinion, was justifiable.

I take first the case of the *St. Thomas*. The *St. Thomas* had finished its discharge

into the *Pladda* at five o clock on Saturday evening. It appears, on the uncontradicted evidence given on behalf of the dock company, that the first available tide—that is to say, the moment when the water was such that the lighter could leave, was half-past nine on Saturday evening; that is, three and a half hours before high water, high water being at one o'clock on Sunday morning. It is quite impossible, in my opinion, to contend that half-past nine in the evening is an hour at which barges cannot be expected to work, and seeing that it had two and a half hours before midnight to go out, I think that it did not go out on the first available tide. In other words, that from and after midnight on Saturday, or an hour even earlier than midnight on Saturday, it was loitering, and therefore ceased to be an exempt barge. If it ceased to be an exempt barge, it appears to me that the powers of charging that barge are just the same as if there was no exemption clause at all.

You can put a charge upon it for being in the dock, not engaged *bonâ fide* in the work of receiving or discharging; the rate they have put on is 6*d*., and, subject to a point which I shall presently deal with, it appears to me that the vessel became liable to the charge, and that they were right in doing that. The point to which I have to refer is this: It has been suggested by Mr. Scrutton on behalf of the barge-owner that this charge of 6*d*. is not a reasonable rate. It is, I think, clear that it is not more than what could be charged to a coastwise-going vessel. It is perfectly true that the coastwise-going vessel is charged a maximum for being in during a certain time, and going out, but there is nothing whatever that I can see which shows that this 6*d*. is more than the dock company are entitled to charge if the barge has ceased to be exempt, as I find was the case. Therefore it was within their statutory power of charging.

That statutory power of charging is also limited by the Act of 1864 to a reasonable charge; but where the Legislature has fixed a maximum expressed in figures you must show distinctly by adequate evidence that to charge up to the maximum is not reasonable before the courts will interfere, and the evidence in the present case appears to be the flimsiest evidence possible. It amounted to saying that one or two rival docks charged very much less under the circumstances. It may be that from the construction of those docks they have nothing to fear from loiterers; it may be that they do this to attract lighters to go to them, whereas otherwise they would not do it. A dock may find under special circumstances it is to its interest to make it as easy as possible for lighters to go and loiter in it. It is ridiculous to say that we are to hold this company to be charging something which is unreasonable because its competitors in business charge less. Therefore I see no ground for saying that this is unreasonable.

Another point was put, but I really scarcely think it is worth referring to, which was suggested by one or two questions in cross-examination, that a barge like this must wait until the tide turns. All I can say is this: In looking through the evidence I cannot find whether this barge was going up stream or down stream, and certainly, if it be its duty to go out on the first available tide, I cannot see that there is any reason whatever for suggesting that it could not go outside, whichever way the tide was running, and anchor outside if necessary. Both those points appear to me to be quite outside the question. I am therefore of opinion that the charge was rightly made on the *St. Thomas*.

I now come to the question of the *Jew*. In the case of the *Jew* we have a barge that remained deliberately after the ship for which she entered the dock had left. A telegram or orders came to the *Jew* to say she was to wait till another vessel had arrived and then she was to put her goods on board that vessel. Here there came an ingenious argument on the part of the lighter owners that as it had gone in *bonâ fide* for the purpose of discharging to a particular vessel and could not get rid of its goods in that way it was not unreasonable, and it was to the benefit of both parties that it should wait in the dock for the purpose of discharging into another vessel, even though that vessel was not there at the time of its arrival, because that would save the dock company from locking it out and locking it in again. All I can say is that that argument makes very little impression on my mind, for this reason: It is quite possible that in that particular instance it might have been to the benefit of both parties that this barge should have been allowed to remain and go to the second vessel, because both parties would have had the trouble of leaving the dock and coming back again, the one in navigating the lighter and the other in working the locks, and it would lead to the same result. But it would make an enormous difference if that was a thing permissible without the consent of the dock company. The dock company could always permit a thing like that, and, if it was for the convenience of both parties, might probably do so; but we have to decide on the rights of the parties, and if it was the right of the lighter-owner to say, "You must let me remain for a day or two until such and such a ship arrives, or until the arrival of some ship that will take my goods, or will use me to discharge its ballast, because it will be less trouble than going out and coming in again," one sees at once that the number of such loiterers in the docks would soon become an actual nuisance.

Therefore, as we are deciding upon rights, we have not got to consider whether in this case it would be more or less convenient for the lighter to go out and then come in again. Both parties have come here to have their rights settled, and with regard to those rights, in my opinion the *Jew* was bound to go out by the first available tide after it had ceased to be engaged in discharging its goods; and I think in the present case that it ought to have gone out by the first available tide after it was clear that its goods could not be received.

For those reasons I am of opinion that the charge made on the *Jew* was also a rightful one. Now, there are two points which have been raised in argument which I have not referred to, and which I do not propose to decide. The first is whether Sunday is a working day for barges. It is not necessary to decide that, because, in my opinion, the barge could have got out and should have got out on the Saturday evening, but if we had to decide it we should require more evidence as to what is usual, and what is, if I may use the

phrase, necessary with regard to the working of barges on the Thames. The other point is as to whether the rate of 2*d.*, which is the rate limited in the schedule to the Act of 1882 as rent for the week, is chargeable for a broken portion of the week. At present I am by no means satisfied that it is, but I think that it is open to grave consideration whether any charge could be made for lying-in which was higher than 2*d.* per ton per week. It does not, however, appear to me to arise in this case, and therefore I do not propose to deal with it. There was another point also raised, but I do not know whether it was persisted in—namely, that under the schedule to the Act of 1882 there was no power of charging anything except for entering. The language of the items in the schedule is something like this: "Vessels entering for the purpose of lying," so much; "Vessels entering for the purpose of discharging or receiving cargo," so much; and it was suggested by Mr. Scrutton, on behalf of the lighter owners, that that took away the power of charging for departing. All I can say is, I think there is nothing in the argument. "Vessels entering" is simply a class of vessels which can be charged. If you look at the schedule it is a schedule to a section which expressly gives the power of charging for entering and departing respectively. Therefore, I am of opinion that there is no justification in saying that this schedule excludes charges for departing. For these reasons I am of opinion that both the rates were good and that the defendants, the dock company, ought to succeed in these two actions.

BUCKLEY, L.J.—The question is as to the proper construction of sect. 136 of the London and St. Katharine Docks Act 1864. There are two phrases in that section whose meaning it is necessary to determine—viz. (1) the words "lying therein," and (2) the words "so long as the lighter or craft is *bonâ fide* engaged in so discharging or receiving." As regards the former, the appellants contend that the words "lying therein" mean lying in the dock at the time the lighter enters, and not lying in the dock at the time the goods are discharged or received. They succeed, I think, in showing that the construction which they attribute to the words makes them active and important, but they fail in persuading me that they are other than descriptive. Had it been intended to provide that as a condition of exemption the lighter should be entering to discharge to a vessel lying in the dock at the time of entrance, that intention could have been expressed in language much more plain. If there were nothing further in the section, I should have been of opinion that the words "lying therein" were descriptive of the vessel that is to receive or discharge the goods from or to the lighter, and not expressive of a quality which must be attributed to the vessel at the moment of the lighter's entrance. But I pass on to add the further words which are secondly to be construed, for to do so assists, I think, in the construction of the first words. In place of the word "so" I will introduce the words to which it relates, and with that alteration will reproduce the material words of the section. It will run thus: "All lighters entering the docks to discharge goods to any ship lying therein shall be exempt so long as the lighter is *bonâ fide* engaged in discharging goods to any ship lying therein."

In that sentence I see no reason for saying that the ship must be "lying therein" at any date other than the date of the discharge. The appellants argue that it does not mean what I have written; they say that in that sentence I must insert after the words "lying therein" in each place where they occur the words "at the date of entry of the lighter." I do not think so. The *bonâ fide* act, I think, is to be a *bonâ fide* discharge of goods to a ship in the dock. The *bona fides* of the act is not affected by the relative dates at which the lighter and the ship entered the dock. My judgment, however, does not rest wholly or principally upon these grounds. The section concludes with a proviso that "all the ballast or goods so discharged or received shall be exempt from any rate or charge whatever." I do not think it necessary to decide whether the ballast or goods in question would, but for these words, have been chargeable under sect. 134. I express no opinion upon it one way or the other. For the purpose of construction I am entitled to say that sect. 136 contemplates that these goods are, or may be, subject to some rate or charge, and provides that they shall be exempt from any rate or charge if they are "so discharged or received." The construction for which the appellants contend necessarily involves that the ballast or goods spoken of will or may be subject or not subject to some rate or charge, according to whether they are put into or taken from a lighter which entered the dock before or after the vessel to or from which the goods are discharged or received. I do not think the Act meant anything of the kind.

The intention, I think, is to provide by these last words of sect. 136 that goods dealt with by a lighter as distinguished from goods dealt with otherwise than by a lighter shall be exempt from rates and charges, a question with which the relative dates at which the lighter and the ship entered the dock have nothing to do. If I am right in my view as to these concluding words, the phrase "lying therein" cannot mean "lying therein when the lighter enters."

In my judgment, therefore, the ship or vessel referred to in sect. 136 need not be a ship or vessel lying in the dock at the time when the lighter enters. This will be found material when I come to state the facts, inasmuch as the *Somali* was not lying in the dock when the barge *Jew* entered. For the purposes of this judgment it is unnecessary to decide a multitude of the points which have been raised in argument. It is not to be inferred from my silence about them that I agree with what Moulton, L.J. has said upon them. I forbear from deciding them, because in my judgment they do not arise for decision. Amongst other things it is unnecessary to decide whether a barge which enters not for the purpose of discharge or receipt to or from a particular ship, but merely to look for a job is within the section. This is not the same question as whether the particular ship must be one which is already in the dock when the lighter enters. Both the barges here in question entered for the purpose of serving a particular ship already in the dock.

To dispose of this appeal it is sufficient to determine whether a barge, which enters to serve a particular ship already lying in the dock, and being unsuccessful in that adventure continues in the dock *bonâ fide* for the pur-

pose of discharging or receiving to or from some other ship, is exempt. In the case of *London and India Docks Company* v. *Thames Steam Tug and Lighterage Company* (*ante*, p. 357) we held that a lighter which entered to serve a particular vessel was entitled to exemption, although she failed in effecting that service, and left without discharging. We decided nothing either for or against her continuing being entitled to exemption, if, having failed in that service, she *bonâ fide* remained to discharge another.

In my opinion the lighter which enters to discharge, or to receive, to or from a particular ship (being the case here in dispute) is exempt so long as she is *bonâ fide* engaged in discharging or receiving, whether she in the result discharges or receives to or from the vessel for whose service she entered, or to or from another vessel lying in the dock at the date of the discharge or receipt. It is a question of fact in each case whether the barge which entered for on purpose, and failed in that purpose, is still *bonâ fide* engaged in discharging or receiving; if she is, I think she is exempt. I repeat that in this judgment I intend to leave entirely open the question whether the barge which enters not for the purpose of serving a particular ship is exempt or not. The facts of this case do not raise that question.

I will now take the two cases with which we have to deal. The *Jew* was exempt when she entered. She entered on the 23rd Nov. to serve the *Matiana*, a vessel then lying in the dock. That vessel could not take her cargo, and left on Saturday, the 25th Nov. Thereupon the *Jew* communicated with her owners for orders, and on Monday, the 27th Nov., received orders to discharge to the *Somali* (a vessel which had entered on the 26th Nov.), and did so. The dock company, on the 28th Nov., claimed against the *Jew* upon the footing of "expiration of privilege." In my opinion the *Jew* was exempt on entry into the dock, was down to the 28th Nov. *bonâ fide* engaged in the business of discharging or receiving, and was none the less so engaged by reason of the fact that the *Somali* did not enter until four days after the *Jew* entered; and consequently the *Jew* was entitled to exemption, and the charge was erroneous. I may add that as regards the *Jew* nothing turns upon that which took place after the 28th Nov.

As regards the *St. Thomas*, she entered on Friday, the 24th Nov., to serve the *Pladda*, she discharged into the *Pladda*, finishing by 5 p.m. on Saturday, the 25th Nov., and attempted to leave about 1 a.m. on Monday, the 27th Nov. The dock company detained her for payment of dues. High water on Saturday-Sunday night was at half-an-hour after midnight. Looking at the pleadings, the parties have not come here to argue that the barge ought to have left before midnight on Saturday. The question is whether she acted reasonably in lying during Sunday and leaving at 1 a.m. on Monday. The dock company have made a rate charging lighters which, having discharged goods, remain in the dock "beyond the first available tide." In fixing that limit of time the dock company have taken upon themselves to deal with what is, I think, a question of fact—namely, whether the barge down to the time of her departure was *bonâ fide* engaged in discharging or receiving. She is so engaged during the entry, the actual discharge or receipt, and the departure, allowing a reasonable time for, amongst other things, departure. Under some circumstances the regulation may be perfectly reasonable that the barge shall leave by the first available tide. Under other circumstances that might not be reasonable.

In my opinion the *St. Thomas* acted reasonably in leaving the dock by the early tide on Monday. According to the practice and principles which to a large extent prevail in this country Sunday is a day of rest. Apart from any religious observance of that day, it is generally recognised that continuous unbroken toil is not desirable or efficient, and Sunday work is not the rule but the exception. The dock company by their own regulations recognise this. Selecting one instance as an example, rule 52 provides that unnecessary work shall not be done or permitted to be done on Sunday. The barge having finished her work on the Saturday was *bonâ fide* engaged within the section if she departed within a reasonable time. In my judgment, to leave at 1 a.m. on Monday morning was departing within a reasonable time. The *St. Thomas* was, therefore, also in my opinion exempt. It results that the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: for the plaintiffs, *Keene, Marsland, Bryden, and Besant*; for the defendants, *E. F. Turner* and *Sons*.

Oct. 21 *and* 22, 1907.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ., and Nautical Assessors.)

THE ARISTOCRAT. (*a*)

Collision — Whistle signals — Course authorised or required—Statutory presumption of fault— Art. 28 *of the Regulations for Preventing Collisions at Sea* 1897*—Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 419 (3).

A steamship was lying in the Humber, a little athwart the river, waiting to enter a dock on the north side of the river, occasionally putting her engines astern to counteract the effect of the ebb tide.

A tug, with a lighter in tow, crossing the river under slight starboard helm, when about 200 *yards off the steamship, sounded a long warning blast on her whistle, and starboarded to pass under the steamship's stern. Shortly afterwards, as the steamship was seen to be coming astern, the tug hard-a-starboarded, but did not sound a helm signal, and a collision occurred between the lighter in tow of the tug and the steamship. Until the collision those navigating the steamship were unaware of the presence of the tug and tow.*

Held, by the Court of Appeal varying the decision of the court below, that the tug was to blame for breach of art. 28 *in not giving a whistle signal, as the fact that the steamship had not heard a one-blast signal from the tug did not prove that a two-blast helm signal would not have been heard, and therefore it could not be said that the breach could not by any possibility have contributed to the collision.*

DAMAGE ACTION.

The appellants, who were the plaintiffs in the court below, were the owners of the steamship

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

Rijnstroom; the respondents, who were the defendants in the court below, and counter-claimed for the damage done to their vessel, were the Great Central Railway Company, the owners of the tug *Aristocrat* and the *Lighter No.* 5.

The collision which gave rise to the action occurred about 5.30 p.m. on the 28th Nov. 1906, in the river Humber, off the entrance to the Humber Dock. The wind at the time was westerly, a moderate breeze; the weather was fine and clear, and the tide was ebb of the force of about one and a half knots.

The case made by the appellants, plaintiffs in the court below, was that the *Rijnstroom*, a steel screw steamship of 855 tons gross and 444 tons net register, manned by a crew of nineteen hands all told, was in the river Humber, in the course of a voyage from Rotterdam to Hull with a general cargo and two passengers. The *Rijnstroom*, having turned round in the river, was lying off the entrance to Humber Dock, with her engines stopped, heading about north-east, in the direction of the Island Pier, and waiting to go into dock. Her regulation lights for a steamship under way and a fixed stern light were being duly exhibited and were burning brightly, and a good look-out was being kept on board her. In these circumstances those on the *Rijnstroom* observed distant about 200 yards off, and bearing broad on the starboard quarter, the masthead towing and green light of the tug *Aristocrat* and a white light on the *Lighter No.* 5, in tow of her. The engines of the *Rijnstroom*, which had been stopped for about twelve minutes, were kept stopped. The *Aristocrat* with her tow approached the *Rijnstroom*, and, instead of keeping clear, as they could and ought to have done, the tug passed close to the stern of the *Rijnstroom*, and the lighter in tow of the *Aristocrat* with her starboard bow struck the rudder and sternpost of the *Rijnstroom* a heavy blow, breaking the rudder and steering gear, and doing her such damage that she was compelled to anchor, and to take the assistance of a tug to enable her to enter the dock.

The case made by the respondents, defendants in the court below, was that the *Lighter No.* 5, manned by a crew of two hands and having on board seven passengers and sixty-five tons of general cargo, was whilst in tow of the tug *Aristocrat*, crossing the river Humber on a voyage from New Holland to Lime Kiln Creek, Albert Dock Basin.

The *Lighter No.* 5 was following in the wake of the tug *Aristocrat*, heading north-east, and was making six and a half knots over the ground. The regulation lights for a tug and tow were being duly exhibited and were burning brightly, and a good look-out was being kept on board both the vessels. In these circumstances those on the tug saw the masthead and red light of the *Rijnstroom* some way off on the starboard bow. The *Rijnstroom* was watched, and was seen to port her helm until she headed to the northward and eastward as if to go into the Humber Dock. When the *Rijnstroom* was about 400 yards off showing her stern light the helms of the tug and her tow, the *Lighter No.* 5, were starboarded, the engines of the tug were slowed, and the vessels were brought into a position to pass all clear under the stern of the *Rijnstroom*, but as the tug and the *Lighter No.* 5 approached the north side of the river the *Rijnstroom* was seen to be coming astern, whereupon the tug sounded one long blast, but as she received no reply and the *Rijnstroom* had sternway on her, those on the tug hard-a-starboarded their helm to throw the *Lighter No.* 5 away from the *Rijnstroom*, and stopped and reversed their engines to ease the blow. When the helm of the tug was hard-a-starboarded, those on the *Lighter No.* 5 also hard-a-starboarded their helm, but the *Rijnstroom* still kept her sternway, and with her rudder struck the starboard bow of the *Lighter No.* 5, doing her damage.

Aspinall, K.C. and *H. C. S. Dumas* appeared for the plaintiffs.

J. A. Hamilton, K.C. and *J. A. Simon* appeared for the defendants.

Art. 28 is as follows:

> The words "short blast" used in this article shall mean a blast of about one second's duration. When vessels are in sight of one another, a steam vessel under way, in taking any course authorised or required by these rules shall indicate that course by the following signals on her whistle or siren, viz., . . . Two short blasts to mean, "I am directing my course to port."

Bucknill, J.—This is the case of a collision between the steamship *Rijnstroom* and the *Lighter No.* 5, which took place on the evening of the 28th Nov. last, in the river Humber. The *Rijnstroom's* tonnage was 855 tons gross. The steamship, with a general cargo and two passengers, was bound from Rotterdam to Hull, and was going to the Humber Dock. The tide was ebb, force of about a knot, and the wind was westerly, a fresh breeze. The *Rijnstroom*, coming up the river, went slightly higher than the mouth of the Albert Dock and turned round under port helm, and was then, for practical purposes, stationary in the river, waiting until certain signals had been given to her from the dock head to tell her that she was at liberty to come in. Vessels were at that time coming out. The tug and the lighter, a short time before the collision happened, had started from a place called New Holland, on the south side of the Humber, bound to Lime Kiln Creek, Albert Dock Basin. The tug *Aristocrat* is the property of the defendants, the Great Central Railway Company, as was the *Lighter No.* 5, which the *Aristocrat* had in tow. The tug and tow would cross the river at an angle. The tide was ebb, and it therefore would be necessary for the tug to cross the river under a slightly starboard helm. The scope of tow rope was about fifteen fathoms between the stern of the tug and the bow of the lighter, and in that way they proceeded across the river; and the point which is really the important point in the case is whether the collision was brought about solely or in part by the *Rijnstroom* having gone astern. The witnesses from the plaintiffs' ship all swear very positively that the vessel did not go astern. In one of the plaintiffs' documents it is alleged she had been stationary for about twenty minutes without moving her engines, but in the statement of claim it is brought down to twelve minutes. I have had an opportunity of seeing and observing the witnesses, and I am satisfied, and I find as a fact, that this steamer did come astern, and must have done so if she had been there twenty minutes, or anything like it, because otherwise she would have drifted down and got into a place of danger in regard to

vessels coming out of dock. She had to keep above the Albert Dock in a place of safety, and I find as a fact that she did go astern and move her engines astern at the time material to this action—that is to say, shortly before the collision. I then find myself in this position, that I cannot accept the statement of her master and those who invite me to come to a contrary conclusion. But there is something else which indicates that the case of the plaintiffs is not one which I can rely upon. There was absolutely no look-out aft, because I treat as valueless the evidence of the man Crown. If this man, or any other man, had seen the lights of the tug, or one of the lights of the tug, coming across the river, it is quite clear he would have reported it, and the master of the plaintiffs' steamer said that the first he knew of the accident was the crash. He had the duty to look forward and see that his vessel was kept out of harm's way in connection with vessels coming out of dock, and he cannot be blamed for not keeping a look-out aft. I also find as a fact that those on the tug blew one long blast—a warning blast—a blast which the tug was entitled to blow, not necessarily because there was any risk of collision at that time, but because she desired to let those on the steamer know where she was. That signal was not heard on board the steamer, and I cannot help coming to the conclusion that the people on the steamer were on this point extremely negligent. The master was not to blame, personally, because he was doing what he had to do, but there seems to have been extreme carelessness and negligence on the part of those on whom he had to rely. The master did not receive the assistance he ought to have received. He knew absolutely nothing about the existence of the tug and tow until the *Lighter No.* 5 hit him. So it is quite clear, to my mind, that those on the steamer were guilty of negligence, and negligence which was negligence at the material time, and which contributed to, if it did not entirely cause, the collision. I will state what I have to say about that in a moment. Now let me go to the defendant's case. The tug and tow started from the place whence they were coming, the tug towing the barge, which was a rudder barge and not a dumb barge, with a scope of about fifteen fathoms, as I have said. They started to get across the river, and the evidence of the man who, I believe, was the master of the tug, is that when about 200 yards away, probably less, he observed that the steamer, which he had seen coming up river before she turned round, was coming astern. As I have said, there is evidence before the court to indicate that the tug and barge were under slightly starboard helm at the time when they first started, and seeing, as the man at the tiller of the lighter said, the steamer was, when distant about 200 yards, coming astern, the helm was further starboarded. They proceeded under that starboard helm and the steamer still continued to move astern. It is ridiculous to say the steamer was coming back at any rate of speed. Of course she was not, but was coming back because it was the proper thing, as the master thought from forward, taking into account the craft coming out of dock. So tug and barge proceeded under that further starboard helm and so the steamer proceeded going astern, until it was clear that there was danger of collision. Then the tug, in order, as he said, either to make the thing a very close shave or to try to avoid the collision, hard-a-starboarded her helm six points or thereabouts, and the barge followed her in a line. The steamer was still coming astern, and nobody on board seems to have been aware—except the man whose evidence I set aside—of what was taking place. The collision took place. The barge at that time headed about N.N.W., and her starboard bow struck the rudder post of the steamer. Those are the facts which I find, and the first question I have asked the Elder Brethren is this, "Was the tug right in starboarding at 200 yards when the steamer was seen to be moving astern?" The answer is "Yes." The second question I have asked is, "Did the tug do the proper thing by hard-a-starboarding when she did and keeping full speed ahead?" The evidence is that when she hard-a-starboarded the collision was—although the word was not used—imminent. The answer I have got from the Elder Brethren is "Yes," and I will give the reason for that. If the barge had been a dumb barge without rudder it is possible that hard-a-starboarding, though it might have saved the tug, would not have saved the barge; but, as I have said before, there was a short scope between the tug and the barge, and the latter was able to follow the tug in line by hard-a-starboarding. Now, it is to be noted that in par. 3 of the defence it is alleged that the tug stopped and reversed her engines to ease the blow. That is contrary to the evidence. The tug did not stop and did not reverse. I have asked the Elder Brethren this question: "If the tug had stopped and reversed as pleaded, would it have made any difference or have avoided the collision?" and the answer is "No." Therefore it was right, and the best thing to do in the circumstances, to hard-a-starboard and keep going full speed ahead. Now we come to a matter which is not pleaded, and which is perhaps most difficult of all for myself to deal with. It is pleaded that when the steamer was seen coming astern the tug sounded one long blast, but, as she received no reply and the *Rijnstroom* had sternway on her, those on the tug hard-a-starboarded their helm to throw the *Lighter No.* 5 away from the *Rijnstroom*, and stopped and reversed their engines. I think there can be no doubt that there was a breach of the rules of navigation in not giving the starboard helm signal, at all events when she hard-a-starboarded—I should be inclined to think when she starboarded also; but, as has been pointed out to me, there is evidence to show that from the start, where they commenced their trip, they were coming necessarily across the river under a starboard helm. There was a time, however, when they starboarded again—that was about 200 yards off—and they hard-a-starboarded when the steamer was much nearer and gave one long blast. The two-blast signal required by the rules to indicate that you are directing your course to port, was not given. Now it is to be noted that the learned counsel who settled the statement of claim has not alleged any breach of art. 28, which is the helm signal rule. A breach of art. 29 has been alleged, but I have allowed such an amendment of the statement of claim as will allege a breach of art. 28. Now, there having been a breach of that rule, the Act of Parliament comes in. The Merchant Shipping Act 1894, s. 419, sub-s. 4,

states, where in a case of collision it is proved to the court before whom the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary. Now, the position was this on board the steamer. No lookout, one blast not heard, the existence of the tug and barge, which might have been made known, and was, so far as the tug was concerned, made known to the steamer, not known to the steamer, and the warning blast signal not heard or disregarded. I have asked the Elder Brethren this question, in the same language as was used by Sir R. Phillimore in the case of *The Tirzah* (4 Asp. Mar. Law Cas. 55, at p. 57 (1878); 4 P. Div. 37): "Could such an infringement of the regulations by possibility have contributed to the collision?" That is evidently a question for the Elder Brethren who have assisted me with their nautical skill. "Could the not giving the starboard helm signal on board the tug by possibility have contributed to the collision?" We have gone very carefully into the question, and seeing there was this bad lookout, and that the master did not receive assistance from the crew, and he was entirely in ignorance of the existence of the tug or barge, it is the view of the Elder Brethren that although there has been a technical breach of art. 28, such a breach could not by possibility have contributed to the collision. That is the view they take, and I agree with them. The result is that the steamer has not made out her case, and this collision was caused by the negligence of the plaintiffs; and although there was this breach of the statutory regulations on the part of the tug and barge—whose witnesses I find to be creditable people whose evidence I accept—I find it could not by possibility have contributed to the collision. There must be judgment for the defendants.

On the 3rd June 1907 the plaintiffs the owners of the *Rijnstroom* delivered a notice of appeal, asking that the judgment might be varied, and that it might be adjudged that the collision was caused by the fault or default of the owners, masters, and crews, of the steam-tug *Aristocrat*, and the *Lighter No.* 5, or some or one of them as well as by the fault of those on the *Rijnstroom*.

Aspinall, K.C. and *H. C. S. Dumas* for the appellants, the owners of the *Rijnstroom*.—The learned judge has found that the tug *Aristocrat* was guilty of a breach of art. 28 of the Collision Regulations. It is impossible to say that this breach could not by any possibility have contributed to the collision:

The Duke of Buccleugh, 65 L. T. Rep. 422; 7 Asp. Mar. Law Cas. 65; (1891) A. C. 310.

It is true that those on the appellants' vessel did not hear the long blast blown by the tug, but it does not follow that they would not have heard a two-blast signal if it had been sounded by the tug. The long blast was a mere warning blast, whereas the two-blast signal would have brought home to the mind of those who heard it that a vessel was taking a course authorised by the rules.

Hamilton, K.C. and *J. A. Simon* for the respondents, the Great Central Railway.—Unless it can be shown that the court below misdirected itself as to the law or went wrong on the facts, this court will not interfere. When the tug first starboarded, the Collision Regulations did not apply, for there was then no reason for those on the tug to think there was risk of collision. They were not bound to assume that there was no look-out being kept on board the *Rijnstroom*. If they had no reason to suppose there was any risk of collision, there was no duty on them to sound any whistle, and in narrow waters such as the Humber unnecessary signals should not be given, as it leads to confusion, and the course a vessel is taking on a clear night is clearly indicated by means of her lights. It is also said that the tug should have sounded a starboard helm signal when she starboarded when the vessels were about 200 yards apart, but the absence of that signal could not by any possibility have contributed to the collision, for the long blast signal was not heard, and that was probably given when the vessels were nearer. The same considerations apply in this case as applied in the case of *The Fanny M. Carvill* (32 L. T. Rep. 129; 2 Asp. Mar. Law Cas. 478 (1875); L. Rep. 4 A. & E. 417), in which it was held that if the breach of the statutory regulation could not by any possibility have contributed to the collision, the vessel would not be held to blame. Art. 28 only lays down a maxim of good seamanship; a breach of that article does not involve the penalties provided by sect. 419 of the Merchant Shipping Act 1894. This is clear from the terms of sect. 418, for statutory sanction is only given to the making of rules for steering and sailing, and as to lights and fog signals. [Lord ALVERSTONE, C.J.—That point is not open to the respondents in this court, for to give effect to it we should have to overrule *The Uskmoor* (87 L. T. Rep. 55; 9 Asp. Mar. Law Cas. 316; (1903) P. 250), and also *The Anselm* (97 L. T. Rep. 16; 10 Asp. Mar. Law Cas. 438; (1907) P. 151).

Lord ALVERSTONE, C.J.—This is an appeal in a collision case which occurred in the night-time, in the river Humber, just off the Albert Dock, between a foreign steamer, the *Rijnstroom*, and the tow of a tug belonging to the Great Central Railway Company. The finding of the learned judge that the *Rijnstroom* was to blame has not been disputed in this court. He has found that the *Rijnstroom* was clearly guilty of negligence at a material time which contributed at all events to, if it did not entirely cause, the collision. It has not been argued that that finding was wrong, therefore we have no need to consider the manœuvres of the *Rijnstroom*, except in so far as they have any bearing on the navigation and conduct of those on board the tug. Now, describing the conduct of the tug in perfectly general terms, she left the south side of the Humber, the New Holland Pier, and was making for a point on the north shore further from the sea. To get across she had to use her starboard helm. She observed, at a considerable distance off, the *Rijnstroom* coming up the river; then she saw the steamer turn round, and get, roughly speaking, about north-east, head towards the Humber Dock entrance. Under those circumstances, if the vessels had continued, the *Rijnstroom* practically in the same position and the *Aristocrat* going across the river under her starboard helm, there would have been no collision. The *Aristocrat*

would have continued to starboard as much as was necessary, and would have gone clear to the westward of the *Rijnstroon*. At a distance which was roughly stated at 400 yards or thereabouts—though finally the evidence rather points to a distance of 200 yards—the *Aristocrat* saw that the *Rijnstroom* was coming astern. It has been contended before us, by junior counsel for the respondents particularly, that the *Aristocrat* never really starboarded for the purposes of the *Rijnstroom* or to avoid the *Rijnstroom*—that she only starboarded sufficiently to keep her head on what is called her course to get to the Albert Dock. If that were the true view of the case very different considerations would arise, but I think we must ascertain, in order to see whether there has been a breach of duty under the rule, what was the real manœuvre which the *Aristocrat* took. Now in Admiralty appeals we, of course, regard with very great importance the preliminary act and pleadings. In the preliminary act, having said the *Rijnstroom* had turned round, it is stated that the tug starboarded her helm to clear the stern of the *Rijnstroom*, and the lighter immediately did the same. That is obviously a manœuvre for the *Rijnstroom*, and it goes on to say "both would have cleared the *Rijnstroom*, but the *Rijnstroom* put her engines astern and gathered stern way, and, in spite of tug and tow putting their helms hard-a-starboard, the *Rijnstroom*, coming astern, struck the lighter." That is a statement of a manœuvre of starboarding for the *Rijnstroom*. In the pleadings it is put that the *Rijnstroom* was about 400 yards away on the starboard bow. Then, without reading all the passages in the evidence which has been accepted by the learned judge, I will refer to some of the leading points. The master of the tug *Sorensen* is examined. "You starboarded your helm? — Yes." "Intending to pass under her stern?—Yes." "When you starboarded your helm you told me you had him on your port bow. When you starboarded your helm to pass under his stern, did you blow two short blasts?—No." Then the mate, Paver, said, "When we saw that she had turned round, we starboarded to come under her stern." I am satisfied the learned judge came to the right conclusion when he held in his judgment that there was a starboarding for the purpose of going under the stern of the *Rijnstroom*.

Under these circumstances we have to consider whether we ought to hold the *Aristocrat* to blame for breach of art. 28. A number of points have been made, but not seriously pressed, by learned counsel. In the first place, it was to a certain extent suggested that there was not an alteration of course here. We pointed out, in the judgment in *The Anselm* (*ubi sup.*), on this very art. 28, that course did not mean compass course, but was an alteration of the direction of the vessel herself, taken with reference to another ship. Then it was suggested by leading counsel for the respondents that a breach of art. 28 did not involve the consequences contemplated by sect. 419, as it now is, of the Merchant Shipping Act. I am clearly of opinion that this art. 28 is one of the regulations made under the Order in Council the breach of which will involve the consequences under sect. 419. Both on the face of art. 28 and in its connection with the other regulations it is one of those articles which will come in every sense within the statute contemplated, as being regulations that are from time to time made under the Order in Council for the purpose of preventing collisions. I now come to the really difficult question of this case. The learned judge thought there had been a breach of art. 28, in which we all agree with him. I certainly think that, the tug electing to pass under the stern of a vessel even while she was not stationary in the water—not at anchor, but keeping herself against the tide approximately in the same position—the necessity arose for indicating that the *Aristocrat* was directing her course to port. I think that course ought to have been taken when the *Aristocrat* continued her starboard helm to go under the stern of the *Rijnstroom*. It was faintly suggested that art. 28 means taking a course—that is, changing a course, instead of keeping a course which will have the effect of directing the course of the vessel either to starboard or to port. The contrary of that was really decided by Lord St. Helier in the *Uskmoor* (*ubi sup.*), and certainly is involved in the judgment of the Court of Appeal in the *Anselm* (*ubi sup.*). I desire to say, in my judgment, the continuing of a helm is just as much a directing of the vessel's head or the vessel's course to one side or the other as changing her course. I am aware that counsel did not dispute the contrary, but on that point I think it right to say I have no doubt. The learned judge thought the defendants, the owners of the *Aristocrat*, had satisfied him that by no possibility could the neglect to give the starboard helm signal have contributed to the collision. The ground on which he seems to have held that is that, inasmuch as the negligence of those on board the *Rijnstroom* was such that they never noticed the *Aristocrat*—he finds, in fact, that the master never knew of the presence of the tug or tow at all—and that nobody on board the steamship paid the smallest attention to the one blast which was given when those on the tug saw that the steamer was coming astern, therefore the absence and neglect to give the two blasts could not by any possibility have contributed to the collision. I think it is a very dangerous thing to construe this rule in that way, or to come to the conclusion that the giving of a proper signal would have no more influence, or call any more attention, than the giving of a neutral signal. I wish to adopt what Kennedy, L.J. has said in the course of this argument. The one long blast given by a tug in a river may be given for many reasons. It may be to warn a small boat to get out of the way; it may be given because somebody is wanting to come off; or for a number of reasons. It is no indication of one ship manœuvring for another, and I am not prepared to say, however negligent and careless the people were, that it follows that because the one blast was not heard, or was not attended to, that the two blasts might not have been attended to. I am rather fortified in that, because the learned judge, though I say it with great respect to his judgment, seems not to have considered that it was not heard only, but that, if heard, it was disregarded. It seems to me to be one thing to disregard a signal which did not give any necessary indication with reference to this ship, and quite another thing to give at a distance of 200 or 300 yards, or even shorter as

the case may be, a signal which must have had reference to this ship. I think, therefore, the fact that the master did not receive the information he should have received, and was left entirely in ignorance as to the existence of the tug or the barge, is not sufficient to prove that by no possibility could the neglect to give this signal have contributed to the collision. Those on board the tug could not possibly tell there was no proper look-out on board the *Rijnstroom*. They see the *Rijnstroom* coming astern at such a period that it is necessary for them to continue their starboard helm, and possibly do more—to go hard-a-starboard. According to the evidence of one of the witnesses, the steamship had to come astern because of the presence of another ship coming out of the dock, and the learned judge seems to have thought that she might have reason to come astern. Therefore the necessity for her to do so was a possibility that ought to have been in the mind of a prudent seaman, and under these circumstances it seems to me, so far as the *Aristocrat* is concerned, it can scarcely be contended that it was not her duty at once to indicate to the steamer coming astern, "I am altering my course under a starboard helm so as to come under your stern." Of course, I am differing from the learned judge, and I am doing so with great hesitation, because one knows his experience and his character. If I thought it was sufficient to say they would no more have heard or paid attention to the two blast, than to the one blast, then I should have felt bound by the decision at which he has arrived that it was one of those cases in which you could fairly say neglect of the rule had nothing at all to do with the collision. In the first place, I am not satisfied of that, and it seems to me he has not sufficiently considered the question that this vessel, the *Rijnstroom*, was entitled to have the warning given by the vessel manœuvring for her, "I am starboarding to come under your stern." I think, therefore, there was a breach of the rule, and that the learned judge has not sufficiently considered what the duty of the *Aristocrat* was when he has come to the conclusion that by no possibility could it contribute to the collision. With great deference, I think the mere fact that possibly they disregarded the one signal is not sufficient to lead one to the conclusion that they must have disregarded the other. Therefore the *Aristocrat* must be held to blame for having broken art. 28.

I think it right to add that our assessors are not satisfied that she was justified in maintaining her speed. They incline to think that had she stopped her engines and slackened her speed and allowed the tow to swing round astern of her, there would have been less probability of collision. Speaking for myself I should not have been prepared to differ from the court below and the view of the Elder Brethren on that point. As far as I can judge I should have concurred in that judgment, but as our assessors have indicated that opinion, it is only right I should express their view. The ground, however, of my decision is that there was a breach of art. 28, and I do not think the learned judge was justified in finding that by no possibility could that breach have contributed to the collision. Therefore this appeal must be allowed, and both vessels held to blame.

BUCKLEY, L.J.—I am of the same opinion. Art. 28 applies no doubt only as from the moment when, the vessels being in sight of one another, such circumstances have arisen as to make it necessary for one or the other to take steps to prevent the contingency of a collision possibly ensuing, and I am willing to assume that when the tug at 400 yards distance from the *Rijnstroom* starboarded her helm, that state of things had not arisen. She did not know the steamer was coming astern. As I read the evidence there was probably plenty of room for her to go by, but at a subsequent moment, when 200 yards off, she perceives the *Rijnstroom* is coming astern. At that moment her duty was to blow her two short blasts, but she blew one long blast. From that moment onwards she owed the duty to the *Rijnstroom* of indicating to her not simply "I am here, take care of what you are doing," but "I am here and I am going to take such a course that if you continue coming astern there will probably be a collision." She did not do that, and that was a breach of art. 28. The other question is whether the learned judge was right in holding that under no circumstances could the breach have assisted or produced the collision. It seems to me it is not possible to say that this is so, for this reason: It is quite true the master of the *Rijnstroom* paid no heed to the one long blast. Whether he would have paid heed to the two short blasts indicating that if he turned round and looked he must have seen a vessel was coming across his course, I do not know. It seems to me it is impossible to say he would not. As I understand the authorities, if the breach is one which could not have contributed to the accident—as, for instance, that a light was not burning at a point which the other vessel could not possibly have seen—that may be an excuse. That is not this class of case. I do not know what might have happened if, instead of blowing the long blast, she had given the proper signal. The collision might have been averted if she had taken that course. Therefore I agree with the judgment that has been given by the Lord Chief Justice.

KENNEDY, L.J.—I have come to the same conclusion, and as we are differing from the learned judge in the court below, who gave a decision with the concurrence of his assessors, I will, as shortly as may be, state my reasons for that conclusion. There is no doubt at all that the *Rijnstroom* did, in fact, commit an actionable wrong. The question is whether or not those on the other side in the action were also really in a position in which they ought not, on the facts, to escape being also held to blame. The matter turns upon art. 28. It turns upon the omision to give a certain signal prescribed in the terms of that article, which I need not recapitulate. I hold it is distinctly an article which carries with it, if there be a breach, the penalty of being in the strongest manner presumed to have committed an actionable wrong on the part of those who do not observe it. The question is raised by junior counsel for the respondents first, that there was no occasion for that rule operating, because, putting aside the final act of the hard-a-starboard helm on the part of the tug, there really never was a time at which the tug came within the operation of the rule so that those on board were bound to give the signal. As to that, I entirely differ on the question of fact.

I agree with the learned judge below, who has found that there was such a time. Apart from the moment of hard-a-starboarding, it is essential for the case of the appellants that there was a time when the signal, "I am directing my course to port," ought to have been shown. As the Lord Chief Justice has said, it is a very striking case to set up here that there was not such an action when you have in the preliminary act under the head 12 of "what measures were taken and when to avoid a collision," a statement distinctly put that the tug starboarded her helm to clear the stern of the *Rijnstroom*. When was that? I do not care myself whether it was 200 or 300 yards. It seems to me for this purpose to be immaterial. There was at a distance, whether it be 200 or 300 yards, a starboarding for the purpose of clearing the stern of the *Rijnstroom*. It was not to keep her course under a starboard helm across the river, but an act pleaded in the most solemn manner as being done for the purpose of avoiding the other ship. Therefore the conditions had been fulfilled which brought the rule into operation—first, that vessels must be in such a relation that, as a matter of seamanship, one ought to act for the other, or owed a debt to the other vessel of some action; and, secondly, that action was taken by directing the course in a particular direction. That that was quite clear, without doubt, in the mind of the learned judge, appears from the judgment. In more than one passage he speaks of the starboarding to avoid the collision, and then the subsequent hard-a-starboarding, and he treats that as being borne out by the evidence which is pleaded by the parties themselves in the preliminary act. Fairly read together I think Sorensen's evidence points entirely to the same thing, because while there is no doubt that at some time from starting they would put their helm to starboard, and to some extent keep it so in order to meet the effect of an ebb tide, there is distinctly alleged a starboarding in order to get under the stern of this vessel—in other words, to avoid a collision. Then did she signal? She did not signal in the way prescribed by the article. What she did do was to give a long blast. It is a matter of common knowledge to anybody who has had anything to do with any river in which there are vessels moving about under steam, particularly tugs, that there are all sorts of reasons for their blowing a single blast of the whistle, and if there ever was a time on which this rule ought to come into application it seems to me it is a time when it is dark, or, at any rate, dusk (the hour is given as 5.45), when vessels are coming in and going out of docks, and when a steamer has to perform the somewhat critical manœuvre of waiting on an ebb tide which, unless met by action of her engines, will drift her past the entrance she is aiming at. Evidence was given that there was a vessel actually coming out of dock at the time, which would necessitate reversing on the part of the *Rijnstroom*. But, be that as it may, whether right or wrong, here you have a time at which lights are required, and a tug coming across the river with a low object, a lighter with a rudder, in tow—a thing which one knows will swing round, and even with a rudder can only follow subject to certain conditions of swinging—not quite closely and immediately, the action of the tug in front. Therefore, it may be swung against an object unless there is great care. They saw the *Rijnstroom* coming astern, and they starboarded for it. That is what the learned judge has found, and what is the case in their own preliminary act. They gave no signal, as required by the rule. They gave another signal, which, as my Lord has said, really indicated nothing. Then, it is said, because that signal was given and—following the phrase—no attention was paid to it on the part of the steamer, we ought to infer that no attention could by any possibility have been paid to the proper signal. To my mind, I confess, from the beginning that has seemed an extraordinary proposition. How stringently the courts have always enforced proofs that by no possibility could the infraction of the rule have contributed to the collision is clear by many decisions. I should like to refer to one in a case in which the vessel was not held to be at fault. It is the judgment of Smith, L.J. in the case of *The Argo* (9 Asp. Mar. Law Cas. 74), delivered in the Court of Appeal in 1900, in which he lays down the law as following the House of Lords in the case of *The Duke of Buccleugh* (*ubi sup.*): "It may be that, although there has been a breach of the rule, that breach of the rule does not necessarily condemn the ship which has committed that breach of the rule; 'that the infringement must be one having some possible connection with the collision, or, in other words, that the presumption of culpability may be met by proof that the infringement could not by any possibility have contributed to the collision.' And the burden of showing this lies on the party guilty of the infringement; proof that the infringement did not, in fact, contribute to the collision being excluded." With great respect to the learned judge, who is so careful and well versed in all these cases, I think what in fact he has asked himself was: Did this in fact contribute to the collision? "Could not by any possibility" is the phrase he used, but how can anybody possibly say a thing could not have contributed to the collision when there are people on the steamer with ears to hear the sound? How can it be said that because they paid no attention to that which was no signal, they would not have attended to the call of a vessel saying "I am starboarding for you; I am altering and directing my course to port for you"—because that would have been the signal? I confess I have had great difficulty in even understanding how such a conclusion could have been arrived at. It seems to me to open the door to the worst possible dangers of really and practically saying "I do not believe this vessel was, in fact, struck by the other vessel owing to the omission of the other vessel to give a statutory signal." That is, of course, what one is always tempted to do, but that is not the law, and one must be very careful that not only in words, but in actual working out of the case, one is not substituting such an argument for the only one which the law allows, which is that by no possibility could it have contributed to the collision. As far as I know, the omission to do acts has been excused in cases which are not at all cases of this sort—cases of lights where there was no look-out on the other ship, or for any other reason the right light could not have been seen. There may have been other cases, but as far as I know there is no case in which there has

been an excuse of the proper sound signal not being given under art. 28. In this case I think it is particularly important, if one may say so, to maintain the regulations. If there ever was a case in which a vessel ought to be held entitled to the fullest consideration in the matter of getting warning from another crossing the river, it is the case of a vessel which, like the *Rijnstroom*, was compulsorily, from no fault of her own, in perfectly proper navigation, trying to keep herself, by putting her engines astern, in a position for getting into the dock, and avoiding collision with the vessels coming out. Therefore the tug ought to have said, "I must give her every chance." They ought to have assisted her by giving the best warning they could of exactly what they were doing, and we ought not too lightly to accept the statement "They did not do anything. They did not attend to the single long blast, and therefore we are justified in arguing before the court that they would not have paid any attention if we had given the signal which the article prescribes." I rest my decision on that ground. But there are two other matters, which, speaking entirely for myself, I wish to call attention to. Here was a tug going not more than six knots, with a tow behind her at fifteen or twenty fathoms, herself able to escape by hard-a-starboarding. I think she ought to have given the chance to the steamer, even at that moment, of ceasing to come astern with her engines by giving her the proper signal. As to whether she ought not to have been held to blame for attempting to cut behind this steamer when she saw she was coming astern—I do not wish to rest my decision on that. But my Lord has said what the view of our assessors would have been on that point, and I confess I should have been inclined to take the same view.

Solicitors for the appellants, *Cattarns* and *Co.*

Solicitors for the respondents, *Dixon H. Davies.*

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

Thursday, June 13, 1907.

(Before SWINFEN EADY, J.)

BARCLAY AND CO. LIMITED *v.* POOLE. (*a*)

Shares — Unregistered mortgage — Contract by mortgagor to sell to joint owners without notice with provision as to application of purchase money for payment of vendor's debts to ship —Registered bill of sale to purchasers—Notice of prior unregistered mortgage — Application of purchase money according to contract — Rights of unregistered mortgagees to purchase money—Merchant Shipping Act 1894 (57 & 58 *Vict. c.* 60), *ss.* 56, 57.

A managing owner of a ship mortgaged his share to his bankers, who at his request did not register the mortgage. He afterwards, having incurred unpaid debts on behalf of the ship and her owners, and being himself indebted to the other joint owners of the ship, contracted to sell his shares to certain joint owners who were unaware of the mortgage. The contract contained a provision for the application of the purchase money in the discharge of the unpaid debts of the ship and of his liability to the joint owners and in payment of the balance in cash to him. The shares were transferred to the purchasers by a bill of sale which was duly registered. The unregistered mortgagees heard of the contract and gave them notice of their prior mortgage. The purchasers after such notice applied the purchase money in discharge of the debts and liability provided for by the contract, but retained in their hands the balance, to which it was admitted that the mortgagees were entitled.

In an action by the mortgagees claiming a prior right to the whole purchase money notwithstanding the provisions of the contract:

Held, that the contract was valid under the Merchant Shipping Act 1894, *s.* 56, *and that the right of the purchasers to apply the purchase money in discharge of the debts and liability provided for therein, in the discharge of which they as joint owners were interested, took precedence over the claim of the mortgagees under their prior unregistered mortgage.*

IN 1902 Anthony Hedgeley Poole, the above-named defendant, was the managing owner of the steamship *Glenco*, and was the registered owner of forty sixty-fourth shares in that vessel. Robert Emmerson, also a defendant in the action, was the registered mortgagee of twenty of such shares, and afterwards became the registered owner of the twenty shares, which were mortgaged to him for more than their full value. James Alfred Poole, the remaining defendant in the action, was the registered owner of twelve other sixty-fourth shares in that ship; and the remaining twelve sixty-fourth shares belonged to various other registered owners.

On the 30th May 1902 Anthony H. Poole mortgaged his remaining twenty sixty-fourth shares in that vessel to Messrs. Barclay and Co., the above-named plaintiffs, who were his bankers, to secure an overdraft of his current account with them; and at his request the plaintiffs refrained from registering that mortgage in accordance with the provisions of the Merchant Shipping Act 1894.

At the beginning of 1906, the defendants R. Emmerson and James A. Poole ascertained that the defendant Anthony H. Poole had appropriated to himself 636*l.* 8*s.* 11*d.* received by him on behalf of the ship and her owners, had also incurred debts on behalf of the ship and her owners to the amount of 483*l.* which he had left unpaid, and was in pecuniary difficulties; and, in order to make good the appropriated amount of 636*l.* 8*s.* 11*d.* and to provide money for payment of the unpaid debts and protect the owners of the vessel, it was agreed as follows:

By an agreement dated the 8th Feb. 1906, and made between Anthony H. Poole of the one part and James A. Poole and R. Emmerson of the other part, it was provided that Anthony H. Poole should sell and James A. Poole and R. Emmerson should purchase the twenty sixty-fourth shares of Anthony H. Poole in the ship; that the purchase price should be the market price of those shares on the 8th Feb. 1906, to be determined by a valuer; that the purchase price should be paid as follows—viz., by the payment by the purchasers

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

of all moneys (not exceeding in the aggregate the amount of the purchase money) owing by the vendor to the owners of the ship or to creditors of the owners of the ship, including any overdraft or other moneys owing by the vendor to the bankers for which the owners of the ship were or might become liable, and as to the balance by payment thereof in three months from the date of the agreement in cash to the vendor; and that the vendor should forthwith execute a legal bill of sale of the shares free from incumbrances to the purchasers.

By a bill of sale, dated the 8th Feb. 1906, made in pursuance of the agreement the vendor transferred the shares to the purchasers, which bill of sale was duly registered on the 10th Feb. 1906.

When this agreement was entered into the purchasers had no notice of the unregistered mortgage to the plaintiffs, as to which no liability attached to the owners of the ship.

On the 14th Feb. 1906 the plaintiffs first heard of the sale effected by the registered bill of sale, and, notwithstanding the prior registration of the bill of sale, they gave notice, dated the 15th Feb. 1906, to the purchasers that they claimed priority to them for the sum due on the mortgage, which amounted to over 1000*l.*, and that they should hold the purchasers responsible if they paid away the purchase money of the shares.

The purchasers after the receipt of this notice discharged out of the purchase money of the shares, which was fixed by valuation at 937*l.* 10*s.*, the unpaid debts incurred on behalf of the ship and her owners and the amount due from the vendor to the other joint owners, and retained in their hands a balance of 301*l.* 1*s.* 1*d.*

This action was commenced on the 19th Feb. 1906 for an account of what was due to the plaintiffs under their mortgage of the 30th May 1902, for payment by the defendant Anthony H. Poole of the amount so found due, and for foreclosure or sale in priority to the claim of the other defendants, or, in the alternative, for a charge on the purchase money of the shares.

The defendant Anthony H. Poole did not enter an appearance to the action. The defendants James A. Poole and R. Emmerson claimed that they were entitled to retain out of the purchase money of the shares the sum of 636*l.* 8*s.* 11*d.* in discharge of the debts to the ship and her owners left unpaid by the defendant Anthony H. Poole and of the amount due to the ship from him, and submitted to deal with the balance of 301*l.* 1*s.* 1*d.* as the court should direct.

It was admitted at the hearing that the plaintiffs were entitled to the balance of 301*l.* 1*s.* 1*d.*

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides as follows:

Sect. 56. No notice of any trust, express, implied, or constructive, shall be entered in the register book or be receivable by the registrar, and, subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share and to give effectual receipts for any money paid or advanced by way of consideration.

Sect. 57. The expression "beneficial interest" where used in this part of this Act includes interests arising under contract and other equitable interests; and the intention of this Act is that without prejudice to the provisions of this Act for preventing notice of trusts from being entered in the register book or received by the registrar and without prejudice to the power of disposition and of giving receipts conferred by this Act on registered owners and mortgagees and without prejudice to the provisions of this Act relating to the exclusion of unqualified persons from the ownership of British ships, interests arising under contract or other equitable interests may be enforced by or against owners and mortgagees of ships in respect of their interest therein in the same manner as in respect of any other personal property.

Eve, K.C. and *Martelli* for the plaintiffs.—The defendant Anthony H. Poole had power to give a valid title to the shares to the defendants James A. Poole and R. Emmerson under sect. 56 of the Merchant Shipping Act 1894; but the plaintiffs have an equitable right to the purchase money of the shares in priority to the claim of the defendants James A. Poole and R. Emmerson to that purchase money: (Merchant Shipping Act 1894, s. 57). The defendants James A. Poole and R. Emmerson were not entitled, after receiving notice of the plaintiffs' equitable claim, to apply the purchase money in discharge of the debts due to the creditors of the ship and her owners, incurred by the defendant Anthony H. Poole, and in satisfaction of the amount due from him to the ship's owners, in accordance with the provisions of the agreement of the 8th Feb. 1906. [SWINFEN EADY, J.—That contract cannot be split up into two parts. If the purchasers were entitled under it to keep the shares, they were also entitled and bound to apply the purchase money in accordance with its provisions in discharging the whole liability from the vendor to the ship, which liability they as part owners were interested in getting discharged.] After receiving notice of the plaintiffs' prior claim they should have repudiated the contract and relinquished the shares. When they proceeded to apply the purchase money according to the directions of the vendor they became liable to the plaintiffs, of whose prior equitable claim they had received notice. The plaintiffs are not disputing the purchaser's title to the shares, so that the case of *Black* v. *Williams* (1895) 1 Ch. 408) does not apply here.

Micklem, K.C. and *A. A. Roche* for the defendants James A. Poole and R. Emmerson.—The vendor having power, owing to the non-registration of the plaintiffs' mortgage, to confer on the purchasers a good title to the shares and give them a valid receipt for the purchase money, was entitled to enter into a contract with them providing for its application; and the purchasers, as part owners of the ship, had an interest in stipulating for its application in discharge of debts for which the owners would be liable, and of money due to them. The recognition of equitable claims like that of the plaintiffs is allowed only without prejudice to the powers of disposition and of giving receipts conferred upon registered owners and mortgagees:

Merchant Shipping Act 1894, s. 57;
Black v. *Williams* (*ubi sup.*).

The agreement between the vendor and purchasers cannot be split in two as suggested by the plaintiffs, but must be treated as wholly valid and binding against all persons, including the plaintiffs. It was part of the contract that the purchase money should be applied in discharge of the

debts of the ship and her owners and of the money owing by the vendor.

Eve, K.C. in reply.—The decision in *Black* v. *Williams* (*ubi sup.*) does affect the equitable claim of the plaintiffs; and the Merchant Shipping Act 1894 does not take away from them the right to enforce their equitable claim. A registered mortgagee of a ship whose mortgage covers further advances could not claim priority for advances made after notice of a second registered mortgage:

The Benwell Tower, 72 L. T. Rep. 664;
Hopkinson v. *Rolt*, 5 L. T. Rep. 90; 9 H. L. Cas. 514.

The agreement for purchase, so far as relates to the disposition of the purchase money, is only an equitable assignment by the vendor, and is subject to his prior equitable assignment to the plaintiffs.

SWINFEN EADY, J.—In my opinion this case is free from doubt, and the rights of the parties are clear. The facts are not in dispute. [His Lordship stated the facts, and continued:] It is not disputed that the balance of 301*l.* cannot be paid to the vendor, but must be paid to the plaintiffs. The dispute between the parties is in reference to the remaining amount of 636*l.* 8*s.* 11*d.* The plaintiffs gave notice of their unregistered mortgage to the purchasers before the sum of 636*l.* 8*s.* 11*d.* was applied by them in pursuance of the agreement, and claim that, after the notice was given, the purchasers had no right so to apply it, but that the plaintiffs' claim has priority, and that the 636*l.* ought to have been paid to the plaintiffs and not to the persons as provided by the agreement. And, further, that if in fact the money has been paid away as provided for by the agreement after notice of the plaintiffs' claim, the plaintiffs are not prejudiced by that payment, but the money must be paid over again to them. There is no dispute about the figures. A little over 1000*l.* is owing to the plaintiffs, and, if their claim is well founded, they would be entitled to the whole purchase money. Now, it cannot, in my opinion, be disputed that the purchasers acquired a valid title to the shares purchased by them. They obtained an absolute registered bill of sale without notice of any prior charge, and their title to the shares is absolute. It was part of the contract under which they purchased the shares that a portion of the purchase money should be applied in discharging the vendor's debt to the ship, and each of the purchasers, as owners of shares in the ship, was pecuniarily interested in that portion of the purchase money being so applied. The owner of every share was interested in the vendor's debt of 636*l.* being discharged. If no portion of that debt had been recovered the owners would have had to pay the ship's debts, amounting to 483*l.*, themselves, and would have lost the remaining 153*l.* 8*s.* 11*d.*, the balance of the vendor's debt. Each of the purchasers, therefore, was pecuniarily interested in this provision of the contract being carried out by the application of 636*l.* in discharge of the vendor's debt to the ship. On behalf of the plaintiffs it was sought to divide the contract into two parts, and to maintain that although the purchasers acquired a good title to the shares, they had no right to apply the purchase money in discharging the vendor's liability to the ship, because the plaintiffs' title to the purchase money under their unregistered mortgage was prior in date to the contract for purchase. In my opinion that contention is not well founded. The purchasers were entitled to deal with the vendor on the footing that he was absolute owner of the shares and absolute owner and master of the purchase money and competent to give a good and valid discharge for it, and therefore able to contract as to the way in which it should be applied. Now, sect. 56 of the Merchant Shipping Act 1894 provides that, "subject to any rights and powers appearing by the register book to be vested in any other person, the registered owner of a ship or of a share therein shall have power absolutely to dispose in manner in this Act provided of the ship or share and to give effectual receipts for any money paid or advanced by way of consideration." Therefore, if the registered owner can give effectual receipts for any money paid or advanced, he can effectually direct how the money is to be paid or applied. In my opinion the contract for purchase of the shares is not severable into two parts, but is one entire contract; and the purchasers, having bought the shares and agreed to pay the purchase money, of which a portion was to be applied for their benefit in a particular way, are entitled to insist on the whole contract being carried out, and their right so to insist is an absolute right under the statute.

It was suggested on behalf of the plaintiffs that the proper course for the defendants after notice of the plaintiffs' claim would have been to abandon their right to the purchased shares and to treat the contract for purchase as one which ought to be rescinded, leaving the shares for the vendor or for the plaintiffs. I cannot accept that view. I think it would be quite contrary to the purpose and object of the Merchant Shipping Act 1894 as explained by Vaughan Williams, L.J. in *Black* v. *Williams* (*ubi sup.*).

The right of the purchasers to have the purchase money applied pursuant to the contract is a valid one, and takes precedence of the plaintiffs' unregistered mortgage. The result is that there will be a declaration that, notwithstanding the notice of the 15th Feb. 1906 of the plaintiffs' prior unregistered mortgage, the purchasers are entitled to apply 636*l.* 8*s.* 11*d.*, part of the purchase money of 937*l.* 10*s.*, in discharge of the vendor's debt to the steamship *Glenco*. The purchasers will retain their costs of this action, when taxed, out of the 301*l.* 1*s.* 1*d.* balance of the purchase money, and pay over the residue to the plaintiffs.

Solicitors: *King, Wigg*, and *Co.*, for *Clayton* and *Gibson*, Newcastle-upon-Tyne; *Botterell* and *Roche*, for *Botterell, Roche*, and *Temperley*, Newcastle-upon-Tyne.

KING'S BENCH DIVISION.

Tuesday, July 16, 1907.

(Before Pickford, J.)

Assicurazioni Generali de Trieste *v.* Empress Assurance Corporation Limited. (*a*)

Marine insurance—Reinsurance—Payment of loss by insurer on fraudulent misrepresentation—Recovery of damages — Diminution of loss — Costs—Subrogation.

The defendants insured certain shipments of lumber having given an open cover to B. and Co., who were acting for persons in America, under which they could declare interests by a number of vessels, but could not declare interests by vessels belonging to a particular firm. Owing to the action of someone in the employment of B. and Co., two of the excepted vessels or shipments by them were put forward and accepted by the defendants in ignorance that they belonged to the firm excepted by them. The defendants paid in respect of losses suffered by the two vessels. The defendants had reinsured with the plaintiffs, and the plaintiffs accordingly paid the defendants in respect of the loss.

The defendants subsequently brought an action against B. and Co., still ignorant of the fact that they were entitled to claim any relief in respect of the losses paid on the two vessels. In the course of discovery and investigation in that action the facts about the two vessels came to light, and the defendants' claim was amended by claiming damages by reason of the defendants having had to pay losses on the two vessels by fraudulent misrepresentations of B. and Co., or someone in their employ, in addition to the other relief claimed.

As regards the two vessels the defendants' action was successful, and damages were recovered, but unsuccessful as regards the other relief claimed.

The defendants were granted the costs of the action in respect to the relief claimed in respect of the two vessels, but B. and Co. were given the costs of the issues on which they succeeded, which far exceeded the costs payable to the defendants. The costs to which the parties would be respectively entitled on taxation between party and party were agreed. The defendants' solicitors had a claim against the defendants for costs in the action as between solicitor and client, and these were settled.

The plaintiffs claimed to be repaid the sum paid by them upon the reinsurance of shipments on the two vessels. The defendants alleged that the sum paid by B. and Co. was not received to the use of the plaintiffs, nor was there any right of subrogation of which the plaintiffs could avail themselves, and that, if they were liable, then they could deduct the costs of recovering that sum, including costs of investigation in the other action, but for which damages could not have been recovered.

Held, the money was received by the defendants by the enforcement of a right which diminished their loss, that the doctrine of subrogation applied, and the reinsurers were entitled to recover, but that the defendants were entitled to deduct whatever were the reasonable expenses of recovering the sum.

Dictum of Brett, L.J. in Castellain *v.* Preston (49 *L. T. Rep.* 29; 11 *Q. B. Div.* 380, *at p.* 388) *applied, and* Hatch, Mansfield, and Co. *v.* Weingott (22 *Times L. Rep.* 366) *followed.*

Commercial list.

Action tried before Pickford, J. sitting without a jury.

Claim to recover under a policy of reinsurance.

The facts as found were as follows:—

This was a claim which arose out of an open cover slip by which the plaintiffs reinsured the defendants to the extent of one-half their interest up to 1000*l.* on certain shipments of lumber, and under the slip the plaintiffs reinsured the defendants by two policies of insurance—one for 635*l.* in respect of a vessel called the *Riverside*, and the other for 1000*l.* in respect of the *Zebina Goudy*. The defendants had given an open cover to Messrs. C. T. Bowring and Co., acting for persons in America or Canada, under which the latter could declare interests by a number of vessels, but were not at liberty to declare interests by vessels belonging to a firm of Martin Taylor and Co.

The two vessels mentioned above, or the shipments by them, did belong to that firm, and were put forward by Messrs. C. T. Bowring and Co. and accepted by the defendants without the knowledge of the latter that they were what has been called Martin Taylor and Co.'s boats, and the losses were settled by the defendants without that knowledge. The defendants then claimed and were paid by the plaintiffs the sum of 1354*l.* 4*s.* 10*d.* under the policies mentioned above.

Subsequently the defendants brought an action on the 1st Feb. 1901 against Messrs. C. T. Bowring and Co. claiming relief on various grounds, and at the time of bringing the action nothing was known about any claim to relief in respect of losses paid on the two vessels named; but in the course of discovery and investigation in that action the facts about the two vessels came to light, and on the 22nd Jan. 1904 the claim in the defendants' action was amended by claiming damages by reason of the defendants having been induced to pay losses on these two vessels and another called the *Curlew* by fraudulent representations of Messrs. C. T. Bowring and Co., or someone in their employment, as well as other relief previously claimed.

The action was tried before Kennedy, L.J., then Kennedy, J., and he gave judgment in favour of the defendants in respect of these two, but held that their action failed in respect of the *Curlew*, and also in respect of all the other relief claimed. His judgment on this point was as follows: "I must declare, therefore, taking the view which I have expressed, that the plaintiffs" (that is, the defendants in this action) "are entitled in respect of the *Zebina Goudy* and the *Riverside* to such damages as may (unless they are agreed) upon inquiry appear to flow from the liability of the plaintiffs as insurers in respect of these two risks." He also gave to the defendants the costs of the action in respect of this relief, but gave to Messrs. C. T. Bowring and Co. the costs of the issues on which they succeeded, which far exceeded the costs payable to the defendants.

An agreement was afterwards made by which the defendants and Messrs. C. T. Bowring and Co.

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

settled the amount payable to one another, and it must be taken that the defendants received the costs to which they were entitled on taxation between party and party in respect of their claim against Messrs. C. T. Bowring and Co. on which they succeeded. The defendants' solicitors, however, had a large claim against the defendants for costs in the action as between solicitor and client, and these were settled for a sum of 14,000*l.*

The plaintiffs now claimed to be repaid the sum paid by them to the defendants upon the reinsurance of shipments on these two vessels, and the defendants resisted the claim on two grounds: (1) That the moneys so received from Messrs. C. T. Bowring and Co. were not received to the use of the plaintiffs, and that there was no right of subrogation of which the plaintiffs could avail themselves; and (2) that, if they were liable for any amount, they are only liable for such an amount as remained after deducting the costs of recovering that sum, and they claimed that as the action against Messrs. C. T. Bowring and Co. was the means of recovering this sum, and the facts upon which they succeeded in doing so were only discovered by means of discovery and investigation in that action, they were entitled to deduct the whole or the greater part of the costs which they had to pay to their solicitors in respect of it. If the defendants were right in this contention, there would be no balance left to which the plaintiffs would be entitled.

Scrutton, K.C. and *Leck* for the plaintiffs.—(1) The sum recovered as damages by the defendants was obtained by enforcing a legal right which diminished the defendants' loss, and was therefore received by the defendants to the use of the plaintiffs as reinsurers:

Castellain v. *Preston*, 49 L. T. Rep. 29; 11 Q. B. Div, at pp. 388 and 403, per Brett, L.J. and Bowen, L.J.

The position is not analogous to an action where damages have been awarded for libel. The plaintiffs are entitled to be reimbursed to the extent of the damages awarded. (2) The defendants can only set off the taxed costs of the particular issues on which they succeeded, or only the costs properly incurred. The expenses of recovering the sum are limited to the amount of costs payable to the defendants between party and party, as that amount in law must be looked on as costs properly incurred by the defendants. The defendants have received those costs and cannot deduct any further expenses.

J. A. Hamilton, K.C. and *Maurice Hill* for the defendants. — (1) The sum recovered was not received to the use of the plaintiffs as reinsurers. *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q. B. Div. 380) does not cover the case, as the observations of Brett and Bowen, L.JJ. at pp. 388 and 403 were dicta. The sum received was in respect of a personal tort committed by a person other than the original assured, and was not received in diminution of the loss. The case is analogous to an action for libel published incidentally in and arising out of the insurance transaction. (2) If the plaintiffs are subrogated to the rights of the defendants, the plaintiffs are entitled to the net salvage only. But for the action against C. T. Bowring and Co., the facts on which damages were recovered would not have been discovered, and no damages would have been recovered, and therefore the costs of investigation before action, which could not be recovered as costs of action, or all the costs incurred in respect of issues in the action in which the plaintiffs were interested if the defendants succeeded in them should be taken into account. The defendants are not limited in deducting costs to party and party costs:

Hatch, Mansfield, and Co. v. *Weingott*, 22 Times L. Rep. 366.

That case is in point and the principle is applicable.

The following cases were cited:

Smith v. *Buller*, 31 L. T. Rep. 873; L. Rep. 19 Eq. 473;
Burnand v. *Rodocanachi*, 4 Asp. Mar. Law Cas. 400, 576; 47 L. T. Rep. 277; 7 App. Cas. 333;
Darrell v. *Tibbits*, 42 L. T. Rep. 707; 5 Q. B. Div. 560;
West of England Fire Insurance Company v. *Isaacs*, 75 L. T. Rep. 564; (1897) 1 Q. B. 226;
Phœnix Assurance Company v. *Spooner*, 93 L. T. Rep. 306; (1905) 2 K. B. 753;
Stearns v. *Village Main Reef Gold Mining Company*, 118 L. T. Jour. 340.

Cur. adv. vult.

Pickford, J., after stating the facts as set out above, read the following judgment:—The plaintiffs contend that, as this money was obtained by enforcing a right which diminished the defendants' loss, it was received to the use of the plaintiffs as reinsurers, and they rely upon the judgments of Brett, L.J. and Bowen, L.J. in *Castellain* v. *Preston* (49 L. T. Rep. 29; 11 Q B. Div. 380, at pp. 388 and 403). The defendants contend that these judgments do not apply to this case, as they say that this was money received in respect of a personal tort committed by a person other than the original assured, and was not received in diminution of their loss, and Mr. Hamilton compared this case to that of an action for libel published incidentally in and arising out of the insurance transactions. The defendants also contended that the passages to which I have referred were dicta merely, and not necessary for the decision of the case then under consideration. The passages were these:—Lord Esher, at p. 388, said this: "In order to apply the doctrine of subrogation, it seems to me that the full and absolute meaning of the word must be used—that is to say, the insurer must be placed in the position of the assured. Now, it seems to me that, in order to carry out the fundamental rule of insurance law, this doctrine of subrogation must be carried to the extent which I am now about to endeavour to express—namely, that as between the underwriter and the assured the underwriter is entitled to the advantage of every right of the assured, whether such right consists in contract, fulfilled or unfulfilled, or in remedy for tort capable of being insisted on, or in any other right, whether by way of condition or otherwise, legal or equitable, which can be or has been exercised or has accrued, and whether such right could or could not be enforced by the insurer in the name of the assured by the exercise or acquiring of which right or condition the loss against which the assured is insured can be or has been diminished. That seems to me to put this doctrine of subrogation in the largest possible form, and if in that form, large as it is, it is short of fulfilling

that which is the fundamental condition, I must have omitted to state something which ought to have been stated." Bowen, L.J. said: "Subrogation is itself only the particular application of the principle of indemnity to a special subject-matter, and there I think is where the learned judge has gone wrong. He has taken the term 'subrogation' and has applied it as if it were a hard-and-fast line, instead of seeing that it is part of the law of indemnity. If there are means of diminishing the loss, the insurer may pursue them, whether he is asking for contracts to be carried out in the name of the assured, or whether he is suing for tort. It is said that the law only gives the underwriters the right to stand in the assured's shoes as to rights which arise out of, or in consequence of, the loss. I venture to think there is absolutely no authority for that proposition. The true test is, can the right to be insisted on be deemed to be one the enforcement of which will diminish the loss?"

I think on the first point the plaintiffs are right. I am by no means sure the passages I have read were only dicta. I think the learned judges were stating the principle on which their decision proceeded, but in any case they are dicta of such authority that I think I am bound to follow them, and that they cover this case. I think that this money was received in diminution of the loss, and that the case of a libel as suggested is not in any way analogous. The claim was to recover the amount of damage which the defendants had suffered by reason of having to pay the loss, and the amount of the loss was the measure of damages which the defendants recovered, as is shown by the passage in the judgment of Kennedy, L.J. which I have read. In the case of a libel, the amount of the loss would have no bearing whatsoever upon the damages which would be recovered in respect of an injury to the defendants' reputation. I think, therefore, that this money was received by reason of the enforcement of a right which diminished the defendants' loss, and therefore is within the judgments I have mentioned and covered by their authority.

With regard to the second point, the plaintiffs contended that the expenses were limited to the amount of costs payable to the defendants between party and party, as they said that that amount must be looked on in law as the costs properly incurred by the defendants in respect of the action. If this be right, the defendants have received these costs and cannot deduct any further expenses. But I think this point is covered by the authority of the decision of Jelf, J. in *Hatch, Mansfield, and Co.* v. *Weingott* (*ubi sup.*), and that the plaintiffs are wrong. It is true that in that case the taxed costs were those of a criminal prosecution, and not those taxed between party and party in a civil action, but I think the principle is the same. The costs taxed in a criminal prosecution as payable by the county are those which are considered as the costs properly payable as the costs of the prosecution in any particular case, and anything beyond them is looked upon as equally a luxury, to use the expression quoted in the Annual Practice, at p. 941, from the case of *Smith* v. *Buller* (L. Rep. 19 Eq., at p. 475), as the costs of an action beyond what are allowed between party and party. I think, therefore, that the defendants are entitled to deduct whatever are the reasonable expenses of recovering the sum obtained from Messrs. C. T. Bowring and Co. But I am quite unable to say that all the costs of that action are properly to be deducted. I do not know enough of that action to say that, and I think it very improbable, and I cannot accept Mr. Hamilton's contention that they are entitled to deduct necessarily either all the costs which were in fact incurred in investigating Messrs. C. T. Bowring and Co.'s business up to the time when the facts which led the judge to find that this fraud was established were discovered, or all the costs incurred in respect of issues in the action in which the plaintiffs were interested, if the defendants succeeded in them. I do not see how I can in my present state of information lay down any principle to guide the inquiry except what I have already said—namely, that they are entitled to deduct whatever may on investigation of the circumstances of that action be found to be properly attributable to the recovery of this money, and that that cannot be determined without knowledge of all those circumstances of which I am quite ignorant. I do not think, therefore, I am in a position to give any final judgment until after that inquiry has been held and the result is known.

Solicitors for the plaintiffs, *Ballantyne, McNair, and Clifford.*

Solicitors for the defendants, *Davidson* and *Morriss.*

Wednesday, July 17, 1907.

(Before WALTON, J.)

MARITIME INSURANCE COMPANY LIMITED *v.* ALIANZA INSURANCE COMPANY OF SANTANDER. (*a*)

Insurance—Construction of policy—Re-insurance—"Port or ports, place or places."

By a policy effected with the plaintiffs a vessel was insured against (inter alia) *perils of the sea "at and from a port in New Zealand to Nehoué, New Caledonia, and while there and thence to Grangemouth." The plaintiffs re-insured with the defendants part of the risk in the following terms "at and from the 1st July 1904 until the 31st Aug. 1904, both days inclusive, or as original whilst at port or ports, place or places in New Caledonia . . . 500l. on hull, materials, &c., valued at 7000l. . . . being a reinsurance applying to policy . . . subject to the same clauses and conditions and to pay as may be paid thereon." During the currency of the policy of reinsurance the vessel whilst passing through Gazelle Passage, within the geographical limits of New Caledonia, struck on a reef.*

Held, that the vessel, at the time of the loss, was not at a "port or place" in New Caledonia within the meaning of the policy, and that the reinsurers were not liable.

Semble: *That "place" meant some place at which the vessel had arrived to load or possibly to discharge, or to take coal, or to repair, or even to shelter, a place at which the vessel was for some*

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

purpose, and not a place at which the vessel happened to be in passing.

COMMERCIAL LIST.

Action tried before Walton, J., sitting without a jury.

The plaintiffs claimed to recover for loss under a policy of marine reinsurance. The facts, as agreed, were as follows :—

(1) By a policy of marine insurance dated the 17th May 1904, for 1000*l.*, at a premium of six guineas per cent., and a second policy of even date for 500*l.*, at a premium of 7*l.* per cent., the said policies being issued pursuant to slips dated the 16th and 20th April 1904 respectively, the plaintiffs insured the *Dumfriesshire*, valued at 7000*l.*, against perils of the sea and other usual perils "at and from a port in New Zealand to Nehoué, New Caledonia, and while there and thence to Grangemouth." (2) By a policy of reinsurance, dated the 25th April 1905, for 500*l.*, at a premium of 6*s* 8*d.* per cent., issued by the defendants pursuant to a slip dated the 25th April 1904, the defendants reinsured the plaintiffs in the following terms: "At and from the 1st July 1904 until the 31st Aug. 1904, both days inclusive, or as original whilst at port or ports, place or places in New Caledonia. . . . 500*l.* on hull, materials, &c., valued at 7000*l.*, or valued as in original policy or policies, being a reinsurance applying to policy . . ." effected with "the Maritime Insurance Company, subject to the same clauses and conditions, and to pay as may be paid thereon." The said terms were accompanied by certain marginal voyage clauses in print and a written clause "risk to commence same time as original," and the policy itself was in the printed form of a voyage policy. The words "at and from" which preceded the words "1st July" and the said marginal clauses were in print. The two policies mentioned in par. 1 constituted the original policy in respect of which the policy of reinsurance was issued. (3) The *Dumfriesshire*, on the 1st June 1904, sailed from Dunedin for Nehoué. (4) On the 3rd July 1904 the *Dumfriesshire* while *en route* for Nehoué was making for Gazelle Passage. After reaching the said Gazelle Passage, and whilst passing through it, she struck on a reef, and certain general and particular average losses were incurred. The plaintiffs paid their proportion of such losses under the policies. (5) Gazelle Passage appears on the Admiralty chart of the north-west part of New Caledonia. Carrey Island, near Gazelle Passage, is an uninhabited patch of sand. (6) If the defendants were liable under the policy of reinsurance to imdemnify the plaintiffs in respect of the plaintiffs' payment, the amount for which the defendants were liable was 191*l.* 6*s.* 1*d.* The vessel struck on a reef near Carrey Island in the Gazelle Passage.

The Gazelle Passage is a passage through the barrier reef of New Caledonia, distant about ten miles from the mainland and Nehoué.

J. A. Hamilton, K.C. and *Leslie Scott* for the plaintiffs.—The vessel suffered a loss at a definite named place in New Caledonia. The reef is geographically part of New Caledonia, and is treated as such in the Admiralty Sailing Directions. To contend that the reef is not such a place necessitates the reading in of some words of limitation—*i.e.*, "place or places in the nature of a port," or "place or places where loading or discharging is done." There is no reason why any such words of limitation should be read in; the words "place or places" should be given their natural meaning. The policy was not intended only to cover risks while lying in a port.

Scrutton, K.C. and *Mackinnon* for the defendants.—"Place" means a place in the nature of a port, a loading or discharging place, or a place where the vessel touched and stayed. The reef on which she struck is not a place within the meaning of the policy, and the defendants are therefore not liable to reimburse the plaintiffs for the latter's payment in respect to the losses.

The following authorities were referred to during the argument:

Cockey v. *Atkinson*, 2 B. & Ald. 460;
Brown v. *Tayleur*, 4 A. & E. 241; 5 L. J. N. S. 57, K. B.;
Haughton v. *Empire Marine Insurance Company*, 2 Mar. Law Cas. O. S. 406 (1866); 15 L. T. Rep. 80; L. Rep. 1 Ex. 206; 4 H. & C. 44;
Cruickshank v. *Janson*, 1810, 2 Taunt. 301;
Crocker v. *Sturge*, 8 Asp. Mar. Law Cas. 208 (1896); 75 L. T. Rep. 549; (1897) 1 Q. B. 330;
Arnould on Marine Insurance, 7th edit., sect. 486.

WALTON, J.—In this case the plaintiffs sue the defendants under a policy of reinsurance, and seek to recover in respect of a loss suffered by a vessel called the *Dumfriesshire* under circumstances which I will mention presently. The policy sued on is one of reinsurance. The original policy was one by which the plaintiffs had insured the vessel against the ordinary perils "at and from a port in New Zealand to Nehoué, New Caledonia, and while there and thence to Grangemouth." The policy by which the plaintiffs reinsured did not cover the whole risk, but only a part of it—rather a special part, and it was an insurance of the vessel between "the 1st July 1904 until the 31st Aug. 1904 . . . whilst at port or ports, place or places, in New Caledonia." On the face of the reinsurance policy it appears to be a "reinsurance applying to policy . . ." effected with "the Maritime Insurance Company, subject to the same clauses and conditions, and to pay as may be paid thereon."

Now, for the purposes of this case one may look, or perhaps one must look, at both policies. The defendants are not liable unless the plaintiffs are liable on the original policy, and the plaintiffs are only liable if the loss occurred on the voyage from "a port in New Zealand to Nehoué, New Caledonia, and while there and thence to Grangemouth," and the defendants are only liable if the loss occurred between the 1st July and the 31st Aug., and only if the loss occurred at some "port or ports, place or places in New Caledonia." As to the reinsurance policy, the risk does not begin until the vessel has arrived, or is at a port or place in New Caledonia. If the vessel arrives at a port or place in New Caledonia, and then proceeds to some other port or place in New Caledonia, it may, perhaps, be that the loss occurs in transit, and it may be that the underwriters would then be liable. But I have not to decide that question now. How did the loss, in fact, arise? That appears from the admitted facts, pars. 3, 4, and 5. The loss occurred

by the vessel striking a reef whilst passing through Gazelle Passage, which is a passage through the outer or barrier reef which more or less surrounds the mainland of New Caledonia. Now, it may be, and I assume for the purposes of this judgment, that the place where the vessel struck was, in the ordinary sense, in New Caledonia. If the reinsurance had been against losses occurring whilst the vessel was "at" New Caledonia, it may be that the defendants would be liable. I think that would be so if the reef was in New Caledonia.

But the policy is not against losses occurring whilst "at" New Caledonia. The words used are different—"at port or ports, place or places in New Caledonia." Is the effect the same?

I have come to the conclusion that it is not. I do not think that the authorities help; indeed, in a question of this kind it is difficult to see how they could. I do not think that the words upon which the present question arises are in such a stereotyped form as to make the authorities of much use. I decide this case on my understanding of the words. Witnesses have been called, but I doubt whether the opinions that they expressed can be evidence, as the words are not a stereotyped form. I wish to say that I am deciding this on my construction of the words. Now, I think that, in construing them the first thing that strikes one is that the risk is not "at" New Caledonia. If the risk was to cover loss anywhere in New Caledonia it would have been easy to have expressed it. I think that that risk was not adopted, and not adopted intentionally, and that the reinsuring underwriters did intend to limit their risk to the time that the vessel was at a port or ports, place or places in New Caledonia. It may be that the words "place or places" do add something to "port or ports."

"Port" has a somewhat technical meaning, and "place or places" were added to show that it was not intended to confine the meaning to port or ports; but one must remember that these words are used in collocation with "port or ports," and therefore to some extent the meaning to be given to "place or places" is coloured by the words used with them in that collocation. Of course, an accident in New Caledonia must happen in a place in New Caledonia; but I do not think that the words can be read as "port or ports and anywhere else," and I think that the contention for the plaintiffs amounts to that. It is sufficient for me to decide that, where the loss occurred—namely, on a submerged reef in Gazelle Passage—the vessel had not arrived at a port or place in New Caledonia within the meaning of the policy.

The words "place or places" used with "port or ports" mean, perhaps, something rather wider than was suggested by some of the witnesses. I do not wish to attempt an exhaustive interpretation, but it seems to me that the word "place" means some place at which the vessel had arrived to load, or maybe to discharge, or to take coal, or to repair, or even to shelter, a place at which the vessel is for some purpose, not a place at which she happens to be in passing. I have come to the conclusion that the loss did not occur, within the meaning of the policy, at a "port or ports, place or places in New Caledonia." There must be judgment for the defendants.

Solicitors for the plaintiffs, *Field, Roscoe*, and *Co.*, for *Batesons, Warr*, and *Wimshurst*, Liverpool.
Solicitors for the defendants, *Parker, Garrett, Holman*, and *Howden*.

HOUSE OF LORDS.

Nov. 4, 6, *and* 21, 1907.

(Before the LORD CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords MACNAGHTEN and ATKINSON.)

NELSON LINE LIMITED *v.* JAMES NELSON AND SONS LIMITED. (*a*)

ON APPEAL FROM THE COURT OF APPEAL IN ENGLAND.

Charter-party—Exceptions—Unseaworthiness at commencement of voyage—Damage to goods—Exception of damage "capable of being covered by insurance or which has been wholly or in part paid for by insurance"—Liability of shipowner.

Goods were shipped on board a vessel under an agreement which purported to protect the shipowner from liability under certain circumstances, but, in the opinion of the court, the language of the agreement was so ill thought out and confused that it was impossible to be certain what the parties intended to stipulate. Hence, where the goods were damaged owing to the unseaworthiness of the ship and the negligence of the shipowner's agents, it was held that the shipowner was liable as he had not discharged his duty to provide a seaworthy ship and to use reasonable care.

APPEAL from a judgment of the Court of Appeal (Collins, M.R., Cozens-Hardy and Moulton, L.JJ.), reported 10 Asp. Mar. Law Cas. 390; 96 L. T. Rep. 402; (1907) 1 K. B. 769), affirming a judgment of Bray, J. at the trial before him with a jury.

The action was brought by the respondents, as charterers and shippers of a cargo of frozen meat on board the appellants' steamship *Highland Chief* at their factories at Las Palmas, in the River Plate, in the months of March and April 1905, for carriage to London, to obtain damages against the appellants, as owners of the *Highland Chief*, for damage to the cargo caused by unseaworthiness, and by the bursting of a brine pipe in one of the holds of the vessel.

At the trial the jury assessed the damages at 23,900*l.*, and found that the *Highland Chief* was at the commencement of the voyage unfit to carry the cargo of frozen meat safely to its destination; that reasonable means were not taken to prevent unfitness; that the neglect was that of the defendants, their officers, and agents; and that no damage was done during the period of loading or before the commencement of the voyage.

Judgment was not entered upon these findings until points of law arising upon the contract were argued before the judge, and he delivered a written judgment in favour of the plaintiffs for the amount of damages found by the jury.

The appellants claimed immunity from liability under the contract of carriage, but did not challenge the facts found by the jury.

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

Clause 10 of the contract was in the following terms:

The owners are not to be liable for any loss, damage, prejudice, or delay, wherever or whenever occurring, caused by the act of God, the King's enemies, pirates, robbers, thieves, whether on board or not, by land or sea, and whether in the employ of the owners or not, barratry of master or mariners, adverse claims, restraint of princes, rulers, and people, strikes or lock-outs or labour disturbances or hindrances, whether afloat or ashore, or from any of the following perils, viz., insufficiency of wrappers, rust, vermin, breakage, evaporation, decay, sweating, explosion, heat, fire, before or after loading in the ship or after discharge and at any time or place whatever, bursting of boilers, nor for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise, and whether arising from breakage of shafts or any latent defect in hull, boilers, machinery, equipment, or appurtenances, refrigerating or electric engines or machinery, or in the chambers or any part thereof, or their insulation or any of their appurtenances, or from the consequences of any damage or injury thereto, however such damage or injury be caused, provided all reasonable means have been taken to provide against unseaworthiness, collision, stranding, jettison, or other perils of the sea, rivers, or navigation of whatever nature or kind and howsoever such collision stranding, or other perils may be caused, and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or has been wholly or in part paid for by insurance, nor for any claim of which written notice has not been given to the owners within forty-eight hours after date of final discharge of the steamer. The above mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act, neglect, or default of the stevedores, master, mariners, pilots, engineers, refrigerating engineers, tug-boats or their crews, or other persons of whatsoever description or employment, and whether employed ashore, on board, or otherwise, for whose acts or defaults the owners would in anywise in connection with the execution of this charter otherwise be responsible. . . ."

Clause 18 contained the words:

The protection given by this article to the owners is intended to be in addition to that given by art. 10, but is subject to the proviso as to taking means to prevent unseaworthiness therein contained.

J. A. Hamilton, K.C. and *Bailhache*, for the appellants, contended that in the Court of Appeal it was said that the case was covered by the decision in *Price* v. *Union Lighterage Company* (9 Asp. Mar. Law Cas. 398; 88 L. T. Rep. 428; (1903) 1 K. B 750; affirmed on appeal, 89 L. T. Rep. 731; (1904) 1 K. B. 412), but that case is distinguishable, as are also *Sutton and Co.* v. *Ciceri and Co.* (62 L. T. Rep. 742; 15 App. Cas. 144) and *Elderslie Steamship Company* v. *Borthwick* (10 Asp. Mar. Law Cas. 24, 121; 92 L. T. Rep. 274; (1905) A. C. 93). The principle of those decisions is that if a shipowner desires to free himself from liability, he must use clear and unambiguous language to effect his purpose. Here the intention is clear that the shipowner should not be liable for any loss which has been covered by insurance.

R. Isaacs, K.C., *Scrutton*, K.C., and *Atkin*, K.C., for the respondents, argued that in construing a contract the whole document must be looked at in order to arrive at the intention of the parties. In all contracts for the carriage of goods by sea there is a fundamental obligation implied on the part of the shipowner to provide a seaworthy vessel, and to take reasonable care, and the contract must be construed with reference to it. Any intention to get rid of this obligation must be made perfectly clear; general words are not sufficient. In the absence of express words, exceptions only apply to the case of an owner who has fulfilled his primary obligation by supplying a seaworthy ship. The contract will not bear the interpretation put on it by the appellants. In addition to the cases referred to by the appellants, they cited

Tattersall v. *National Steamship Company*, 5 Asp. Mar. Law Cas. 206 (1884); 50 L. T. Rep. 299; 12 Q. B. Div. 297;

Phillips v. *Clark*, 29 L. T. Rep. O. S. 181; 2 C. B. N. S. 156;

Steinman v. *Angier Line*, 7 Asp. Mar. Law Cas. 46; 64 L. T. Rep. 613; (1891) 1 Q. B. 619;

Owners of Cargo on Ship Maori King v. *Hughes*, 8 Asp. Mar. Law Cas. 65; 73 L. T. Rep 141; (1895) 2 Q. B. 550.

J. A. Hamilton, K.C. was heard in reply.

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

Nov. 21.—Their Lordships gave judgment as follows:—

The LORD CHANCELLOR (Loreburn).—My Lords: The plaintiffs shipped a cargo of meat on the defendants' vessel under an agreement of the 18th June 1904. The cargo was lost by reason of the vessel's unseaworthiness, which was due to the defendants' negligence, and in this action the sole question is whether or not they are freed from liability by certain words in the agreement. If the words are considered by themselves they seem to excuse the shipowners, not merely from this, but from any imaginable liability, except such as by law cannot be underwritten. They run as follows: "The owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or has been wholly or in part paid for by insurance." But the whole agreement must be regarded, and especially the context of the clause in which this alleged exemption occurs. The words in question do not stand by themselves; they are at the end of a very long sentence, the earlier part of which is wholly without effect if the last part means what the defendants maintain. Beyond that there are two potent considerations weighing heavily against the defendants. One is that in this clause the words in dispute are preceded by an express provision dealing with the very subject of unseaworthiness and negligence, which would be flatly contradicted and overruled by the defendants' interpretation; and yet there follows immediately another sentence which assumes that this express provision is still operative. The other consideration is that in the 18th clause, which is a later clause, the language is again used which shows that the parties supposed this same express provision still to be operative, whereas on the defendants' construction it had ceased to have any effect. I am aware that on the alternative interpretation there would also be some redundancy in this agreement, but there would not be irreconcilable stipulations in one and the same clause. If I were obliged to fix a definite meaning to the disputed language, I should prefer the plaintiffs' construction. But, in truth, I think that the clause, taken as a whole, is so ill thought out and expressed that it is not

possible to feel sure what the parties intended to stipulate. The law imposes on shipowners the duty of providing a seaworthy ship and of using reasonable care. They may contract themselves out of those duties, but unless they prove such a contract the duties remain; and such a contract is not proved by producing language which may mean that, and may mean something different. As Lord Macnaghten said in the case of *Elderslie Steamship Company* v. *Borthwick* (*ubi sup.*), "an ambiguous document is no protection." That is the ground on which I rest my opinion. I wish to say, with the utmost respect for Mr. Scrutton's arguments, that I cannot agree with him in what I think was his contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning—namely, what do the words mean on a fair reading, having regard to the whole document? I am afraid that it is useless to draw the attention of commercial men to the risks which they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them, when a question is raised; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract.

The Earl of HALSBURY.—My Lords: I am entirely of the same opinion. The only observation which I wish to make is in reference to the language used by commercial men. Lord Blackburn used to say that the difference between commercial men and lawyers was that commercial men wished to write their documents short, and lawyers to write them long. But a mixture of the two renders the whole thing unintelligible. I can understand cases where the documents of commercial men acquire a particular meaning, and the courts will give effect to the common interpretation of such words. But here is a document where apparently the draughtsman has put every conceivable hypothesis into it. He was not content to put in a protective clause which might have had an effect. He has gone on as if he were a lawyer to endeavour to make the document as long as possible, and to deal with every part of the subject-matter. Not unnaturally, that sort of composition leads to the document contradicting itself. In one part it is said that the defendants should not be liable at all, and in another that they should be liable under certain circumstances. How is it possible for any court to give a construction to such a document? The result is that the draughtsman has only jumbled together a number of phrases to which no legal interpretation can be given, so that in the result the legal liability remains.

Lord MACNAGHTEN.—My Lords: I concur.

Lord ATKINSON.—My Lords: I also agree with my noble and learned friend on the woolsack.

Judgment appealed from affirmed and appeal dismissed with costs.

Solicitors for the appellants, *Rawle, Johnstone, and Co.*, for *Hill, Dickinson, and Co.*, Liverpool.

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

Monday, Nov. 25, 1907.

(Before the LORD CHANCELLOR (Loreburn), the Earl of HALSBURY, Lords MACNAGHTEN, JAMES OF HEREFORD, ROBERTSON, and ATKINSON).

SIR JAMES LAING AND SONS LIMITED *v.* BARCLAY, CURLE, AND CO. LIMITED. (*a*)

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

Shipbuilding contract—Payment by instalments—Passing of property — Contract for completed ship—Sale of Goods Act 1893 (56 *&* 57 *Vict. c.* 71).

Where a ship was built to order, under the inspection of an agent of the owner, and the contract provided that the price was to be paid in instalments as the work progressed and was approved, the final instalment to be paid six months after delivery to the owner:

Held (affirming the judgment of the court below), that the property did not pass to the owner until the ship was completed and delivered, the contract being for a finished ship.

APPEAL from a judgment of the First Division of the Court of Session in Scotland consisting of the Lord President (Lord Dunedin) and Lords M'Laren and Kinnear.

The case is reported 45 Sc. L. Rep. 87.

The judgment of the court below recalled arrestments by the appellants of the vessel 468, lying in graving dock at Glasgow, and of vessel 469, then on the stocks in the shipbuilding yard of the respondents.

The ships were being built for an Italian company by the respondents, and the main question was whether, under an agreement between the respondents and the Italian company, dated the 11th Feb. 1907, and ratified on the 11th March, whereby the respondents agreed to build and sell and the Italian company agreed to purchase the steamers, the property in the two vessels constructed, or so far as constructed, was vested in the respondents or in the Italian company.

On the 26th Oct. 1907 a summons was signeted at the appellants' instance against the Italian company, concluding for payment to the appellants of sums amounting in all to 220,091*l.* 14*s.* 9*d.*, due by that company to the appellants as the balance of the purchase price of three steamers built for and sold and delivered by the appellants to that company.

The appellants' contention was that by the law of England and of Scotland, when the price of a ship under a building contract was to be paid for by instalments as the work progressed, the property passed to the purchaser as the vessel was constructed, its work inspected and approved, and the instalments duly paid. They accordingly arrested these ships in the respondents' yard, under their summons, as being the property of the Italian company.

Under the agreement between the respondents and the Italian company it was provided that the vessels, which were to be built according to certain specifications, should be completed ready for leaving, after steam trials, on or before certain specified dates.

By art. 8 it was provided that "on completion of each of the steamers at Greenock upon the

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

terms and conditions aforesaid, the builders shall, in exchange for the purchase money due to them up to and including delivery instalment, and for a bank guarantee for the final instalment" hand over to the purchasers the usual certificates.

Art. 10 provided that the purchasers should be entitled to appoint an expert to superintend the construction of the vessels and machinery, and art. 11 that the vessels should be at risk of the builders until they left Greenock, up to which date the builders should keep them insured.

The contract further provided that the price of each of the said steamers should be payable in cash instalments at certain stages of their construction—viz., when the contract was signed, when the keel was laid, when the vessels were framed, when plated, when launched, when handed over after steam trials at Greenock, and the final instalment six months after delivery to owners at Genoa.

The Italian company duly appointed a representative, under whose supervision and inspection the construction of the vessels was to be and was being carried out. They had further made payment to the respondents of the instalments as they became due. Five or six of the instalments had been paid on ship No. 468; three or four on ship No. 469. The amount of such instalments was about 221,000*l.*

J. Avon Clyde, K.C. (of the Scotch Bar), *F. E. Smith*, and *J. Macgregor* (of the Scotch Bar) appeared for the appellants, and contended that by Scotch law on the sale of a corporeal immovable to which something more had to be done by the vendor—*i.e.*, a sale with an "executory clause"—the property passed to the purchaser to the extent to which the article was completed. (See Bell's Principles of Scotch Law, sects. 1303, 1328). The Sale of Goods Act 1893 (56 & 57 Vict. c. 71) leaves the common law as to executory contracts intact. See sect. 62, which defines specific goods. Here the ship was not in existence when the contract was made, and therefore it could not be "specific goods" within sect. 18 of the Act. Sect. 6 relates to the sale of unascertained goods, and an unbuilt ship must be "unascertained." A contract to build a ship cannot be a contract for the sale of ascertained goods. See *Seath* v. *Moore* (5 Asp. Mar. Law Cas. 586 (1886); 54 L. T. Rep. 690; 11 App. Cas. 350), which was a case decided before the Act, in which it was held that a mere agreement to transfer was ineffectual. [The Lord Chancellor.—Does it not come to a question of intention? What did the contract really mean?] Here by the contract the parties intended the property to pass on payment of the instalments, and there was a constructive delivery, or, if not, sect. 18, r. 5, of the Act of 1893 applies. See *McBain* v. *Wallace* (45 L. T. Rep. 261; 6 App. Cas. 588) as to reputed ownership, per Lord Selborne, L.C., citing *Holderness* v. *Rankin* (2 De G. F. & J. 258; 29 L. J. 753, Ch.). See also *Reid* v. *Macbeth and Gray* (90 L. T. Rep. 422; (1904) A. C. 223) and the earlier Scotch cases, *Simson* v. *Duncanson* (Mor. Dict. 14,204, and note to 6 App. Cas. 598 and 11 App. Cas. 362), *Wylie and Lochead* v. *Mitchell* (8 Macph. 552), *Orr's Trustees* v. *Tullis* (8 Macph. 936), and *Spencer and Co.* v. *Dobie and Co.* (7 R. 396). The property passed as the instalments were paid, and the Act of 1893 has not altered the old common law of Scotland. The clear intention of the parties was that the property should pass to guard against the possible insolvency of the builder. *Clark* v. *Spence* (4 A. & E. 448; 43 R. R. 395) was a very similar case. See also the English decisions in *Woods* v. *Russell* (5 B. & Ald. 942; 24 R. R. 621), *Atkinson* v. *Bell* (8 B. & C. 277), *Laidler* v. *Burlinson* (2 M. &. W. 602; 44 R. R. 717), and *Wood* v. *Bell* (5 E. & B. 772; on appeal, 6 E. & B. 355), which are discussed in Benjamin on Sale, 4th edit., p. 293 *et seq.*

Scott-Dickson, K.C. and *D. P. Fleming* (both of the Scotch Bar), who appeared for the respondents, were not called on to address their Lordships.

At the conclusion of the argument for the appellants their Lordships gave judgment as follows:—

The Lord Chancellor (Loreburn).—My Lords: It is not necessary to trouble counsel for the respondents. The question is as to whether the property has passed, and whether the parties intended by their contract that it should pass. I must say that I do not know that any conclusive use can be made of the comparison of the language of a contract and the language that is used in regard to other contracts in judgments. I have always myself some misgivings when presumptions of fact—that is to say, presumptions in regard to the interpretation that is to be put upon particular words in a contract apart from their natural signification—are put forward. They may be of great use of a kind and to a certain degree, but, after all, the question is what the contract says that the parties intended to do. The facts referred to by Mr. Clyde and Mr. Smith—namely, that this ship was to be paid for by instalments, and that there were powers of inspection on the part of the purchaser—may be marks or badges pointing to the property passing, but there is nothing conclusive, and the question still remains as to what they meant. I think that the contract was for a complete ship, which was to remain with the builder until delivery, and that there was no intention to make delivery or pass the property until the ship was completed. Under these circumstances I consider that the appeal should be dismissed.

The Earl of Halsbury.—My Lords: I am of the same opinion. A contract might no doubt have been framed which would have given to the purchasers the property in the parts of the ship as they were successively finished; but that is not the case here. I also have misgivings with respect to the use of the word "presumption" in connection with a contract the language of which has to be construed. What your Lordships have to do is to interpret the contract as it is brought before you, and it appears to me to be a contract for a completed ship.

Lords Macnaghten and James of Hereford concurred.

Lord Robertson.—My Lords: The question in the present appeal seems to me to be governed by the Sale of Goods Act 1893, and by that statute to be determinable by the intention of the instrument under which the ship was built. In aid and supplement of construction the statute supplies certain rules, but these rules may or may not come into operation according as

the contract requires it. In the present case I find the contract to require no aid or supplement from the statutory rules, for it seems to me to provide from the beginning for the completion of this ship by the shipbuilders with their materials, and transfers it to the purchasers only as a finished ship, and at a stage not yet reached. This is a simple view of the matter, but in my judgment it is the sound one. It treats the Sale of Goods Act as superseding the previous law, and if in some instances it may be found necessary to revive and reconstruct the old common law for purposes of consideration, I can only say that that occasion has not yet come. I therefore concur in the conclusion of the Court of Session, which rests on the contract. It seems right, however, to say that this does not imply concurrence in all that is said by way of statement of doctrine in the judgments of the learned Lords. Some of them seem open to exception, or at least criticism, but the judgment of the learned judges does not seem to have been at least minutely considered. Among matters of omission I think that the fifth head of the 18th section of the Act is so directly applicable that it required perhaps more attention than it received. But I do not require to enter on those disputable matters, as the grounds of judgment which your Lordships adopt are common to us and to their Lordships of the First Division.

Lord ATKINSON concurred.

Judgment appealed from affirmed, and appeal dismissed with costs.

Solicitors for the appellants, *Pritchard, Englefield,* and *Co.*, for *Steedman, Ramage* and *Co.*, Edinburgh.

Solicitors for the respondents, *Burchells,* for *H. B.* and *F. J. Dewar*, Edinburgh, and *Montgomerie* and *Fleming*, Glasgow.

Supreme Court of Judicature.

COURT OF APPEAL.

Oct. 22 *and* 23, 1907.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ., and Nautical Assessors.)

THE GUILDHALL. (*a*)

Collision—Risk of collision—Steam vessels meeting in the Thames—Duty to port—Art. 46 *of the Thames By-laws* 1898.

Two steam vessels were meeting in the Thames a little above Cuckold's Point. The steam vessel coming up the river sighted the other steam vessel with her starboard side open to them, about 400 *yards off and half a point on their starboard bow. The steam vessel coming up the river kept a starboard helm and sounded two short blasts on her whistle, which the other vessel, as she was porting her helm, replied to with one; whereupon the engines of the vessel coming up stream were immediately reversed and three short blasts were sounded on her whistle, and, although the engines of the down coming steam vessel were also reversed and a three-blast signal was sounded on her whistle, a collision occurred.*

Held, by the Court of Appeal varying the decision of the court below, that art. 46 *of the Thames By-laws applied, and that the steamers ought to have passed port side to port side.*

Held, further, by Buckley, L.J.: Risk of collision is a question of opinion rather than a question of fact, and does not mean that an accident presumably will happen, but that the circumstances are such that precautions ought to be taken to preclude the possibility of danger resulting.

DAMAGE ACTION.

The appellants, who were the plaintiffs in the court below, were the General Steam Navigation Company Limited, the owners of the steamship *Leeuwarden*; the respondents, who were the defendants in the court below, and counterclaimed for damage done to their vessel, were the owners of the steamship *Guildhall.*

The collision which gave rise to the action occurred about 11.57 a.m. on the 16th Dec. 1906, in the river Thames a little above Cuckold's Point. The wind at the the time was south-west, a light air, the weather was hazy and the tide flood, of the force of about two knots.

The case made by the appellants (plaintiffs in the court below) was that shortly before 11.55 a.m. on the 16th Dec. 1906 the *Leeuwarden*, a steel screw steamship of 990 tons gross and 374 tons net register, 230ft. long, manned by a crew of seventeen hands all told, was, whilst on a voyage from London to Harlingen with a general cargo, going down the river Thames to the south of mid-channel. The *Leeuwarden* was on a down-river course to round the bend of the Lower Pool, and was making about two to three knots over the ground. A good look out was being kept on board of her.

In these circumstances those on the *Leeuwarden* first noticed the *Guildhall* with a tug in attendance about 500 yards off and about ahead. Just about this time the helm of the *Leeuwarden* was a-port and her engines stopped to pass to the south of a dumb barge, so one short blast was sounded on her whistle, her engines put on slow, and her helm ported a little more. The *Guildhall* replied with one short blast, but seemed to act as if under starboard helm, though her tug was towing to the northward, whereupon the engines of the *Leeuwarden* were put full speed astern, and three short blasts were sounded twice on her whistle, but the *Guildhall* came on, also blowing three blasts, and with her stem struck the *Leeuwarden* on the port bow, doing damage.

Those on the *Leeuwarden* charged those on the *Guildhall* with not keeping a good look-out, with sounding misleading signals, with negligently starboarding, with neglecting to pass the *Leeuwarden* port to port, with neglecting to slacken their speed and stop and reverse in due time or at all, and with breach of art. 46 of the Thames Rules.

The case made by the respondents (defendants in the court below) was that shortly before 11.57 a.m. on the 16th Dec. the *Guildhall*, a screw steamship of 2609 tons gross and 1659 tons net register, fitted with engines of 250 horse

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law

power nominal, was proceeding up the river Thames in charge of a duly licensed Trinity House pilot, on a voyage from Bussorah to London, with two passengers and a general cargo, manned by a crew of twenty-six hands all told. The *Guildhall* was rounding Cuckold's Point under starboard helm with the tug *Challenge* in attendance, and was making about a knot through the water with her engines stopped, and a good look-out was being kept on board the *Guildhall* and on her tug. In these circumstances those on the *Guildhall* observed the *Leeuwarden* distant about a quarter of a mile with her starboard side open to them, and bearing a little on the starboard bow. When the *Leeuwarden* was seen two short blasts were sounded on the whistle of the *Guildhall*, and her helm was kept a-starboard, and afterwards steadied. Shortly afterwards the *Leeuwarden* sounded one short blast. The engines of the *Guildhall* were immediately put full speed astern, and three short blasts were blown on her whistle. The *Leeuwarden* answered with three short blasts; but coming on at an excessive speed under port helm struck with her stem the stern of the *Guildhall*, doing her great damage.

Those on the *Guildhall* charged those on the *Leeuwarden* with not keeping a good look-out, with proceeding at an excessive and improper speed, with improperly porting, and with neglecting to slacken her speed or stop or reverse.

Alternatively, the defendants pleaded that the *Guildhall* was in charge of a duly qualified pilot, within a district where the employment of such pilot was compulsory by law, and that if and so far as the collision was caused or contributed to by any negligence of anyone on board the *Guildhall*, the negligence was that of the pilot, for whose fault the defendants were not answerable.

Art. 46 of the Thames By-laws is as follows:

46. When two steam vessels or steam launches, proceeding in opposite directions, the one up and the other down the river, are approaching each other so as to involve risk of collision, they shall pass port side to port side.

Aspinall, K.C. and *Bateson* appeared for the plaintiffs.

Laing, K.C. and *Dawson Miller* appeared for the defendants.

May 13.—Bucknill, J.—This is a case of a collision between the steamship *Leeuwarden*, the property of the General Steamship Navigation Company, and the defendants' steamship the *Guildhall*, which took place off, or about off, Cuckolds Point in the river Thames about noon on the 16th Dec. 1906. The *Leeuwarden* is a steamship of 990 tons gross, and she was bound from London to Harlingen. The *Guildhall* is a screw steamship of 2600 tons gross, and she was bound up the river in charge of a duly licensed Trinity House pilot from Bussorah to London, and she had two passengers on board. The case for the plaintiffs is shortly this: That they were proceeding down, to the south of mid-channel, withal, and had manœuvred for barges which were to the southward of mid-channel, and, having passed very close to one of them, were still proceeding down at a moderate speed; that the *Guildhall* was then seen to the northward of mid-channel, about 500 yards away, and nearly ahead; that the *Leeuwarden* then sounded one short blast, as a port helm signal, ported her helm and put her engines slow ahead, they having been stopped shortly before; that the *Guildhall* then blew one short blast signal, but was then seen to be acting under a starboard helm, whereupon the engines of the *Leeuwarden* were reversed full speed and three short blasts were sounded on her whistle, and shortly after that the collision happened. Her witnesses said that her first reversing signal was not answered by those on board the *Guildhall*, so another reversing signal was given, and then the *Guildhall* gave three blasts in reply. The story told by the witnesses from the *Guildhall* is that they were bound up river and were coming up about mid-channel, or slightly to the southward withal; that the *Guildhall* had, shortly before seeing the *Leeuwarden*, acted for a down coming steamer by giving her a starboard helm signal, and that those two steamers had passed starboard side to starboard side; that the *Guildhall* never got to the north of mid-channel; that she was passing up slowly with a tug in attendance, which tug was not at the time towing at her; that those on board the *Guildhall* were anxious about her, considering her draught, coupled with the fact that she was going to turn round shortly afterwards under the port helm, and she was therefore never at that time to the northward of mid-channel. Then it is said that the *Leeuwarden* was reported by the look-out. I may say at once that I find that a good look-out was kept on board the *Guildhall*, and that the *Leeuwarden* was reported to the pilot and that the pilot saw her, the *Leeuwarden*, bearing then about half a point on the *Guildhall*'s starboard bow, and about a quarter of a mile distant; but, whatever the exact bearing was, the starboard side of the *Leeuwarden* was visible to those on board the *Guildhall*. The *Guildhall* then gave two short blasts and the *Leeuwarden* replied with one, exactly the opposite of the story told by the *Leeuwarden*, which is that the *Leeuwarden* gave one short blast first. The *Guildhall* then says, having given those two short blasts, which the *Leeuwarden* answered with one and indicating that she was proceeding under a port helm, that the engines of the *Guildhall* were immediately reversed and three blasts of the whistle were sounded; but the *Leeuwarden*, coming on very fast, struck the *Guildhall* with her stem, doing considerable damage. Now, I have to find the facts, and the first fact I find is that the witnesses on board the *Guildhall* are telling the truth when they say she was about in mid-channel, or a little bit to the southward withal, coming up under a steady starboard helm, and that they had passed a down-coming steamer starboard side to starboard side, and had passed safely, and that the *Guildhall* was still acting under a slight starboard helm when the *Leeuwarden* was reported. I also find as a fact that the *Guildhall* was the one that gave the helm signal first; and I find as a fact that she did not blow a port helm signal at all, but blew two short blasts. She was then coming round the bend under a starboard helm, and she may have starboarded—but I do not say that she had—for the other down-coming steamer, but she was and had been for some time before the *Leeuwarden* was seen coming round under a

starboard and steady starboard helm. I find as a fact also that those on board the *Guildhall* saw the *Leeuwarden* slightly on her starboard bow, and showing her starboard side, and it is to that fact, that those on board the *Guildhall* saw the starboard side of the *Leeuwarden*, that the court attaches very much importance. That being so, it follows that I cannot accept the story told by those on board the *Leeuwarden*. I cannot accept the story told by the *Leeuwarden* that she was to the southward of mid-channel, and that the *Guildhall* was on her port bow, nor can I accept the story about the helm signals, that the *Guildhall* blew one short blast and yet acted as if under a starboard helm. I find also that the *Leeuwarden* was going faster at the time of the collision than it was alleged she was. I do not find that she was going down the river at too great a rate of speed because she had a two-and-a-half knot tide against her, and the speed at which she was going, supposing it was five knots, represents only two and a half over the ground. I cannot accept her story with regard to the helm signals, and I cannot accept her story of the place of collision with regard to mid-channel. Now, having found those facts, I have asked the Elder Brethren certain questions. I have asked them, "Assuming that the *Leeuwarden* was showing her starboard side to the *Guildhall*, was the *Leeuwarden* justified in the circumstances in porting?" The answer is, "No, she was not." I have asked them this other question: "Supposing the *Leeuwarden* had done nothing except to proceed down under a steady helm on a steady down-river course, when she was showing her starboard side to the upcoming ship, would there have been any collision at all, on the supposition, as I have found it, that the *Guildhall* was then acting under a steady starboard helm?" The answer is: "No; there would not have been a collision, and the down-coming steamer would have passed safely starboard side to starboard side to the *Guildhall*, as, indeed, the one which preceded her had, in fact, done." That being so, it follows that this collision was not caused by anything that was done on board the up-coming steamer, but that it was caused by the *Leeuwarden* improperly porting her helm. Now, in confirmation of that opinion, which is given to me by the Elder Brethren, I have this fact. I put this question myself to the master of the down-coming steamer. I said: "But do you mean to tell me, if the story of the *Guildhall* is correct, that if you were slightly on her starboard bow you would still have ported your helm?" He said, "Yes, I should." Then I said, "Although she was starboarding her helm and giving you a starboard helm signal?" And he answered, "Yes, I should." That shows that the captain was acting under what I call a delusion, or an obstinate determination in certain cases to port the helm, and that if you port your helm you cannot be wrong; but you may well be wrong, and I find, as a last fact, that at the time when the down-coming steamer ported her helm the two ships, being in the relative positions which I have found, were not proceeding so as to involve risk of collision, and, therefore, that the Thames rule as to porting did not apply. I think I have covered the whole ground; and my judgment is that the plaintiff ship the *Leeuwarden* is alone to blame.

On the 6th June 1907 the plaintiffs delivered a notice of appeal asking that the decision of Bucknill, J. might be reversed, and that it might be pronounced that the collision was solely occasioned by the fault or default of the owners, master, and crew of the steamship *Guildhall*, and that the defendants' counter claim might be dismissed and the plaintiffs' claim for damages be pronounced for, and the defendants be condemned in such damages and in the costs of the proceedings in the court below and on the appeal.

Aspinall, K.C. and *A. D. Bateson* for the appellants.—The *Leeuwarden* was justified in porting; she had to round the point, and would naturally keep on her starboard side of the river. Rule 46 of the Thames Rules applies, for risk of collision existed even though the vessels were starboard to starboard, as found by the learned judge:

The Odessa, 46 L. T. Rep. 77; 4 Asp. Mar. Law Cas. 493.

Both the vessels should have ported. By following the rule each vessel takes the same action, viz., ports. The *Guildhall* should have kept to her starboard side of the channel. [Lord ALVERSTONE, C.J.—Where there is no starboard hand rule, may not a vessel navigate on either side of a river? *The Ecossaise*, *Shipping Gazette*, Dec. 15, 1885.] Possibly; but here you have two vessels meeting near a bend; the navigation is difficult, for the river is narrow; and, in view of r. 46, it would have been prudent for the *Guildhall* to keep on her starboard side of the channel. The plea of compulsory pilotage should fail, as the pilot did receive the assistance he was entitled to from the crew.

Laing, K.C. and *Dawson Miller* for the respondents.—The learned judge in the court below did not accept the story told by the *Leeuwarden*, and has found the vessels were meeting starboard to starboard, and in such a way that they would have passed all clear if the *Leeuwarden* had kept on a steady down river course. That being so, *The Odessa* (*ubi sup.*) has no application, for the rule is not that every vessel meeting another is to port, but only when vessels are meeting so as to involve risk of collision. The provisions of r. 46 are not the same as the provisions of the rule in the case of *The Cleopatra* (Swabey 135). In any event, the owners of the *Guildhall* are not to blame for the collision, the fault on their vessel being the fault of the pilot, and he received all the assistance it was possible to give him.

Lord ALVERSTONE, C.J.—This case has given me a very great deal of difficulty, and, but for the fact that I think it very important that I should give judgment while I have a very clear recollection of the arguments and the facts, and but, also, for the fact that it seems to me we have to deal with a very broad principle in this case, should have liked further to consider the matter. I have been very much impressed in favour of the respondents with the recollection and reflection that the appellants took into court a case which the judge has wholly disbelieved. They said a port helm signal was given from the *Guildhall*; they said her helm was all wrong, and she would not steer, and they put themselves far away over to the south. Some of their witnesses stated that they were as much as half-

way between mid-channel and the south shore. I can quite understand the learned judge, in deciding as he did against the *Leeuwarden*, was very much influenced, as I am sure I should have been influenced, by the fact that the case which was made by the *Leeuwarden* had broken down hopelessly in many respects. Now we are face to face with the application of art. 46, the old rule 22, in a part of the river where its operation has not had to be directly considered before, where there is a narrow waterway. There are influences of tide in one way or the other—in this case a flood tide—underneath a ship going up, and, of course, craft which may or may not impede the navigation of one vessel or the other. We have to say what are the duties of the two ships when they are navigating in such a part of the river as that, and what are their obligations, having regard to the directions of art. 46. Now, at one time it seemed to me, listening to the arguments of counsel for the respondents, that a short answer to this appeal might be given upon the ground that the learned judge had held that at a distance of, roughly, 400 yards or thereabouts, when these vessels sighted one another, at any rate, from the point of view of manœuvring for one another, the *Leeuwarden* had so navigated herself, or was so navigated, having regard to what she had done before, that she brought herself showing her starboard side upon the starboard bow of the *Guildhall*; and that being so, to take the learned judge's language, "in the relative positions in which they then were proceeding, they were not proceeding so as to involve risk of collision." I do not overlook the fact that he had said the *Leeuwarden* was bearing about half a point on the *Guildhall's* starboard bow, and about a quarter of a mile distant. I confess I should have had a good deal of difficulty, examining the evidence, in finding she had ever got so broad as that, but I assume for the moment that that was what the learned judge's opinion was. The *Guildhall* was "in about mid-channel or a little bit to the southward withal, coming up under a steady starboard helm," and "the *Guildhall* saw the *Leeuwarden* slightly on her starboard bow, and showing her starboard side." I think counsel for the respondents did satisfy me that in putting the question which he did to the Elder Brethren it must be assumed the learned judge had told them, or they would know, that the *Leeuwarden* was showing her starboard side to the *Guildhall* a little on the starboard bow of the *Guildhall*. If that explanation is not given it is extremely difficult, of course, to reconcile the way in which the question was put to the Elder Brethren. If I had not been convinced that there were other considerations to be dealt with in this case, and that we had perhaps to look at the matter from a slightly different standpoint, it would have satisfied me to have affirmed this decision upon the ground that the learned judge had found that at a distance of 400 yards these two vessels were proceeding upon concentric circles, one under starboard and the other under port helm, that the circle in which the *Guildhall* was going was well inside the circle in which the *Leeuwarden* was going, and therefore there was no risk of collision. But, after the consideration I have given to this case from the time I have understood it, after very anxious consideration, it seems to me both upon principle and authority, that would be too dangerous a view to adopt. I am not going to deal with this question and to differ from the learned judge upon the ground that he did not put the fact that the *Leeuwarden* was upon the starboard side of the *Guildhall* in that question to the Elder Brethren. But, of course, it really goes without saying, because the learned counsel are agreed that, if the real question which he considered was whether the *Leeuwarden* was showing her starboard side to the *Guildhall* independently of the position of the *Leeuwarden* on the starboard side of the *Guildhall*, he would certainly not have considered the proper question. Therefore I do not assume that he only regarded the *Leeuwarden* showing her starboard side to the *Guildhall*.

We are advised by our assessors, and, so far as a landsman may, it seems to me I should concur with the view, at any rate if we apply the principles of certain decisions — we are advised that, even taking the *Guildhall* to have got the *Leeuwarden* slightly, or fine, or a quarter of a point, which I think is the outside at which it can be put, upon her starboard bow, they were still approaching round such a point as this as to involve risk of collision. That is the advice given us by our assessors, and I certainly see no reason, so far as I am entitled to express any opinion, to differ from it. It does seem to me, if the rule means anything, we have got to apply it in a case in which the total waterway is said to be but 600ft. wide. You have got the question of what may be the effect of tide setting vessels over the one way or the other, the effect of difficulties of navigation which may prevent there being the clear concentric circles to which reference has been made; and certainly it does not seem to be suggested in this case that there is any obstruction on the north side of the river to prevent the *Guildhall* having gone up to the starboard side of mid-channel — that is, acting under her port helm. We have to consider whether or not there is any authority that would justify us in coming to the conclusion that, if the *Leeuwarden* had gone slightly upon the starboard bow of the *Guildhall*, we ought still to hold that there is no risk of collision in the face of the advice given to us by our assessors that the vessels were approaching so as to involve risk of collision, and the duty of each one of them was to port. So far as there is any authority it certainly tells the other way. The case of *The Odessa* (46 L. T. Rep. 77; 4 Asp. Mar. Law Cas. 493), which has been admitted by counsel for the respondents to be a difficulty in his way, is a case in the Court of Appeal. Counsel for the respondents has said it is treated with something like contempt in the Admiralty Court whenever it is cited, and he rather attributed to me a certain part of the blame because I had something to do in a humble way with the case in the court below. But we have to look at what was said by the learned judges dealing with a case in which the vessels were approaching green to green. If we had been advised that the fact that this was a daylight collision and the vessels could so clearly see their relative positions in the channel as to make *The Odessa* (*ubi sup.*) not an authority which had to be considered from a legal and navigation point of view, different considerations might have arisen. But accepting, as I am

bound to do, the advice given by our assessors as to the duty of these ships from a navigation point of view, and having regard to the fact that, as seamen, they tell us the two ships were approaching so as to involve risk of collision, it does become important to see what was said in *The Odessa* (*ubi sup.*) on this point. Brett, L.J., who speaks with great authority on these matters, said: "I take that judgment to be that the position of the vessels, even as given by the witnesses for the *Murton*, was, in the opinion of the assessors below, such, not that there must have been a collision if they proceeded in the courses they were then upon, but that there would have been risk of collision in this sense—that if the vessels had kept on they would have passed so closely to each other that any small obstruction in the river or slight variation in their course would have caused a collision. In other words, they were in such a position that if they had continued their course, there would have been reasonable risk of a collision." This collision occurred in Gravesend Reach where the river is very much wider and there is much less chance of obstruction than in the Limehouse Reach. Brett, L.J. proceeds: "Now it is said that the vessels were going on nearly parallel courses, and that they were a quarter of a mile off when they saw each other's green light. That is true. But how did each vessel see the green light of the other? Those on board the *Murton* saw the green light of the *Odessa* a point on their starboard bow. That might be, although the vessels were not on exactly parallel courses, but if one vessel was only slightly pointing to the other the two vessels might have crossed one another's course. It is only on the supposition that both vessels would keep on parallel courses that they would pass each other without collision. Mr. Butt says that so long as green light was to green light there would be no danger of a collision, and he says if we hold to the contrary that will be making a hard-and-fast rule. On the contrary, I think that if we adopted his theory we should be making a hard-and-fast rule. Whether there is risk of collision must be a question of fact and skill to be decided by the learned judge with the assistance of assessors on the evidence brought forward." Then he goes into the question of the number of points. I cannot help pointing out that if that kind of reasoning was applied in such a case as *The Odessa* (*ubi sup.*) it certainly in my judgment applies *a fortiori* when we are dealing with a case the facts of which are such as those which appeared from the judgment I have briefly summarised when I said I assumed for the moment that the learned judge thought the vessels were rounding this point, one under starboard helm, and the other port, the *Leeuwarden* getting a quarter of a point, or slightly or fine on the starboard bow of the *Guildhall*. Their passing on the concentric circles depends on the degree of starboarding and porting of each ship; it depends upon there not being influence of tide or other influences which might tend to make the circles non-concentric. And it does seem to me there is good sense in holding that our assessors are right when they advise us that it was cutting it too fine. I notice also that Mr. Butt, the eminent counsel who was then appearing on the appeal, cited *The Cleopatra* (Swab. 125) to the court, and therefore if the distinction which has been attempted to be drawn by counsel for the respondents could be drawn in that case, no doubt it would have been pointed out by the court. But certainly it would not apply to the case we are dealing with of the vessels approaching this crowded part of the Thames, with the difficulties, not to say dangers, of navigation to which I have referred. I think, therefore, even taking the case as the learned judge found it, and assuming that there was involved in his direction to the assessors that the *Leeuwarden* was slightly upon the starboard bow of the *Guildhall*, we must act on the advice given us, even on this state of facts, that these vessels were approaching so as to involve a risk of collision.

I think I ought to add for myself that I should have had a very great deal of difficulty in going as far as the learned judge did upon the facts. I quite understand we are dealing with a question of fact, and I do not say I should have been disposed to reverse him for a moment if there had been only the question of fact. But going through the evidence I have come to the conclusion that both these vessels as they came up were very near mid-channel, possibly one a little to the south, possibly one a little to the north, but the impression produced upon my mind on all the evidence which has been read to us is that these vessels were, practically speaking, approaching very nearly in mid-channel, and therefore the initial position when they each began to round the point was of vessels approaching so as to involve risk of collision. I should have had a difficulty in thinking there would have been anything like as much getting on the starboard bow of the *Guildhall* as would have determined that risk of collision when it existed. The consequence is that, in my opinion, the appeal ought to be allowed on the ground that the duty of these two vessels as they approached one another was to obey art. 46. I think I may point out on broad principles that when there is risk of collision the rule is to be obeyed, as the rule says, peremptorily. We ought certainly not, if it is open to us, to cut that rule down by allowing people to judge too finely and too nicely as to whether they can get by with a shave, or whether if each of the vessels act exactly with the same degree of helm, one starboard and the other port, they will happen to pass one another safely. Therefore the appeal must be allowed in so far as it finds that the *Leeuwarden* was to blame for porting, and that the *Guildhall* was not to blame for not having obeyed the rule. It is contended by counsel for the appellants that we ought to prevent the defence of compulsory pilotage being available for the *Guildhall*. It was ingeniously put by the junior counsel for the appellants that the pilot saw the vessel in the wrong place, or that he thought he saw the vessel in another place to what she was, that the look-out had informed the pilot that the *Leeuwarden* was not where he (the pilot) thought she was. There are a great many assumptions in that argument. I will not enumerate them. I will spare his feelings. But we know the practical way in which these vessels are reported. It is a daylight collision. It is not suggested that the pilot did not see the vessel in ample time to act for her, and therefore I entirely agree with the learned judge when he expressed the opinion that there was no reason for suggesting that the *Guildhall* was to blame

for not keeping a proper look-out. Therefore the defence of compulsory pilotage will prevail, but the appeal must be allowed in so far as the judgment proceeded on the basis that art. 46 did not apply. I think the *Guildhall* was to blame for not obeying that rule, and the *Leeuwarden* acted properly in porting to pass on the port side of the *Guildhall*.

Buckley, L.J.—I agree. The determination of this appeal so very nearly depends upon the determination of a pure question of fact that it is not without great hesitation I have arrived at the same conclusion as the Lord Chief Justice. I myself am strongly of opinion that, if a pure question of fact has to be determined, the judge who has seen the witnesses and heard the evidence given is really a better judge to determine the question of fact than this court, acting upon the written evidence. But the appeal does not turn wholly upon a question of fact. In the first place, so far as the question arises of construction of art. 46, of course that is law and not fact; and if risk of collision means, as I think it does, not that an accident presumably will happen, but that the circumstances are such that precautions ought to be taken to preclude the possibility of danger resulting, then I doubt whether the learned judge has properly applied the rule to the facts with that meaning in mind. Another point is this: That if risk of collision means what I think it means, it involves really what is a question of opinion rather than a question of fact. It is not a mere question of fact whether such circumstances have arisen as that precautions ought to be taken. It is a question of nautical opinion, the opinion of persons skilled in these matters, as to whether the facts are such that in their judgment that state of circumstances has arisen. Now here our assessors without any hesitation say, in their judgment as persons skilled in this matter, the position was such that there was risk of collision. They think certainly the *Guildhall* ought to have ported. We must bear that in mind, and pay deference to them. The fact that the *Guildhall* found the starboard side of the *Leeuwarden* open to her at a slight angle on the *Guildhall's* starboard bow is the main fact on which the learned judge has proceeded. As to the exact bearing which that fact has on the question of risk or no risk, it seems to me nautical opinion must be relied upon. Under those circumstances, paying all respect to the learned judge, who was a much better judge than I am as to the facts to be determined, I agree in thinking his judgment is erroneous, seeing that in the opinion of those who advise us in this matter the circumstances were such that there was risk of collision. I have some satisfaction in arriving at this conclusion because I think it is of broad general importance in a narrow channel of this sort; if there be room for a question as to whether risk has or has not arisen, it is better to resolve it in favour of saying it has, so that both ships will know what to do.

Kennedy, L.J.—I am of the same opinion. I personally have the greatest reluctance in differing from the learned judge below in his conclusions upon facts. Even if my own view were to some extent the other way, I should feel myself bound to accept, where it is possible to do so, the version accepted below, knowing, as I do, how frequently what appears on paper gives, at any rate, an inadequate and sometimes an inaccurate expression of the evidence when given orally. But in this case, if I follow the judgment and the arguments by which we have been so greatly assisted, there is no finding of fact, depending upon the evidence, as to which it appears to me we are reversing the finding below, in dealing with the one point on which with great respect I differ from the learned judge. He has not found in his judgment, that I can see, the position of the *Leeuwarden* at the time when she and the *Guildhall* sighted each other. He has found simply that he does not believe the statement that she was to the southward of mid-channel, but leaves her position otherwise, as far as I can see, untouched by his decision. Speaking with the diffidence which a layman ought to feel in such matters, I cannot help thinking that the finding of that position was one of the most material facts to be decided to form a confident opinion as to the correctness or incorrectness of the question as to the breach of the rule. Now it seems to me that has arisen from an apparent difference of opinion between the learned assessors who assisted the learned judge and those gentlemen whose assistance this court has, that difference may have arisen from the form of question which appears by the judgment to have been the form the learned judge adopted. Because it will be observed that the question he put was this: "Supposing the *Leeuwarden* had done nothing except proceed under steady helm on a down-river course, showing her starboard side, would there have been any collision at all, on the supposition that the *Guildhall* was acting under steady starboard helm?" I hope it is not putting too subtle an interpretation upon the rule to say in my opinion I could understand that question being taken by the person to whom it was addressed in a different sense from that in which he ought to take it to give a valuable skilled opinion in accordance with the rule. The question in this case, as I understand the authorities, is that you are not to risk a collision. It does not mean will there or will there not be a collision if the courses are followed, but is there a risk of collision if vessel A sights B in such and such conditions, and they are approaching each other on opposite courses in the river Thames. Therefore, to ask the Elder Brethren would there have been a collision at all is really assuming just those points as certain which in practice in navigation in a river with a sinuous course cannot be properly treated as such. You may have barges; you may have, we are told, in this particular part, a set of the tide in one direction or the other; and further than that, though she was not pulling, this vessel the *Guildhall* had attached to her a tug at that time—all of which are circumstances which, as in similar cases of meeting ships, have to be considered. It was never intended that if it could be shown that exactly placed as they are, if they exactly followed certain courses, they might escape colliding—that that was a test as to whether this rule should or should not be obeyed. That that is not material is shown by the fact that the answer the learned judge gives as that of the assessors is, "No, there would not have been, and the down-coming steamer would have passed safely on the

starboard side of the *Guildhall*." The fact that if everything had gone exactly as it might have done, they would not have touched seems to me to be, neither in reason nor authority, a complete answer to the question. At the conclusion of his judgment the learned judge says, "I find, as a last fact, that at the time when the down-coming steamer ported her helm the two ships, being in the relative positions which I have found, were not proceeding so as to involve risk of collision, and therefore that the Thames rule as to porting did not apply." He has given us the first ground. He has given the question apparently to which he addressed himself, and to which the Elder Brethren addressed themselves. It may be assumed, in saying "would there be a collision at all?" that they would understand risk of collision. But I am desirous of pointing out, merely from my own point of view, it may be that the answers given by the assessors below may be explained as they differ from the advice given to us, because they were asked "assuming a certain position, that the *Leeuwarden* was to some extent slightly on the starboard bow of the *Guildhall* at the time, would there have been a collision? Working it out, they say "No," if all these things had happened—that the one vessel had remained on a steady helm on a steady down-river course. Yet there might be a risk of collision within the meaning of reason and of the authorities. With regard to the authorities, I shall not refer again to *The Cleopatra* (*ubi sup.*) except to quote the following: "According to my view of the statute the meaning is this—Whenever two vessels are seen from each other, even in parallel courses, provided they are close to each other, or in any course so that there is reasonable probability of collision, it is their duty, unless there is some impediment, to obey the provision of the statute." Then comes the case which has been dealt with by my Lord, and with which he is for so many special reasons familiar—the case of *The Odessa* (*ubi sup.*)—in which quite clearly the bearings, which, had they been followed up by courses of a certain kind, would not have produced a collision, were still held to be bearings which allowed, or indeed required obedience to this rule. The only case that bears upon it since is that of *The Lady Wodehouse* (2 Times L. Rep. 252). It was there guarding against an interpretation too liberal—namely, that whenever vessels are coming in opposite directions they should port. Lopes, L.J., in a short judgment at the end, says: "It was probable that the *Presto* had acted on a misconception of the rule. it being, as the assessors said, a popular error that the rule applied in every case in which vessels were coming in opposite directions, whereas it only applied where they were likely to meet." In this case we find, in a collision which took place only a short time afterwards, after the vessels had travelled a very short distance, the actual impact was an end-on impact; in other words, neither of them could have altered their course very much in the time. Making all allowance for possible heading to the northward of the *Guildhall*, owing, I think counsel for the respondents suggested, to the reversing action of the right-handed screw—making all allowance for that, it is practically an end-on blow, as everybody in the case agreed. Therefore, considering the very slight alteration that could have taken place from the time they sighted ecah other, the courses must have been so very close that the rule, in common sense, as well as by the terms of the statute, ought to have been acted on by the *Guildhall*, and consequently I think she was to blame. That is all I desire to add to the judgment that has been pronounced. I entirely agree the fault, as fault I think there was, was the fault of the pilot. That pilot being a compulsory pilot, the owners are exempt, but, subject to that, I agree that on the point with which we have dealt the learned judge below has pronounced a judgment with which, for the reasons I have endeavoured to give, and with the strong advice of our assessors, I am unable to concur.

Solicitors for the appellants, *Batham* and *Son*.

Solicitors for the respondents, *Bolam*, *Middleton*, and *Co*.

Thursday, Oct. 24, 1907.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ., sitting with Nautical Assessors.)

THE KONING WILLEM II. (*a*)

Collision—Crossing steam vessels—Duty to give way—Duty to keep course and speed—Crossing rule ceasing to be applicable—Meaning of crossing steam vessel—Right to alter helm—Collision Regulations 1897, *arts.* 19, 21, 22.

Two steam vessels were approaching each other on courses which made them crossing vessels within the meaning of arts. 19 *and* 21 *of the collision regulations. The vessel which had the other on her starboard hand was on a course of E.N.E., and when a short distance off crossed ahead of the other, which was on a course of W.S.W.* ½ *W. After getting into a position to pass the other starboard to starboard, the vessel on the E.N.E. course ported her helm. Those on the vessel proceeding on a W.S.W.* ½ *W. course kept their course and speed until they saw that the vessel which had crossed ahead of them on to their starboard bow was porting, when they reversed their engines.*

Held (*affirming the decision of the court below*), *that the vessel on the E.N.E. course, whose duty it was to keep out of the way and avoid crossing ahead of the other, was to blame for not keeping a good look-out and improperly porting; that the vessel on the W.S.W.* ½ *W. course, whose duty it was to keep her course and speed, was not to blame, as, on the first indication that the other vessel was porting after crossing ahead and so bringing about a position of danger, she had stopped and reversed her engines.*

APPEAL from a decision of Bargrave Deane, J. sitting with Elder Brethren of the Trinity House.

The appellants, plaintiffs in the court below, were the Isle of Caldy Steamship Company Limited, the owners of the *Isle of Caldy*, and the master and crew of that vessel proceeding for their effects; the respondents, defendants and counter-claimants in the court below, were the owners of the steamship *Koning Willem II.*

(*a*) Reported by L. F. C. DARBY, Esq., Barrister-at-Law.

The action was brought to recover the damage sustained by the plaintiffs by reason of a collision which occurred about 1.45 a.m. on the 15th July 1906 about sixteen or seventeen miles to the eastward and northward of the Sandettie Lightship. The wind at the time was a light breeze from the W.S.W., the weather was overcast and hazy, and the tide flood.

The case made by the plaintiffs was that the *Isle of Caldy*, a screw steamship of 1381 tons gross and 867 tons net register, manned by a crew of eighteen hands, was in the North Sea on a voyage from Huelva to Amsterdam with a cargo of copper pyrites. The *Isle of Caldy* had a duly licensed Dutch pilot on board, and was making about seven knots an hour through the water on a course of E.N.E. magnetic. Her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her. In these circumstances the two masthead lights of the *Koning Willem II.* were observed bearing about ahead and about two to two and a half miles distant. The helm of the *Isle of Caldy* was then ported, and immediately afterwards, when the masthead lights were brought on the port bow of the *Isle of Caldy*, the red light of the *Koning Willem II.* also came in sight. The vessels then approached port side to port side, but after a time, as the *Koning Willem II.* did not appear to be broadening sufficiently, the helm of the *Isle of Caldy* was put hard-a-port and one short blast was sounded on her whistle. The *Koning Willem II.* did not reply, but opened her green light on the port bow of the *Isle of Caldy*, and, coming on at great speed under starboard helm, with her stem struck the port side of the *Isle of Caldy* about amidships, cutting her almost in two, and doing her so much damage that she shortly afterwards sank and was lost with everything on board of her, two of her crew being drowned.

The plaintiffs charged those on the *Koning Willem II.* with not keeping a good look-out; with neglecting to pass port to port; with improperly starboarding; with neglecting to signify her course by whistle signal; and with neglecting to slacken her speed or stop or reverse their engines.

The case made by the defendants was that the *Koning Willem II.*, of 4300 tons gross and 2827 tons net register, manned by a crew of 101 hands all told, was in the North Sea on a voyage from Amsterdam to various ports in the East *viâ* Southampton and Genoa, and had on board a general cargo and about eighty passengers. The *Koning Willem II.*, steering a course of W.S.W. ½ W. magnetic, was making about thirteen knots through the water. Her regulation lights were being duly exhibited and were burning brightly, and a good look-out was being kept on board of her.

In these circumstances those on the *Koning Willem II.* observed, a little on their port bow and between two and three miles off, the masthead lights and the green light of the *Isle of Caldy*. The *Isle of Caldy*, whose masthead lights were open, the higher one being more to port, gradually drew across the bows of the *Koning Willem II.*, which vessel was kept on her course. The *Isle of Caldy* continued to approach, showing only her masthead and green lights, in a position to pass all clear starboard to starboard, until she was a short distance off, when she suddenly showed both her side lights, causing danger of collision. The engines of the *Koning Willem II.* were immediately put full speed astern, her whistle was sounded three short blasts, and directly afterwards her helm was put hard a-starboard, but, notwithstanding these manœuvres, the *Isle of Caldy*, swinging rapidly as if under a hard-a-port helm, came on at considerable speed, and, with her port side in the way of the engine-room, struck the stem of the *Koning Willem II.* a heavy blow, causing her damage. One short blast was heard from the whistle of the *Isle of Caldy* directly after she opened her red light.

The defendants charged the plaintiffs with not keeping a good look-out; with improperly porting; and with not easing, stopping, or reversing their engines; and counter-claimed for the damage they had sustained.

The following are the collision regulations which were referred to during the course of the case:

Art. 19. When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side shall keep out of the way of the other.

Art. 21. Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed. Note.—When, in consequence of thick weather or other causes, such vessel finds herself so close that collision cannot be avoided by the action of the giving-way vessel alone, she also shall take such action as will best aid to avert collision.

Art. 22. Every vessel which is directed to keep out of the way of another vessel shall, if the circumstances of the case admit, avoid crossing ahead of the other.

Laing, K.C. and *Dawson Miller* appeared for the plaintiffs, the owners of the *Isle of Caldy*.

Aspinall, K.C. and *Stephens* appeared for the defendants, the owners of the *Koning Willem II.*

Bargrave Deane, J.—This is a collision which took place between two steamers in the North Sea, near the Sandettie Lightship. The *Koning Willem II.*, the defendant vessel, was coming from Amsterdam, and the other vessel was going to Amsterdam. The vessel coming away from Holland was going on a W.S.W. ½ W. course, and the other vessel was going E.N.E. Now, the real question one has to decide is first of all which is telling the more probable story, and with regard to that I start with this, that we think the evidence of the witnesses from the *Isle of Caldy* is very unsatisfactory. The master knows practically nothing about it. He was called up on deck just before the collision, and does not know very much. The second mate, who was examined on commission, is certainly a very stupid man, to put it mildly, and his evidence was very confused, and not at all satisfactory. The man at the wheel was the best of them. The look-out man was, if possible, more stupid than the second mate, and he appears to us to have kept a very bad look-out, because, although he said he saw the lights of this vessel some mile or two away, up to the time he came into court he did not know she was carrying two masthead lights. According to his evidence he reported nothing but a fishing vessel. The second officer says he reported a white light, and that would be consistent with his seeing a fishing vessel, but putting the two together the evidence is in a very unsatisfactory condition as to what was

going on on board the *Isle of Caldy* at the critical time before the collision. There is another matter. The weather, according to the preliminary act, is stated by those on the *Isle of Caldy* to be "overcast and hazy," and by those on the *Koning Willem II.* to be "fine and clear, but overcast." It was the 15th July 1906, in the early morning, when the collision happened, and we all know that July 1906 was a very hot month, and it may very well be—and the Elder Brethren agree with me in this—that at that time, although it may have been fine and clear, there was a haze on the water, which deceived those on board both ships. In our opinion these ships were not so far apart as they thought they were, and throughout the whole case the distances are exaggerated—not intentionally, but owing to the haze, which I think the witnesses did not really appreciate. We are all agreed that the *Isle of Caldy* is to blame. We think she was not keeping a good look-out, and we think that she crossed on to the starboard bow of the *Koning Willem II.*, so as to be green to green, and having the other on her starboard side she had no business to port. We think she improperly ported across the bows of the *Koning Willem II.* On those two grounds we are of opinion that she is to blame. I always like to state the opinions of those who are advising me when it happens that the court is not agreed, and the court is not at one as to the responsibility attaching to the *Koning Willem II.* She was being navigated by the chief officer, and he has given us a very clear account of what happened. He again, we think, exaggerates the distances at which the lights were seen, not only at first, but afterwards. The description he gives—and the man at the wheel agrees with him—is that at some considerable distance the two masthead lights of the *Isle of Caldy* were seen on the port bow, crossing to starboard, and that they did cross to starboard; that when they were three to four ships' lengths off and a half to three quarters of a point on the starboard bow he noticed the two masthead lights coming into one, which indicated to him that the vessel was porting; and that she opened her red light across his bows. At that time, he says, he ordered the engines to be put full speed astern, and blew three blasts of his whistle, and starboarded his helm. The point upon which the court does not agree is as to what ought to have been done or not done by the *Koning Willem II.* The majority of the court is of opinion that the *Koning Willem II.* was free from blame. The *Koning Willem II.* had three courses open to her. She could starboard, she could port, or she could go astern, and the question is whether she had time to do any of those things when she became conscious that danger was imminent. The question of distance is most material. If the *Isle of Caldy* was three to four ships' lengths off, and half a point on the *Koning Willem II.*'s starboard bow when she showed her red light, then the court is of opinion that she would have cleared the *Koning Willem II.*, crossing from starboard to port of the *Koning Willem II.* If she was further off, of course she would have cleared her more. In the opinion of the majority of the court she was closer to than three to four ships' lengths. One member of the court is of opinion that we must take the *Koning Willem II.*'s own evidence of distance, and, that being the case, she ought not to have kept her speed so long, and should have acted with her helm as soon as she saw the green light on the starboard bow; and it is pointed out that the chief officer was under a misapprehension when he talked of the duty imposed upon him being to keep his course and speed. That is not so. As soon as he got the other vessel across his bows, showing green to green, he was entitled to starboard to make a little more room. If he had ported and the other vessel had changed her mind he would clearly have been in the wrong for porting to a green light. Had he time to reverse sooner? There comes in again the question of distance. If it was a greater distance than the majority of the court believe it was, then, of course, he might have reversed and gone astern sooner; but I see no reason to doubt that he reversed at the very first moment he really saw these two white lights changing their position and getting into one—and I believe she was then within four ships' lengths of him, and that the collision took place by reason of the *Isle of Caldy* throwing herself across the bows of the *Koning Willem II.* If the *Koning Willem II.* was going, as she says she was, 13½ knots, that would be 450 yards in a minute; that would be three to three and a half ships' lengths — she is said to be 400ft. long—and it seems to me, although I am not at one with both my assessors, that, even at three and a half ships' lengths, the other vessel, the *Isle of Caldy*, was too close for this collision to have been avoided. The result is that, in my opinion, supported by one of my assessors, the whole blame for this collision rests with the *Isle of Caldy*. I have pointed out, and I wish to emphasise it, that the chief officer of the *Koning Willem II.* was manifestly wrong in his interpretation of the rules when he thought that a crossing ship was a ship which had crossed. As soon as a vessel has crossed she ceases to be a crossing ship.

The owners of the *Isle of Caldy* appealed from that decision to the Court of Appeal.

Notice of appeal was served on the 1st Aug. 1907, praying that the judgment might be reversed or varied, and that the *Koning Willem II.* might be held solely or in part to blame.

Laing, K.C. and *Dawson Miller* appeared for the appellants.—Even if the *Isle of Caldy* is to blame, the *Koning Willem II.* is also to blame. It was her action which really brought about the collision, for she kept her speed too long. She ought to have reduced it before she did, for she saw the other vessel was crossing her bows. She was also to blame for starboarding, for the angle of the blow shows she must have starboarded. If she had reduced her speed sooner, she would have given the other vessel more time and space in which to act.

Aspinall, K.C. and *Stephens* for the respondents. —Under art. 19 the *Isle of Caldy* was under an obligation to keep out of the way of the *Koning Willem II.*; that being so, she should avoid crossing ahead of the *Koning Willem II.* She broke art. 22 and got on to the starboard bow of the defendants' vessel in a position of green to green, and then ported. By porting and trying to cross ahead of the *Koning Willem II.* she placed that vessel in a difficult position, and,

therefore, even if the *Koning Willem II.* was not manœuvred with perfect skill and presence of mind, she should not be held to blame:

The Bywell Castle, 41 L. T. Rep. 747; 4 Asp. Mar. Law Cas. 207; 4 P. Div. 219.

The duty of the *Koning Willem II.* was to keep her course and speed until the moment comes when she found that collision could not be avoided by the action of the *Isle of Caldy* alone; then she has to take such action as will best aid to avert collision. That moment came when she saw the masthead lights of the *Isle of Caldy* coming into line fine on her starboard bow, and then she at once stopped and reversed her engines; she could do no more, and she obeyed the rule. The duty cast on vessels under art. 22 is a very difficult one. [Lord ALVERSTONE, C.J.—The decision in *The Bywell Castle* (*ubi sup.*) may in some respects make it less difficult.] The *Koning Willem II.* had to keep her course and speed until the danger is immediate and manifest, and it only became that when the *Isle of Caldy*, being fine on her starboard bow, began to port:

The Ranza, Ship. Gaz. Dec. 13, 1898.

Lord ALVERSTONE, C.J.—I hope nothing I shall say in this case—I have made the same observation once or twice before—will in any way be thought to minimise the duty of seamen to stop and reverse when there is any real indication of danger, because, as I said, I think, with the approval of my brother Kennedy, L.J., I know of nothing that has done more to prevent collisions or minimise their gravity than stopping and reversing. I say that after a long experience of these cases. But, in my judgment, we must be very careful that we do not, in wishing to impress upon those who navigate the seas the duty of stopping and reversing as soon as there is any real danger, work an injustice; we must, before enforcing the rule, have reason to believe that there has been negligent navigation. There are one or two things which I wish to point out with regard to the law in this case before I come to consider the facts. It is admitted this is only a question of seamanship. There is now no rule which makes it obligatory upon the *Koning Willem II.*, in any view of the case, to stop. I agree with junior counsel for the respondents that in dealing with seamanship we have also to apply that principle which was laid down by James, L.J. and Lord Esher in *The Bywell Castle* (*ubi sup.*) and in other cases, that when a man is put in a position of difficulty he has a right to think and consider whether he is really acting for the best. The rules which are applicable in this case are 19, 21, and 22—19 being that the steamer which has the other one upon her starboard hand is to get out of the way; 21, the steamer which has to keep her course shall keep her course and speed; and 22, that the steamer that has to get out of the way shall, if the circumstances of the case admit, avoid crossing ahead of the other. Under those circumstances, it is not disputed (for counsel for the appellants has most fairly said he will take the evidence of the *Koning Willem II.*) that the *Koning Willem II.* was on a course which would put originally the *Isle of Caldy* on her port bow with the *Isle of Caldy's* starboard side open. It is not disputed that the course of the vessel would have put the *Koning Willem II.* upon the starboard side of the *Isle of Caldy*, or, in other words, rule 19 applies. The other facts of the case, for it is a night collision, support that view, for the *Isle of Caldy* sees the red light after she had seen the masthead light of the *Koning Willem II.*, and the *Koning Willem II.* sees the green light of the *Isle of Caldy*. I think it has been a little overlooked in arguing this case, and perhaps it has not been sufficiently considered, that the vessels were going on very fine courses with reference to one another—that there was not a difference between their courses certainly of more than half a point, probably not so much; and, although it is equally the duty of the *Isle of Caldy* to get out of the way and the duty of the *Koning Willem II.* to keep her course, the result will be that they will pass not broad—not the *Isle of Caldy* going broad across the bows of the *Koning Willem II.*, but very fine across the bows. Whatever distance it is, it will be a very acute angle between the two courses. The keels of the vessels will be not far off, being in a line with one another. Under these circumstances, at what period of time is the *Koning Willem II.* to break or depart from rule 21? In my judgment, it must be at such a time as the *Isle of Caldy* has given an indication that she is going to do something which brings about a position of danger, or, in other words, shows that she is not only disobeying the rule, but is disobeying the rule in circumstances in which a seaman will see that he must do something. What the *Koning Willem II.* has to do in the emergency depends entirely on good seamanship. We are advised by both our assessors that, if the officer in charge of the *Koning Willem II.* stopped his engines within as reasonable a time as he could on seeing two white lights come into line, it was as soon as he could be expected to act. I venture to say, as I put it to counsel for the appellants in the argument, the only incident in the case which would not only lead him to act, but justify the *Koning Willem II.* in acting, was that coming of the two white lights into one, showing that she was altering under her port helm. When did that happen? We have heard a great many arguments which were well entitled to consideration based on the fact that the blow was apparently a broad blow. How much was due to the final hard-a-porting of the *Isle of Caldy* we do not know. It is not possible to say what sort of vessel she was with reference to her helm. What the exact angle was no one can say. I think it must certainly have been of considerable broadness, though I doubt whether as much as five points or not. But in my judgment, assuming the case to be determined by the test I have already mentioned, namely, whether or not the officer in charge stopped his engines as soon as he saw the two white lights come into one, I think there is nothing in these theories to show that that cannot have been the case. If you look at p. 41 of the record at the top the officer gives an account which struck me at the time as being the account of an intelligent man, and, if a truthful account, would correspond with what was going on, as I have already described, as to the courses of this vessel and their original bearing. "Q.: How did you think this other vessel was going to pass you?—A.: He should have passed me green to green. Q.: What did he do?—A. When he was about three-quarters of a point on

my starboard bow I saw his masthead lights altering, so I said to the fourth officer, 'Look, the ship is going to alter its course.' A little moment afterwards I saw the two masthead lights in one line, and immediately I thought there should be danger, and I rang my telegraph 'Full speed astern.'" I asked myself in the course of this argument—I put the question to myself, not to counsel—"If that is so, could this man be reasonably expected to act earlier?" Continuing the evidence: "Q.: How far away was she from you when you appreciated that she was porting?—A.: When I noticed it the first time. Q.: When you noticed it, yes?—A.: About three or four ships' lengths—four ships' lengths I should say." That would be somewhere about 400 yards. "Q.: You ordered your engines, you say, full speed astern. Did you use your whistle?—A.: Yes, the fourth officer was standing close to the telegraph. He rang the telegraph 'Full speed astern,' and I pulled my whistle two or three times." It is quite true, in cross-examination, there is one answer in which he says that he did not, I think, put his engines astern, or alter his speed until he was about one and a half ships' lengths away. Speaking for myself, I certainly, at the time the answer was read, did not quite think the question was an easy one for a foreigner to appreciate; but, taking it as it is, I am only in the difficulty which learned judges have been in in cases before of having to deal with witnesses who have given some answers that cannot be reconciled exactly with their previous answers. Then again, in the same way, the answer given by Hasselo, who I do not think was a very intelligent man, at the bottom of p. 47, certainly does not contradict the officer, but when it is put to him that there was a position of serious danger when the masthead lights came into line about three-quarters of a point on the starboard bow, he does say, "No, it was green to green first." "Q.: That was a position of great danger, was it not, if she continued to alter?—A.: If she continued to go right ahead the ships would get clear, green to green." I think to a certain extent one seems to feel that that man's evidence was not by any means as much in favour of the *Koning Willem II.* as the evidence of the officer to whom I have referred. Now, how has the learned judge dealt with this? It is true at the top of p. 56 of the record, stating the whole story, he does use language which rather looks as though he may have thought the man did not give the order to reverse the engines full speed astern, until the red light was seen, because he says "he still kept observation on them; that when from three to four ships' lengths off him and bearing only half a point to three-quarters of a point on his starboard bow, he noticed the two masthead lights coming into one, which indicated to him that the vessel was porting, and then she opened her red light and crossed his bows. At that time he says he ordered his engines to be put full speed astern." "At that time" means when she opened her red light, and certainly I should have thought it was open to argument that the man had not acted quite soon enough. It would not be a very long time, and I doubt whether it would be longer than the man was entitled to think "when the other fellow pulls the wrong rein," to use Lord Justice James' illustration. But I agree with the argument of counsel for the respondents that the real finding of the judge on this is at line 40, p. 56, of the record: "Had he time to reverse sooner? Then comes the question of distance. If it was a greater distance than the majority of the court believes it was, then, of course, he might have reversed and gone astern sooner, but I see no reason to doubt he reversed at the very first moment that he really saw these two white lights changing their position and getting into one." That, in my opinion, is a recognition of the truth of the story as told at p. 41 of the record, and I think that is what the learned judge intended to find. I come to the conclusion on the question of fact we ought not to differ from the learned judge. I think he has found, as a matter of fact, that the vessel the *Isle of Caldy* got green to green, and brought about this collision wholly by porting at the last moment, and that, as soon as the officer who had every reason to believe the vessels would have gone safe, however much the *Isle of Caldy* may have been cutting it fine—as soon as he appreciated that this vessel was porting, he stopped and reversed his engines, and he did that on his becoming aware of the only incident in this case which would justify his so acting. I desire to point out, and I am glad attention was called to it by learned counsel, that there is strong corroboration of the view I take that the learned judge was right when he said that the man reversed his engines as soon as he became alive to the fact that the vessel was porting. Of course, it takes time. You have got to telegraph, and the engineer has to act. There is evidence from the engineer that he was going astern before the collision half a minute. The united speed of these vessels, if they were going as they were, was just over twenty knots. Taking it at twenty knots, if it was half a minute or anything like it, it would be a distance of something like between 300 and 400 yards, which corresponds very nearly indeed with the suggestion of it being from three to four ships' lengths.

I therefore come to the conclusion, whatever discrepancies there may be—and I should be very surprised if in many Admiralty cases there were not discrepancies—that the learned judge has believed the story that the *Koning Willem II.*, the ship whose duty it was to keep her course and speed, did keep that course and speed until she became aware of the fact that the other vessel was improperly porting fine upon her starboard bow, and, having become aware of that, stopped and reversed her engines. I have only one other word to add, but it seems to me of importance. We have always difficulties in these cases through contradictions, and what has been pointed out by greater judges of the Admiralty Court than I can ever hope to be is this: You have to look at the story as a whole, and see if you can, upon the evidence, come to a conclusion on some theory which will really reconcile the conflicting stories. In my judgment this story becomes perfectly plain if you accept the view that the *Isle of Caldy*, having a bad look-out, and having got fine, green to green, becomes alive to the presence of the *Koning Willem II.*, and, knowing that her duty under rule 22 is to go under her stern, improperly ports at the last moment. She finds at that moment she has still got upon her starboard bow a steamer

which she has not noticed before, and, appreciating that it is her duty to get out of the way under these circumstances, and not appreciating what is the bearing of the other vessel and the direction she is going, at the last moment, when she ought not to have done it, ports. Because it must be observed that it is assumed on both sides in this case that at one time these vessels were green to green. If green to green, there was clearly no necessity for the *Koning Willem II.* to stop, and in my judgment this collision occurred because those on the *Isle of Caldy* did not keep a proper look-out, became aware of the presence of the *Koning Willem II.* much too late, and then, knowing that it was their duty to get out of the way, obeyed the rule in a way which brought about this danger. I cannot see the slightest reason for thinking that the *Koning Willem II.* ought to have stopped until the *Isle of Caldy* began to alter her course. I agree with the view taken by Bargrave Deane, J. that the officer in charge did act as soon as he became alive to the fact that this vessel was, as he says, altering or about to alter her course under the port helm. I think, therefore, this appeal must be dismissed.

Buckley, L.J.—Down to a moment it was the duty of the *Koning Willem II.* to maintain her course and speed. At a moment she altered her course and speed. The question here is whether she ought to have done so at an earlier moment. The position of affairs was that the *Isle of Caldy* was showing her green light fine on the starboard bow of the *Koning Willem II.* It was the duty of the *Isle of Caldy* to get out of the way. If she had kept or put her helm to starboard and got further away she would have cleared the *Koning Willem II.* The latter was entitled to say, "It is her business to get out of the way. How it is for her to do it, is for her to determine. My duty is to keep my course and speed." But at a particular moment the *Koning Willem II.* ascertains that the *Isle of Caldy* is altering her course. She found the two masthead lights were coming into line, and that, obviously, the *Isle of Caldy* was porting her helm and coming round to starboard, and a collision was imminent. At that moment there was a new duty cast on the *Koning Willem II.* To my mind the point is: When did that occur? What I found impressed me is the evidence of the defendants' witness given at p. 47 of the record, but certainly I ought not to shut my eyes to the whole of the evidence in the case. If it had been for me to determine the question of fact I should have arrived at the conclusion that the evidence most to be relied upon was that of the officer in charge, Yeppe Teensma, and that the true meaning of his evidence is that directly he found the two lights coming into line he did take steps to check the speed. I think that is a pure question of fact to be determined as between differences of evidence given by different witnesses. The learned judge who heard and saw the witnesses is a very much better judge than I am in that respect, and he says, "I see no reason to doubt that he reversed at the very first moment that he really saw these two white lights changing their position and getting into one." I accept that finding of fact as being the right finding of fact, and, that being so, I think the *Koning Willem II.* was not to blame.

Kennedy, L.J.—I agree. I have one or two things I desire to add. In the first place, I think the cardinal matter here is this—that the learned judge who has heard the case with very great care has found obviously from the passage just read by Buckley, L.J. a fact which depends partly on the credibility of the witnesses, partly also on the inferences of probability as they may appear to him upon that evidence. I should not feel justified, even if I were inclined to take a different view, in reversing a judgment where it does depend upon a question of fact, where I cannot see anything to explain and show it was a mistake or a mistaken view of the evidence, or that there was some omission to consider something in the evidence which ought to have been considered. I think here the case was evidently considered as a whole with very great care, and I should not feel myself justified, on what was a pure question of fact for the judge, in reversing the decision. I think it is important to bear in mind what seems to me to have a little tended to obscure the true relation of the evidence in this case. The learned judge treats himself and the two assessors as forming the court, and speaks of this judgment as a judgment of the majority of the court. It is material to bear that in mind in my humble judgment for this reason—that the result is the learned judge may be tempted to leave to the assessors a question of fact not involving nautical skill. And when I see, as I read here, that "in the opinion of the majority of the court she was closer than three to four ships' lengths"—which is a pure question of fact—and "one member of the court is of opinion that you must take her own evidence as to the distance"—which is partly fact and partly law—I confess I think it is very important to bear in mind that it ought to be his judgment, unaffected in those pure questions of credibility of the evidence by the opinion of those of whose skill he has the great advantage at the trial.

Looked at as a question of fact, I certainly am not inclined to dissent from his view. I think he has intended to find, as the Lord Chief Justice pointed out, that the officer who was responsible on board the *Koning Willem II.* did give the order to reverse the very first moment he saw the lights changing their position. I was myself very much impressed by the statement made by that same witness, who seems to have been a clear and intelligent witness, at p. 45 of the record, but when I came, as I did, to read afterwards the words that followed, the difficulty that evidence had created had gone. I will just refer to them. The words that created the difficulty were: "You kept your course and speed until she was within about, how close of you?—About a ship's length—one and a half—something like that." That certainly was nearer than the period at which he first saw that, owing to the alteration in the position of the masthead lights, the vessel was altering her course. Then comes this: "Then did you reverse your engines?—Yes. How long do you think they were reversing before the collision?—About half a minute." So, reading that together, you have got the statement by this officer that "I gave the order to reverse half a minute before the collision." It could not therefore have been one and a half lengths when the order was given, because the two vessels, travelling as they did, making full allowance for the

alteration on the part of the *Isle of Caldy*, would have been together far quicker than half a minute if there was no order given to reverse before they were at that point. It follows, therefore, reading the evidence of that witness as a whole, that he cannot have intended to mean that it was about a ship's length. Because he was a man very accurate about time; we see that eight seconds was a computation he made with regard to one portion of the proceedings. That he says they were actually reversing half a minute before the collision clearly shows that he acted really at the earlier period when the lights were first seen, as you would have inferred from the answer given at the top of p. 41 of the record which has been read. As I understand the facts, this was not a case in which one of two vessels gets on to the starboard bow of another, the courses being very nearly opposite, and, instead of broadening, actually narrows, or remains on the same bearing for a material time. As I understand the evidence, three-quarters of a point on the starboard bow of the *Koning Willem II.* was a position which I may call the maximum position attained by the *Isle of Caldy*, and it is by deviating from that maximum position, reached by keeping a steady course, that she suddenly alters in the way she did. Whatever be the distance—four or five or three or four lengths, I do not know—the evidence is indefinite. She then alters and changes. So that until the moment, as I read the evidence at which these lights were seen to alter, if you had asked the officer of the *Koning Willem II.* what has that vessel done, he would have said, "She has been getting on my starboard bow until she has got three-quarters of a point." Our assessors say that change of light would be the first moment that indicated the duty of a seaman to change either course or speed, and this was not the case of a vessel remaining on the same bearing, or even narrowing on the starboard bow bearing, but of a vessel attaining, no doubt as their courses would lead you to suppose, a position, you may call it fine upon the bow, but still a position which would have been safe had he not altered, and which the officer on board the *Koning Willem II.* was justified in expecting he would continue. If that be so, then it seems to me if you fix that moment you must fix it in accordance with the evidence, and I shall certainly not differ from the view taken by the learned judge in the court below, a view which I think the evidence justifies.

Solicitors for the appellants, *Wynne* and *Sons*, agents for *Forshaw* and *Hawkins*.

Solicitors for the respondents, *Clarkson, Greenwell*, and *Co.*

Monday, Nov. 4, 1907.

(Before Lord ALVERSTONE, C.J., BUCKLEY and KENNEDY, L.JJ.)

GREENSHIELDS, COWIE, AND CO. *v.* STEPHENS AND SONS. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

General average—Cargo damaged by water in extinguishing fire — Spontaneous combustion of cargo of coal — Cargo in separate holds —"Portions" of bulk cargo on fire—York-Antwerp Rules 1890, *r.* 3—*Merchant Shipping Act* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 502.

A ship was loaded with coal under bills of lading which provided that average, if any, was to be adjusted according to York-Antwerp Rules 1890.

These rules provide (inter alia) *that damage to a ship or cargo by water in extinguishing a fire on the ship shall be made good as general average; except that no compensation shall be made for damage to such "portions" of bulk cargo as have been on fire.*

The coal was stowed in separate holds, and during the voyage a fire broke out in two of the holds by spontaneous combustion.

The coal in the other holds having been damaged by water used to extinguish the coal that had caught fire, a claim was made by the shippers against the shipowners for general average contribution in respect of the coal damaged by water.

Held, that there was nothing in sect. 502 *of the Merchant Shipping Act* 1894 *which afforded any protection to the shipowners against a general average claim.*

Held, also, that the mere fact that a cargo of coal is naturally liable to spontaneous combustion did not deprive the shippers of their rights to a general average contribution, unless guilty of wrongful or negligent shipment.

Held, also, that in rule 3 *of the York-Antwerp Rules* 1890 *the expression "such portions of . . . bulk cargo . . . as have been on fire" meant so much of the cargo as had been actually ignited.*

APPEAL by the plaintiffs from the judgment of Channell, J. at the trial of the action without a jury.

The plaintiffs were the owners of the British ship *Knight of the Garter*, which left Calcutta for Bombay loaded with about 10,000 tons of coal.

Of this coal 8000 tons belonged to the defendants, and were shipped under bills of lading which provided that average, if any, was to be adjusted according to the York-Antwerp Rules 1890.

The York-Antwerp Rules 1890 contain the following rule:

Rule 3. Damage done to a ship and cargo, or either of them, by water or otherwise, including damage by beaching or scuttling a burning ship, in extinguishing a fire on board the ship, shall be made good as general average; except that no compensation shall be made for damage to such portions of the ship and bulk cargo, or to such separate packages of cargo, as have been on fire.

The coal was loaded in separate holds.

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

The ship remained in the Hooghly for about a week, and some three days after crossing the bar a fire broke out spontaneously in No. 2 hold.

She put into Colombo for refuge, and subsequently, in consequence of fire having broken out in two other holds in spite of the water poured on the burning coal to extinguish it, it was found necessary to discharge the cargo and terminate the adventure.

Under these circumstances the plaintiffs claimed from the defendants a sum of 467*l.* for a general average contribution in respect of the sacrifices by the ship.

By way of set-off and counter-claim, the defendants claimed a sum of 868*l.* as a general average contribution due to them from the shipowners in respect of the damage done by the water used to extinguish the fire to the coal which did not get on fire.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 502. The owner of a British seagoing ship, or any share therein, shall not be liable to make good to any extent whatever any loss or damage happening without his actual default or privity in the following cases; namely—(1) Where any goods, merchandise, or other things whatsoever taken in or put on board his ship are lost or damaged by reason of fire on board the ship; . . .

Channell, J.—Interesting points upon the law of general average have been raised and argued in this case, but I have come to the conclusion that it is not necessary for me to decide them. If it were, I should prefer to take time to consider the matter. The reason that I do not think that they arise here is that the York-Antwerp Rules have been incorporated as part of the contract between these parties, and there is no doubt that these rules must be followed in adjusting the general average in this case. Now it was argued that the coal that was shipped was liable, as, I believe, all coal is, to spontaneous combustion; that it was shipped in very large quantities whereby the liability of spontaneous combustion was increased; and that some portion of it got alight under circumstances that clearly point to its having got alight from spontaneous combustion. It was then said that the owner of the entirety of the coal cannot claim contribution in the nature of general average from the fact that some of his coal was damaged by the water used to put out the fire. I do not propose to go further into the question whether it is necessary to show a fault on the owner's part to prevent his being entitled to recover. The proposition advanced by Mr. Hamilton clearly involves the proposition that the owner cannot recover compensation because the peril was in fact caused by the article in question. Now, the exception at the end of rule 3 of the York-Antwerp Rules seems to me to mean that, in the cases mentioned, the portions that have been on fire are to be treated as wreck, as it is called in this case—that is to say, they are something the value of which has gone, and which therefore cannot be considered to be sacrificed for the general good. But for this rule, a question of fact would arise whether in each particular case the thing had been so damaged as that you could say it was wreck. If it is, there is no sacrifice. This rule provides for that. We have here to deal with a large bulk of coal. It was not all on fire. In a popular sense, no doubt, it might be said that No. 2 hold and No. 3 hold were both on fire, because some of the coal in each of those holds was on fire; but I do not think it would be right to speak of that coal as being "separate packages of cargo." They were portions of bulk cargo. I cannot apply to the rule the interpretation which suggests that if any part of those portions of cargo has been on fire, it comes within the latter portion of the rule. It is said that the portions which have been on fire are not to get any contribution, and, by necessary implication it is said that the other portions are to get contribution. It is a question of the greatest possible difficulty to find out which portions have been on fire. The adjuster did not see the cargo. If he had seen it, it would have been impracticable to have gone over it all lump by lump, and to have seen whether each particular lump had been on fire or not. But he has had reports, and surveys and various documents, and the results of the sale, and he has set to work to find out which parts of the cargo have been on fire and which have not, and he has adjusted this claim upon the footing that it is a claim for damage to the parts of the coal which have not been on fire. If that is so, and upon the assumption that that has been done rightly, and that the claim which is now being put forward is a claim for damage by water to the portion of the coal which never has been on fire, I cannot see on what possible ground it can be said that that portion of coal which has not been on fire has caused peril to the whole adventure. It is true that the coal was liable to get alight by spontaneous combustion, but one is dealing with it on the hypothesis that it did not get on fire. It was the coal that did get on fire that caused the peril. It seems to me, therefore, that, applying this rule, the result is that the exception in it excludes from the right to contribution by way of general average all that coal which could be excluded from contribution if Mr. Hamilton's proposition is right; and, if that be so, it is quite clear that it is not necessary to decide the point in this case. Entertaining the view that the rule covers this case, I must allow the claim for contribution.

Judgment for defendants on claim and counter-claim.

The plaintiffs appealed.

J. A. Hamilton, K.C. and *Maurice Hill* for the plaintiffs.—The damage was caused by the spontaneous combustion of the coal of the defendants; that is to say, it arose from the inherent vice of the cargo shipped. That being so, the defendants are disentitled to recover a general average contribution:

Piric and Co. v. *Middle Dock Company*, 4 Asp. Mar. Law Cas. 388 (1881); 44 L. T. Rep. 426;
Johnson v. *Chapman*, 2 Mar. Law Cas. O. S. 404 (1866); 15 L. T. Rep. 70; 19 C. B. N. S. 563.

It is clear that a person cannot claim general average contribution if the damage has been brought about by his own fault:

Schloss v. *Heriot*, 1 Mar. Law Cas. O. S. 335 (1863); 8 L. T. Rep. 246; 14 C. B. N. S. 59;
Strang, Steel, and Co. v. *Scott*, 6 Asp. Mar. Law Cas. 419 (1889); 61 L. T. Rep. 597; 14 App. Cas. 601;

The Ettrick; Prehn v. *Bailey*, 4 Asp. Mar. Law Cas. 428, 465 (1881); 45 L. T. Rep. 399; 6 P. Div. 127.

Secondly, under rule 3 of the York-Antwerp Rules 1890 the defendants can only claim contribution in respect of the coal in one hold, because in each of the other holds fire broke out. Each hold constitutes a "portion" of the cargo within rule 3. Lastly, under sect. 502 of the Merchant Shipping Act 1894 the plaintiffs are not liable to make good the loss. The decision of Blackburn and Lush, JJ. upon the repealed Merchant Shipping Act 1854 in the case of *Schmidt* v. *Royal Mail Steamship Company* (4 Asp. Mar. Law Cas. 217 n. (1876) is no authority upon the section now in force.

Scrutton, K.C. and *Mackinnon* for the defendants.

Lord ALVERSTONE, C.J.—This case raises some points of great interest and of some general application. The first point raised on behalf of the plaintiffs was apparently not raised in the court below because of a decision which was binding on Channell, J. It was based upon sect. 502 of the Merchant Shipping Act 1894. [His Lordship read the section.] I do not think I should be wrong in saying that if that section were an answer to a claim for general average where the original cause of the sacrifice was a fire, it might and would have been so used in scores of cases. Similar legislation to that has existed at least since 1786. The language of sect. 2 of 26 Geo. 3, c 86, and of sect. 503 of the Merchant Shipping Act 1854 is practically identical with that of sect. 502 of the Act of 1894. Some argument on behalf of the plaintiff was based upon the words "liable to make good." It was said that they indicate some liability wider than a responsibility in damages. The point in question has, however, been directly decided by Blackburn and Lush, JJ. in the case of *Schmidt* v. *Royal Mail Steamship Company* (*ubi sup.*), where those two learned judges seem to have followed a previous decision which they had given shortly before in the unreported case of *Aspinwall* v. *Merchant Shipping Company*. That case has stood as law since 1876; it is exactly in point, and, in my judgment, we ought not to overrule it now, even if we thought it wrong. But in my opinion it was rightly decided. The section was intended only to relieve shipowners from liability to an action for damages, and not to afford protection to a general average claim.

The next point raised by counsel for the plaintiffs was that, inasmuch as the fire was occasioned by spontaneous combustion in the coal, although there was no evidence of negligence on the part of the cargo-owners or of any person for whom they were responsible, the right to claim in general average was lost. Channell, J. seems to have thought that it was not necessary to consider that point because the contract of carriage between the parties specially provides for the incorporation into it of the York-Antwerp Rules 1890. For myself, I do not quite see that the incorporation of those rules would be an answer to the claim put forward by the shipowners, assuming that they were right in their contention that, under the general rules of the maritime law of the land, the cargo-owners lost any right to general average contribution by reason of the fire having arisen by the spontaneous combustion of their cargo. But, in my opinion, they are wrong in that contention. Speaking for myself, I think we are bound by the principle of two or three decisions to hold that unless there is negligence or some wrong-doing on the part of the cargo-owner or shipowner, as the case may be, that would make it unjust and inequitable that he should enforce a general average claim, the fact that the original cause of the sacrfice arose from an inherent defect in the cargo or the ship, as the case may be, without negligence on the part of the cargo-owner or shipowner is no answer to the claim. Mr. Carver, whose book on Carriage by Sea will always in my opinion remain as a monument of great learning, and as one of the best recent law books, says in sect. 373 b of his last (the fourth) edition: "The true conclusion then, it is submitted, is that the limitation, set by law, to the legal right to contribution is generally independent of the contract of carriage, as well as of rules of procedure. The extent of the limitation depends on the view of the law as to what justice requires, and the cases above cited show that the limitation applies where the need for the shipowners' sacrifice has been caused by negligence on his part, or on the part of his servants, in properly fitting the ship for the voyage, or in making her seaworthy, or in navigating her. They also seem to show that the same limitation precludes the claim to contribution of a cargo-owner where the danger which has led to a sacrifice of his goods was caused by their unfitness for shipment, if his conduct in shipping them was wrongful or negligent." If I may be allowed to say so, I should think that is a perfectly correct statement of the law. He goes on to say: "Whether the limitation would apply where the condition of the ship, or of the goods, has produced the danger, but without any negligence on the part of the shipowner, or of the shipper, seems to be more doubtful. (Sect. 373 c.). It must, however, be confessed that the theory here put forward is in conflict with the judgment of Sir J. Hannen in the case of *The Carron Park* (6 Asp. Mar. Law Cas. 543 (1890); 63 L. T. Rep. 356; 15 P. Div. 203) and of the Court of Appeal in *Milburn* v. *Jamaica Fruit Company* (9 Asp. Mar. Law Cas. 122 (1900); 83 L. T. Rep. 321; (1900) 2 Q. B. 540)." The learned author of that book certainly says there no more than this: that in his opinion it was uncertain what view would be taken by the courts in a case where the loss has arisen from the condition of the cargo without any negligence on the part of the cargo-owner. But I do not think that effect would be given to the plaintiffs' argument here without disregarding principles that have been recognised in the House of Lords and in this court. The earliest case cited in argument was *Johnson* v. *Chapman* (*ubi sup.*). That is not an authority one way or the other. There a deck cargo was jettisoned, and it was held that the shipper was entitled to claim general average damage in respect thereof, as against the shipowner. Willes, J., who delivered the judgment of the court, referred to the case suggested by Mr. Cohen in argument, of cotton which was brought on board in a damp state bursting out into a flame and being thrown overboard, and he described it as a peculiar danger from the fault of the person putting it on board. The next case in point of time was the

case of *Pirie and Co.* v. *Middle Dock Company* (*ubi sup.*) decided by Watkin Williams, J. The learned judge, who was no doubt a great authority on such a point, certainly did say at p. 428: "There is also the further possible view that if the cargo is considered to have suffered alone through the damage by water, the cargo may nevertheless be not entitled to claim a contribution in the general average, because it was through its own inherent vice the real cause of the whole misfortune and sacrifice." Then a little lower down he says: "It is material to bear in mind that the claim in this case is not one made by the owner of destroyed cargo against the shipowner, and resisted by the latter upon the ground either that the cargo was in fault, or that there was no real sacrifice by reason of the cargo having been already inevitably lost, but a claim by the shipowner to be entitled as against the merchant whose goods had been saved to bring into the general average the freight alleged to have been sacrificed by an operation which saved the ship and a large part of the cargo, and at the same time caused the total loss of the freight." It is quite plain that Watkin Williams, J. was not dealing with the case of general average alone, and the decision amounts to no more than a possible opinion of Watkin Williams, J. slightly in favour of the view Mr. Hamilton contends for. When you come to look at the case of *Strang, Steel, and Co.* v. *Scott* (*ubi sup.*) and look at the enunciation of the law by Lord Watson, it is to my mind clear that Lord Watson considered that the question of negligence on the part of the person claiming was the important consideration to be borne in mind. Having referred to the law of contribution, he goes on: "There are two well-established exceptions to the rule of contribution for general average, which it is necessary to notice. When a person who would otherwise have been entitled to claim contribution has, by his own fault, occasioned the peril which immediately gave rise to the claim, it would be manifestly unjust to permit him to recover from those whose goods are saved, although they may be said, in a certain sense, to have benefited by the sacrifice of his property. In any question with them he is a wrongdoer, and, as such under an obligation to use every means within his power to ward off or repair the natural consequences of his wrongful act. He cannot be permitted to claim either recompense for services rendered, or indemity for losses sustained by him, in the endeavour to rescue property which was imperilled by his own tortious act, and which it was his duty to save. *Schloss* v. *Heriot* (*ubi sup.*) is the leading English authority upon the point. In that case, which was an action by the shipowner against the owners of cargo for contribution in an average loss, a plea stated in defence, to the effect that the ship was unseaworthy at the commencement of the voyage, and that the average loss was occasioned by such unseaworthiness, was held to be a good answer to the claim by Erle, C.J. and Willes and Keating, JJ." I need not read more than that. We all of us know the great learning of Lord Watson and his masterly way of dealing with a subject on principle. To my mind, it is quite impossible to think that the fact that the loss sprang from the cargo-owner, without any default on his part, would have been overlooked by Lord Watson, or he would have based his answer with regard to the cargo-owner on the reasons or principles he gives. When we remember that the judgment of Lord Watson was referred to with approval by Lord Hannen (whom it bound) in the case of *The Carron Park* (*ubi sup.*) and again dealt with by the Court of Appeal in the case of *Milburn* v. *Jamaica Fruit Company* (*ubi sup.*) to my mind it is quite impossible, as I have already said, to come to any other conclusion than that negligence or some wrongful act on the part of the person claiming general average contribution must be shown before he can be held not entitled to recover.

I therefore come to the conclusion in this case that, the loss having occurred without any negligence on the part of the cargo-owners, their claim to general average is not answered or cannot be resisted by the shipowners merely on the ground of the cargo of coal having ignited spontaneously. Now there only remains to be considered the point taken on the York-Antwerp Rules. In my judgment the York-Antwerp Rules, which were to a certain extent an agreement that certain disputed points should be dealt with in a particular way, were not meant to deal with the whole question of general average, or to be a code to prevent the rules of each individual nation applying where by their law persons under certain liabilities possessed certain rights. That is where, I think, Channell, J. was not quite correct in saying that this rule of necessity excluded Mr. Hamilton's argument. Rule 3 runs thus: [His Lordship read it.] Mr. Hamilton contended that each hold constituted a "portion" of bulk cargo, and that no compensation could be claimed under this rule in respect of damage by water to the coal in the three holds which were on fire. I think it is quite impossible to read the clause in that way. As was pointed out by Buckley, L.J., during the argument, you could not possibly apply that construction when dealing with the ship, because, if so, a shipowner could only claim contribution for any part of the ship which caught fire. The "portion" here spoken of means the portion which caught fire. The framers of this rule of course knew perfectly well that cargoes were constantly carried in bulk, and the rule might have to be applied to the case of a ship with only one hold. In my judgment the words "such portion" show, to my mind that the same principle ought to apply. I think that there is no ground for interfering with the judgment of Channell, J., and that this appeal must be dismissed.

Buckley, L.J.—I am of the same opinion, and I cannot usefully add anything to what the Lord Chief Justice has said.

Kennedy, L.J.—I have come to the same conclusion. I think that the fact that rule 3 of the York-Antwerp Rules is embodied in the bills of lading does not exclude the consideration of the other points argued by Mr. Hamilton and Mr. Maurice Hill. Dealing first with the construction of the rule itself, I entirely agree with and shall not repeat the judgment delivered by my lord. I think that the effect of the rule is to say, first of all, that there shall be made good as general average certain damage done by water or otherwise in extinguishing a fire. Secondly, the rule limits the compensation by excluding compensation for damage to either any part of the ship

that has been on fire or any part of a bulk cargo that has been on fire, or (as a difficulty might have arisen if it was left there without express direction, when there were separate packages of cargo) any separate packages of cargo tha have been on fire. It seems to me impossible to read "portions of bulk cargo that have been on fire" as intended to apply to the cargo which may be in this or that hold. Passing from that which has been dealt with, I will go on to say the only part of my brother Channell's judgment and reasoning which I am not quite able to follow is his view that if you so read the rule, you have, as it were, a means of deciding this case without considering the other points raised on behalf of the plaintiffs. In that portion of his judgment, after going carefully through the various considerations which have to be borne in mind, he says: "If that is so, and upon the assumption that that has been done rightly and that the claim that is now being put forward is a claim for damage by water to the portion of the coal which never has been on fire, I cannot see on what possible ground it can be said that that portion of coal which has not been on fire has caused peril to the whole adventure." And then he proceeds to point out it was the coal that did get on fire that caused the peril. My difficulty in following that is that the question raised by the appellants here is not at all contrary to that. What they say is that no compensation in respect of any coal should be paid to the owner of that coal, because it was the inherent vice of that coal which caused the mischief. That is not dealt with by the York-Antwerp Rules at all. Now, as regards that point I do desire to say a few words, because it is an important question of general mercantile interest which is not confined to this country, and which has been very greatly and very seriously debated, by those who have a considerable interest in its settlement. It is suggested here by the appellants that the fact that this cargo contracted fire in parts from spontaneous combustion is a reason for depriving the owner of any compensation for any part of that cargo. I think that for us, in this court, it is settled, as my Lord has said, by decisions which bind us, that, as it was expressed by Lord Esher in the case of *The Ettrick*; *Prehn* v. *Bailey* (*ubi sup.*), if the general average contribution which a person claims "is a general average contribution which arose by reason of a default of his, he cannot claim anything." Cotton, L.J. in the same case says: "It would be against equity to say that the person who himself has done the wrongful act which caused the expenditure shall claim thereupon from anybody else." It seems to me it is settled for the purposes of our deliberations here, that "wrongful" there means wrongful in the eye of the law. It seems to me to follow from the effects of the judgments which have been referred to, and from the language of Lord Watson, in *Strang, Steel, and Co.* v. *Scott* (*ubi sup.*), in which he says that "such exceptions as that recognised in *Schloss* v. *Heriot* (*ubi sup.*), are in truth limitations on the rule, which have been introduced, from equitable considerations," and I lay stress on these words which follow: "in the case of actual wrongdoers or of those who are legally responsible for them." In this matter we are bound by that authority. If the matter goes further, no doubt it will be considered, because the Supreme Court of the United States has apparently taken a different view, and in *The Irrawaddy* (171 U. S. Rep. 187), where there must have been something which caused the loss, but from liability for which this shipper, the owner, was excused by certain considerations in their law, he was none the less unable to recover. But be that as it may, whether it be as suggested in *Schloss* v. *Heriot* (*ubi sup.*) that it is by right of avoiding circuity of a cross claim, or whether it be by reason of the equitable considerations, of which Cotton, L.J. spoke, and to which Lord Watson referred, which prevent a man who has done a legal wrong, and is legally responsible for the mischief, from recovering in general average—it is quite clear a person in that position cannot recover, but our law has never gone further. It has never been said if there was no legal liability, the mere fact that it was out of the commodity shipped by the person claiming general average that the mischief arose should deprive him of his right of general average. Now, we have been appealed to by Mr. Maurice Hill in particular to say that there is nevertheless an equitable principle which disentitles the owners of the coal from receiving contribution, because the coal suffered from an inherent vice by which it was liable to spontaneous combustion. Speaking for myself, I should be willing to meet Mr. Maurice Hill's argument on his own grounds. Why is it fair or reasonable that because this coal has suffered from spontaneous combustion, and produced the fire, that therefore so much of that coal as has been damaged should not be a subject of general average contribution? It seems to me that when you use the word unfair or unreasonable, you must look at some grounds for finding it fair or reasonable to deprive him of it. Now, on what equitable or moral grounds can it be said that the cargo-owners ought not to have contribution? As between themselves and the shipowners they shipped that which the shipowners knew was liable to spontaneous combustion. So, too, every other shipper of coal on this vessel chose to ship it in a vessel which he might, on inquiry, have found would carry coal, the nature of which is obviously possibly combustible. I cannot see the shippers of this bulk of the cargo were in such a position that anybody could say that in fairness they ought not to receive a general average contribution. Everybody knows what is the nature of coal. It is conceded in this case that there was in fact neither wrongful conduct in a more positive form, nor wrongful conduct in the form of want of care or negligence on the part of the shipper of that coal in regard to the cargo. We go back, as it seems to me, to the reasoning of Crompton, J. in *Brass* v. *Maitland* (6 E. & B. 470), in which he pointed out very clearly a long time ago the position that might arise if it should be held, or if it ought to be held, that a shipper was liable to another shipper because he shipped hay or cotton apparently in a fit state — not dangerous to the knowledge of shippers or shipowners, but in fact in a dangerous state, as such cargoes may be in to the knowledge of the whole mercantile world that ship goods. He there incidentally says that the true remedy ought not to be found, in his judgment, in the right of one shipper against another, where the hay or cotton has taken fire, but the real remedy is in each

person against his underwriters, who ought to be the persons to suffer from such an unexpected occurrence. In my opinion, in a case where there is neither negligence nor positive active wrong on the part of the shipper whose goods caught fire and set fire to others, there is nothing unfair, unreasonable, or inequitable in his retaining his rights with others to general average contribution in respect of such goods as have been sacrificed for the safety of the general average.

Appeal dismissed.

Solicitors: for the plaintiffs, *Waltons, Johnson, Bubb,* and *Whatton*; for the defendants, *Thomas Cooper* and *Co.*

Wednesday, Dec. 18, 1907.

(Before Lord Alverstone, C.J., Sir Gorell Barnes, President, and Buckley, L.J.)

Cairn Line of Steamships Limited *v.* Trinity House Corporation. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Light dues—Tonnage—Deck cargo—Deck load—"Timber, stores, or other goods"—Coal carried on deck for use of ship—Merchant Shipping Act 1894 (57 *&* 58 *Vict. c.* 60), *s.* 85 (1).

Coals carried in an uncovered space on the deck of a ship for use on the voyage are "stores or other goods" carried "as deck cargo," within sect. 85 (1) *of the Merchant Shipping Act* 1894, *and the light dues payable on the ship's tonnage are payable as if there were added to the registered tonnage the tonnage of the space occupied by the coals so carried.*

Appeal of the plaintiffs from the judgment of Bray, J. at the trial of the action without a jury.

The plaintiffs brought this action to recover from the defendants the sum of 6*s.* 10*d.* paid to their collector, under protest, in respect of light dues.

The facts, which were agreed between the parties, were as follows.

The plaintiffs' steamship *Cairntorr* left Penarth, in April 1906, for a voyage to Buenos Ayres, carrying 4924 tons of coal shipped by Messrs. Cory Brothers Limited under bills of lading. This coal was carried in the ship's holds. In addition the *Cairntorr* took on board 1291 tons of coal, of which 1127 tons were put in the ship's bunkers, 64 tons in the poop, and 100 tons on the awning deck.

None of the 1291 tons of coal were shipped under bills of lading or so as to earn freight; they had been bought by the plaintiffs for use on board in the ship's fires.

On the voyage out to Buenos Ayres the whole of the 100 tons of coal stored on the awning deck was transferred from the awning deck into the thwartship bunkers and consumed in the boiler fires.

The defendants, being the authority charged with the collection of light dues, by their collector at Cardiff demanded from the plaintiffs in respect of the *Cairntorr* and in respect of the said voyage, and compelled the plaintiffs to pay, light dues amounting to 6*s.* 10*d.* on the tonnage space occupied by the 100 tons of coal stored on the awning deck.

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

The plaintiffs, in order to get their ship cleared at the custom house and to avoid detention, paid under protest that sum of 6*s.* 10*d.* and brought this action to recover the same.

The Merchant Shipping Act 1894 (57 & 58 Vict. c. 60) provides:

Sect. 85 (1). If any ship, British or foreign, other than home trade ship as defined by this Act, 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 part of 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 those goods at the time at which the dues became payable.

The Merchant Shipping (Mercantile Marine Fund) Act 1898 (61 & 62 Vict. c. 44) provides:

Sect. 5 (1). On and after the commencement of this Act the general lighthouse authorities shall levy light dues with respect to the voyages made by ships or by way of periodical payment, and not with respect to the lights which a ship passes or from which it derives benefit, and the dues so levied shall take the place of the dues now levied by those authorities. (2) The scale and rules set out in the second schedule to this Act shall have effect for the purpose of the levying of light dues in pursuance of this Act, but Her Majesty may, by Order in Council, alter, either generally or with respect to particular classes of cases, the scale or rules and the exemptions therefrom.

Second schedule.—Rule 8. For the purposes of these rules—(*a*) A ship's tonnage shall be reckoned as under the Merchant Shipping Act 1894 for dues payable on a ship's tonnage, with the addition required in section eighty-four of that Act with respect to deck cargo, or in the case of an unregistered vessel in accordance with the Thames measurement adopted by Lloyd's register.

The action was tried before Bray, J. without a jury. The learned judge held that the coal carried on deck for the use of the ship was "stores or other goods" carried "as deck cargo" within the meaning of sect. 85 (1) of the Merchant Shipping Act 1894, and gave judgment in favour of the defendants (10 Asp. Mar. Law Cas. 457 (1907); 96 L. T. Rep. 846).

The plaintiffs appealed.

J. A. Hamilton, K.C. and *Maurice Hill,* for the appellants.—The question in this case is whether light dues are payable in respect of deck space occupied by coals carried for the use of the ship. The question turns upon the construction of sect. 85 of the Merchant Shipping Act 1894, which provides that if a ship "carries as deck cargo, that is to say, in any uncovered space upon deck, . . . timber, stores, or other goods," the tonnage in respect of which dues are payable shall include the tonnage of the space occupied by such timber, stores, or other goods. These coals were not cargo in respect of which freight was or could be earned, and the intention of the Act is that dues shall be payable in respect of deck space occupied by freight-earning cargo. With regard to steamships, the registered tonnage in respect of which dues are payable is the tonnage of the space below deck, but not the whole of that space, because it cannot all be used to carry cargo. Certain specified deductions are allowed by sect. 78, which provides that an allowance shall be made for the space occupied by the propelling power—that is, the space actually so occupied with an addition of one-half or three-

fourths of the tonnage of that space. The space so calculated makes allowance for the space occupied by bunkers for coal, the intention being that space so occupied shall not be reckoned in the tonnage upon which dues are charged; and the provisions of sub-sect. 3 show that "stores" cannot include coal carried for use of the ship. In sect. 85 the words are, "carries as deck cargo," and the governing word is "cargo." "Cargo" is a well-known commercial term to signify that which is transported from place to place in return for freight, and not that which is carried for the use of the ship itself. The words "that is to say," in sect. 85, define the word "deck" and nothing more, and do not define the subsequent words "timber, stores, or other goods" as deck cargo. The fallacy of the judgment of Bray, J. is that it ignores and gives no effect to the word "cargo." Timber is a well-known deck cargo, and "other goods" refer to similar kinds of deck cargo. The word "stores" refers to stores carried to a destination as cargo, and cannot refer to consumable stores carried for the ship's use when used in conjunction with the words timber and other goods. In sect. 81 "cargo," "stores," and "fuel" are separately mentioned, which shows that in this Act fuel is expressly mentioned when it is intended to be dealt with, and that "stores" does not include fuel. The rules and exemptions contained in the second schedule to the Act of 1898, which imposes these light dues, show that the dues are payable in respect of a voyage and at the first port of loading "cargo," and that ships are exempt when carrying no cargo in respect of which freight is earned. The scheme of that Act is evidently to charge dues where freight-earning cargo is carried and then to charge in respect of the registered tonnage below deck and of deck space occupied by such cargo. In the case of *Richmond Hill Steamship Company* v. *Corporation of Trinity House* (8 Asp. Mar. Law Cas. 146, 164; 75 L. T. Rep. 8; (1896) 2 Q. B. 134), which was decided under sect. 23 of the Act of 1876 in which the words are the same as in sect. 85 of the Act of 1894, Lord Esher, M.R. said: "The provisions of sect. 23 . . . appear to be directed to cases in which a shipowner uses the deck of his ship as if it were the hold by carrying cargo upon it and so earning freight for such carriage"; and Kay, L.J. said: "It was argued that 'stores' meant in this section ship's stores. If so, it would appear that it must mean stores intended for the fitting out of other ships, because stores belonging to the ship herself would not be cargo." Sect. 302 of the Act of 1894 shows that "stores" carried for freight are meant when they are referred to as cargo.

Cohen, K.C. and *Bateson* for the respondents.—Coal carried for the use of the ship is within the words "timber, stores, or other goods" in sect. 85. In sect. 85 it was necessary to define cargo and deck, and both are there defined, cargo being defined as "timber, stores, or other goods." Those words clearly include all goods carried on deck, and cannot be restricted to freight-earning goods. The definition in sect. 85 was necessary because the expression "deck cargo" is used in other sections in a more limited sense, as in sect. 451. In sect. 451 spare spars, carried on deck, if exceeding five in number, are treated as deck cargo, which shows that things carried for the use of the ship are treated in the Act as cargo. By sect. 651 a ship may be detained at the port where light dues are payable until the receipt for the dues is produced to the proper officer; and by the Act of 1898 the dues in respect of a foreign-going ship are payable at the first port of loading. In the case of an outward-bound ship it is impossible for the custom-house officer to say whether coal carried on deck is for the use of the ship or not; and that shows that the dues ought to be charged for all deck space occupied by coal at the port of loading.

J. A. Hamilton, K.C. replied.

Lord Alverstone, C.J.—This case, I think, is by no means free from difficulty, but having followed closely the very able arguments of Mr. Hamilton and Mr. Cohen, any doubt which I felt has been removed, and I have come to the conclusion that the judgment of Bray, J. is right. Now, the question turns upon the way in which one ought to construe the words in sect. 85 of the Merchant Shipping Act 1894, "carries as deck cargo." It is contended by Mr. Hamilton that they mean that which is transported from place to place in return for freight and not that which is carried for the use of the ship itself. I think, looking at their natural meaning, that the section only meant to define, for the purpose of the section, the two words, "deck cargo." The words, which are the same as those in sect. 451, are, "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." I understand that to mean, in both sections, that the Legislature intends to deal with that which is carried as deck cargo in two senses, that is, which is either carried in an uncovered space, or in a covered space on deck, which latter is a covered space that is not included in the registered tonnage of the ship. Therefore, the main argument which has been urged before us on behalf of the appellants, that "as deck cargo" means carried as cargo, I think overlooks the object and purview of this language, which is to define the expression "deck cargo" for the purpose of the section. Therefore, in my judgment, we cannot properly confine this section to goods which are carried on deck as cargo for freight. I must also say that, if that argument were really right, I can see no reason why the words "timber, stores, or other goods" should be inserted at all. Timber was, of course, one of the most common kinds of deck cargo, and therefore it would be quite unnecessary to insert it. "Timber," I think, means, or may include, at any rate, timber carried for the purpose of the ship—timber which the ship may require to use. Certainly "stores" would include that. I had for some time a doubt as to whether the words "other goods" ought to include bunker coal, or other coal which was going to be used for the purpose of the ship, because I find in sect. 81 that "cargo" and "stores" are contrasted with "fuel," or, at any rate, fuel is separately mentioned, and also in sect. 78 (3) "goods or stores" are referred to, which rather point to the view that when the Legislature meant fuel they said so. But looking at the object of this Act, which was either to prevent deck loading, if sect. 23 of the Act of 1876 or sect. 451 of this Act

is taken, or to make the shipowners pay if they carry a deck cargo under certain circumstances, I think we ought not to limit the meaning of the words "other goods." I think, therefore, that in the expression "timber, stores, or other goods," in sect. 85, it is proper to read the words "other goods" as including coal.

Now, the only other argument to be dealt with is that based upon the case in the Court of Appeal, *Richmond Hill Steamship Company* v. *Corporation of Trinity House* (*ubi sup.*), which is, of course, binding upon us if it decides the question. In that case, however, this point was never argued or raised. The contention was that horses were not "other goods," and it was decided that they were. So far that case is an authority in favour of the contention that "other goods" may include coal. The real point taken was that the shipowners could get out of this section because a limited construction ought to be put upon the words "other goods." That was the only point decided, and it was only necessary to refer to the cargo character of the horses in that case, because it was admitted they were cargo, and it was sought to get out of the section only on the ground that the words "other goods" did not include horses. I think, therefore, that the judgment of Bray, J., to which I can add nothing, ought to be affirmed.

Sir Gorell Barnes, P.—I am of the same opinion. I think that it assists in arriving at the construction of sect. 85 to follow the line of thought which was presented by Mr. Cohen in his argument, and to see what was the scheme which the Act contemplated—now the scheme, stating it very shortly, was to measure the whole internal tonnage capacity of the ship, which I think would be below the spar deck, if there was one; but, in addition to that, there should be included in the gross measurement any space inclosed above the deck, for which there is a provision made in the second schedule to the Act, sub-clause 5, which deals with the "poop, deck-house, forecastle, and any other closed-in space" which is available for cargo or stores, being measured; and thus the whole internal contents of the vessel are arrived at. Then a deduction is allowed in certain instances for crew space, and, summarising it very shortly by reference to the section, for the propelling power space, and for stores, and limited allowances are given for those different matters. If the construction of this section is approached by the light of that line of thought, I think that sect. 85 is really free from difficulty. It seems to me to have been passed to meet the case, putting it quite generally, of goods being stored or carried in that part of the ship which has not been included in the gross computation, for, if that is done, then, as they are treating that part of the vessel, which was not really intended for lading at all, as a place on which lading is to be allowed and exercised, there ought to be a payment based upon the tonnage, or rather that that part ought to be included in the tonnage space, which is a space, speaking generally, where cargo is to be carried. I think, then, that the section may be read thus: "If any ship, British or foreign, other than a home trade ship as defined by this Act, carries as deck cargo"—that is to say, as deck lading, something laden on deck—"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"—which practically includes everything which can be loaded on deck—"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 those goods at the time at which the dues become payable." I think that is the true view to be taken, and the object with which that clause was passed. If that were not so, it seems to me that Mr. Hamilton's argument would really give no substantial effect to the word "stores" at all. Therefore I think this appeal should be dismissed.

Buckley, L.J.—I am of the same opinion. This is a short, but, to my mind, not an easy question of construction, and I wish to say why I am able to arrive at the same conclusion. Sect. 85 uses the words "that is to say" after the words "as deck cargo," and those words "that is to say" are followed by, first, a statement of place, and then a statement of subject-matter. The former might be a qualification of what I may call the adjective "deck," but the latter cannot be a qualification of the noun substantive "cargo." But I think that is an impossible view, and for this reason: Those words "timber, stores, or other goods" are necessarily the subject governed by the verb "carries," and we must read the sentence transposing the words thus: "carries timber, stores, or other goods as deck cargo, that is to say"; and then follows the definition of a particular place. So there is nothing, I think, to which the words "that is to say" can refer for the purpose of defining or limiting the noun substantive "cargo." I think the words "that is to say" are simply a qualification of what I call the adjective "deck," leaving the noun substantive "cargo" as a subsisting and, in this connection, an emphatic word. That being so, the next point is what is meant by "carrying as deck cargo," because, in my view, the word "cargo" is there and must mean something. Does that mean what is called freight-earning cargo, or does it mean load? I should have thought it meant freight-earning cargo but for the fact that Mr. Cohen has shown me that in another section of this Act—namely, sect. 451, it cannot mean that. In sect. 451 I find words which are identical for the present purpose—"carrying 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 any wood goods." Then I find later in that section that ship's "spare spars or store spars," if they are more than five in number, are plainly within that clause, so that there ship's spare spars or store spars are spoken of as cargo. Of course, they are not freight-earning cargo. They are load, and not cargo at all; so that that leads me to the conclusion that in sect. 85, as in sect. 451, the words "deck cargo" may mean deck load. I think that they mean deck load, and not necessarily freight-earning cargo placed on the deck.

That leaves still another question, which is a question of difficulty, and that is this: I must find, in order to arrive at the conclusion that this decision is right, that these coals are within the words "timber, stores, or other goods." There I find this difficulty, that sect. 78 (3) has used the words

"goods or stores" in such a sense that they plainly there do not include coal, because in sect. 78, which is the section providing for measuring the ship and so on, there is an allowance for the space actually occupied by the machinery with a margin, and it is agreed on all hands that that margin is to contain, amongst other things, the bunker coal, but sub-sect. 3 says, "goods or stores shall not be stowed or carried in any space measured for propelling power"; so that if coals are included in "goods or stores," then coals could not be loaded in the space which it is agreed is provided for loading them. Then I find in sect. 85 the words "stores or other goods," and I have to ask myself whether they mean the same as in sect. 78 (3), because if they do, then they mean stores or other goods to the exclusion of coal. That is the point which I confess has pressed me most; but I do not know that it necessarily follows that in sect. 85 the words bear the same meaning as obviously they must bear in sect. 78, having regard to the subject-matter of that section, and I agree with the other members of the court that coal is included under the words "other goods" in sect. 85. It seems to me that that is a possible meaning, and upon the fair construction of the whole section I think that its purpose is to deal with all that forms part of the deck load, including ship's stores and coal. For these reasons I agree that the appeal fails.

Appeal dismissed.

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

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

Dec. 17 *and* 18, 1907.

(Before COZENS-HARDY, M.R., MOULTON and FARWELL, L.JJ.)

ANDERSON *v.* MARTEN. (*a*)

APPEAL FROM THE KING'S BENCH DIVISION.

Marine insurance—Time policy on disbursements—Perils of the seas—"Warranted free from capture, seizure, and detention, and consequences of hostilities"—Neutral ship carrying contraband of war—Damage causing leaks—Capture by belligerent before making port of refuge—Beaching of vessel—Total loss—Subsequent condemnation by prize court.

A vessel carrying contraband of war and bound for a certain port was insured against perils of the seas on a time policy for disbursements in respect of total loss only. The policy contained clauses: "Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy. . . . Warranted free from capture, seizure, detention, and the consequences of hostilities. . . ."

The vessel was captured by belligerents, who put a prize crew on board, and ordered the vessel to proceed to a port where a prize court was sitting. On the voyage to that port, by reason of the leaks, the vessel became a total loss. The vessel was subsequently condemned by the prize court.

Held, that the underwriters were not liable under the policy as for a total loss by perils of the seas, the capture having been the cause of the loss to the owners.

Hahn *v.* Corbett (2 *Bing.* 205) *followed.*

Decision of Channell, J. (10 *Asp. Mar. Law Cas.* 494 (1907); 97 *L. T. Rep.* 375) *affirmed.*

THE plaintiff was the owner of the steamship *Romulus*, and the defendant was an underwriter at Lloyd's.

The plaintiff's claim was was for a total loss of disbursements, caused by perils of the seas, under a marine policy of insurance, dated the 11th Jan. 1905, for 3300*l.* on disbursements per the ship *Romulus* subscribed by the defendant for 200*l.*

The defendant alleged that the disbursements per the ship *Romulus* were not lost by perils of the seas.

The policy, which was a Lloyd's policy, contained the following provisions:

For and during the space of twelve calendar months, commencing the 12th Jan. 1905 and ending the 11th Jan. 1906, both days inclusive, beginning and ending with Greenwich mean time, 3300*l.* upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition . . . of and in the good ship . . . called *Romulus*. . . . The said ship, &c., goods and merchandise, &c., for so much as concerns the assured by agreement between the assured and assurers in this policy, are and shall be valued at, say, on disbursements, subject to the printed clauses attached, touching the adventures and perils which we, the assurers, are contented to bear . . . are, of the seas, men-of-war . . . takings at sea, arrests, restraints, and detainments of all kings, princes, and people . . . and of all other perils, losses . . . the consideration due unto us for this assurance by the assured at and after the rate of 75*s.* per cent.

The following clause was stamped upon the policy:

Warranted free from all average, being against the risk of total and (or) constructive total loss of steamer only, as per clause attached.

The following clause was written upon the policy:

No claim for salvage charges to attach hereto.

The attached clauses provided (*inter alia*) by clause 4:

Warranted free from all average, being against the risk of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy.

And by clause 5:

Warranted free from capture, seizure, and detention, and the consequences of hostilities, piracy and barratry excepted . . .

The *Romulus* loaded at Cardiff on the 11th Dec. 1905 a cargo of coal for Vladivostok during the war between Russia and Japan, such coal being contraband of war.

The vessel, to avoid the attention of the Japanese cruisers, proceeded well to the eastward and northward of Japan, intending to make Vladivostok by passing through the Urup Strait (between Company's Island and Black Brothers in the Kuril Islands) and La Perouse Strait. In

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

anticipation of meeting floating ice, the collision bulkheads had been shored up.

The vessel proceeded through Urup Strait, but on the 21st Feb. 1905 collided with floating ice, which damaged the bows, causing the vessel to make water. The water rose in holds No. 1 and No. 2 and the pumps were worked. Being in a dangerous state by reason of the risk of the fine coal getting into the bilges and choking the pumps, the captain put about and repassed the Strait, abandoning the attempt to proceed to Vladivostok.

The crew mutinied, and the captain made for for Hakodate as a port of refuge. Some of the cargo was jettisoned.

The vessel being down by the head, the course held was along the coast in case necessity arose of beaching the vessel.

On the 26th Feb. the vessel was not leaking quite so much. On that day, at 7 a.m., when thirty miles from Hakodate, the vessel was stopped by a Japanese cruiser. A Japanese officer remained on board, who directed the vessel to be steered for Yokosuka, where there was a prize court.

On the afternoon of the 26th Feb. the water increased rapidly in holds No. 1 and No. 2, and on the early morning of the 27th Feb. the water ran into the engine-room, and the vessel was steered for the shore for the purpose of beaching her.

Before a spot was selected the vessel grounded at a place forty miles from where she was arrested. Not being able to be got off, the vessel was driven firmly on to the beach. The vessel became a total wreck, having broken her back.

On the 16th May both the ship and cargo were condemned by the prize court at Yokosuka.

On the 10th May 1907 the action came on for trial before Channell, J. sitting without a jury in Middlesex, when his Lordship decided (*ubi sup.*) that, although the mere capture without condemnation of the prize court did not divest the property in the vessel, yet when such condemnation did take place the property in the vessel passed as from the time of capture; that the vessel, but for the arrest, had a good chance of getting safely into a port of refuge; that the shipwreck was not the direct consequence of hostilities; but that there was a loss by capture, and that the owner having no further interest could not lose the vessel again. His Lordship decided, therefore, that the underwriters were not liable under the policy.

From that decision the plaintiff now appealed.

J. A. Hamilton, K.C. and *Balloch* for the appellant.

Scrutton, K.C. and *Bailhache* for the respondent.

In the view taken by the court of the facts of the case, the arguments are immaterial for the purposes of this report.

COZENS-HARDY, M.R.—I rather regret that having regard to the near approach of the end of these sittings, and the fact that the court will be differently constituted next sittings, it is desirable that we should give judgment at once. For I could have wished to have put my observations somewhat more into shape. But as I have arrived at a conclusion satisfactory to my own mind that the judgment of Channell, J. is correct, I think that I had better shortly state how the matter presents itself to me. We are dealing here with a policy of a peculiar form. It is a policy on disbursements. It is not a policy on the hull or the cargo, but simply on disbursements. And one of the clauses in the policy is this: "Warranted free from all average, being against the risks of total loss only. A total loss or constructive total loss paid by underwriters on hull and machinery to constitute a total loss under this policy." Then follows this clause: "Warranted free from capture, seizure, detention, and the consequences of hostilities . . ." Now, the facts with which we have here to deal are these: The vessel was a vessel taking a contraband cargo—contraband that is to say in the view of both of the belligerents engaged in war—namely, the Russians and Japanese. The vessel was on its way, as was found by the prize court, which ultimately dealt with it, to Vladivostok. The captain, I believe, said that, although he was apparently going that way, he was minded to put into the Japanese port of Hakodate, near Urup Strait, through which he was wending his way. His vessel had been more or less damaged by ice, with the result that she was making very slow progress. At seven o'clock in the morning she was stopped, examined, and seized by a Japanese cruiser; and a prize crew under a lieutenant were put on board. That being the case, she was diverted from her course, and whether her course was Vladivostok or towards the Japanese port of Hakodate is immaterial for our present purpose. She was, I repeat, diverted from her course and taken into the open sea; and being in a very damaged condition, she was going very slowly, and the sea being very rough, she was either purposely beached or was driven on shore—I am not quite sure which it was—with the result that her back was broken and she became a total wreck. The matter was brought before the Japanese prize court, and the Japanese prize court held that the capture was legal and valid, and it is not disputed that the judgment of the Japanese court as from some date and for some purposes, at all events, was a judgment *in rem* which shifted the property in the vessel. We had a very learned and interesting argument as to whether the judgment of the prize court in a case like this, dealing with a neutral vessel, condemned for carrying contraband, does or does not change the property therein as from the date of the seizure. I think that the authorities show that that is the case where the seizure is of a foreign vessel; and I do not desire to indicate any opinion adverse to the view that it also applies to the case of a judgment dealing with the seizure of a neutral vessel. It seems to me that it is really not necessary for us to give a final decision upon that point, for the authorities to which our attention have been called seem to me to show that as between the assurer and the assured the question of the transfer of property is not, or is probably not, a material matter—certainly not a material one in the present case. On reading the present policy, it is clear that a loss by capture is exempted from the policy; and if the true view is that the loss has accrued by capture, anything subsequent to the capture seems to me to be immaterial and unimportant. Now, the ship was, as I have already

said, *de facto* seized by the Japanese cruiser at seven o'clock on the morning I have mentioned; *de facto* the prize crew, with a lieutenant in charge, were put on board. That seizure might, or might not, be an abnormal and illegal one, but it has been decided by the prize court—which alone has jurisdiction in dealing with the matter, and whose decision is binding on all parties as a judgment *in rem*—that the seizure was lawful, and the ship was, therefore, lost by reason of the capture. Now, it seems to me that, for all proceedings in the Japanese court, what happened after the seizure was entirely irrelevant, and of no moment whatever. The question which the Japanese were deciding was, Aye or no, was that vessel lawfully and well seized as being a neutral vessel carrying contraband of war under circumstances which entitled it to condemnation? They found that it was. That, therefore, was the cause of loss, and that is a loss which is excepted from the policy. The fact that after the seizure and on its way to port the ship went on shore and became a total wreck is an irrelevant circumstance, and one which does not enable the plaintiff to assert that the loss was one which occurred from the perils of the sea as distinct from the perils of capture. I venture to say that in this case, as I hope in many other cases, if not in all, the law agrees with common sense, and I desire to adopt and accept what Channell, J. said: "I think that most people, looking at the matter from a common sense point of view, and apart from technicalities, would say that, under the circumstances, the owner lost his ship by capture, and that the Japanese captors afterwards lost their prize by shipwreck."

That, I think, is the correct view, and, in my judgment, that is sufficient to dispose of this case. I do not think that it is necessary to refer in detail to the numerous authorities which were cited, except to mention that the case of *Hahn* v. *Corbett* (2 Bing. 205) seems to me to be singularly analogous, because there the vessel, through the perils of the sea, was driven on a sand-bank, or met with some disaster of the sea, and, being there, afterwards she was captured in that state by the enemy. The court held that the underwriters who had insured against the perils of the sea were liable—that being the first and the real cause of the loss—and that the subsequent capture made no difference. So here the capture was the real cause of the loss, and the subsequent perils of the sea were an irrelevant matter for all purposes we have to consider. In my view the judgment of Channell, J. was quite right, and the appeal must be dismissed with costs.

MOULTON, L.J.—I am of the same opinion, and quite agree with the judgment which has just been delivered. In my mind, the only question here involved is the simple question of fact—namely, what was the cause of the loss of this vessel to the owners. And the mine of wealth of learning and research which has been displayed by Mr. Hamilton in his most interesting and able argument is really unnecessary for the decision of the court. The policy is one which would include almost all possible risks, and certainly all risk of capture, if it were not that by a slip attached to it the risk is "Warranted free from capture, seizure, and detention, and the consequences of hostilities. . . ." In other words, those particular risks, although included in the wide words of the policy, are excepted; and now we have to consider in this case, whether this loss is by one of those excepted risks or not, and I do not think that the court would be putting the question in an incorrect form if it were to ask itself, aye or no, under a policy which covered loss from "capture, seizure, detention, and the consequences of hostilities," could the owner under these circumstances, recover? In whichever way you put it, it appears to me that this loss was unquestionably a loss by capture. A plain, common sense man, I should think, would have no hesitation in taking that view; and I can see no rule of law which would prevent a court following the dictates of good sense in the same way. The ship was seized by a ship of the Japanese Government under circumstances which show that it was intended to be, and was, a seizure, and she was taken for the purpose of condemnation to the prize court. An accident happened on the way; but nevertheless the question of whether this was a proper and effective seizure did come up before the prize court, and a judgment *in rem* was pronounced which settled for all the world the question that it was an effectual seizure. Now, under those circumstances, I cannot see how we could possibly come to any other decision on the question of fact than that this vessel was lost to the insured by seizure. If nothing else had happened that must have been the consequence. It is said that before the actual condemnation was pronounced the vessel had been destroyed by perils of the sea. But I agree with the Master of the Rolls that that is immaterial. The prize court could not have gone into it. What the prize court decided was the fact of the seizure. It decided that the seizure was a seizure which took the ship effectually away from the owner, and made it the property of the captors. We have been pressed very much by the suggestion that there is no doctrine of relation back. In my opinion the doctrine of relation back is not involved in our decision in this case. The question is whether or not there was a total loss to the insured by reason of the seizure, and the fact that an authoritative determination of that matter could only occur some day subsequently appears to me not in the least to affect the question as to whether the loss was really at the moment, and by reason of, the capture. A question that I put to Mr. Hamilton during the course of the argument I think illustrates it. Supposing there had been a time policy against capture, and, during the currency of that policy, a proper capture, as this was, had been made, but that the actual adjudication that it was a proper capture which deprived the owner of the property was not made until after the expiry of the policy, can it be doubted that that would have been a loss by capture within the period covered by the policy? Personally I do not think that it could. I am therefore of opinion that the judgment of Channell, J. was right, and that this appeal ought to be dismissed.

FARWELL, J.—I am of the same opinion. I have very few words to add. The writ was issued on the 16th Sept. 1905. The final decision of the prize court at Yokosuka was on the 16th May of the same year. So that at the date of the writ

there was no sort of question or doubt that everybody's rights were finally settled. Test the case in this way. Supposing there had been an insurance of a vessel lost by sea by one person, and against capture and perils of the sea by another. Is it not absolutely plain that in a case like the present the second insurer would have had to pay, and not the first? I can see no reason whatever why the second insurer should escape when the actual events have happened. Nor does it appear to me to be material to suggest that if there had been an insurance of that sort and notice of abandonment had been given, that the assurer would have to step into the assured's shoes, because that is merely a contract between the parties that the one should be subrogated to the other's position under certain circumstances. It leaves the rights as regards the vessel itself absolutely untouched. When the final decision is given, it is a decision *in rem*, and the ship has then become condemned, and from the date of capture, so far as I can see, has been rightly and lawfully seized. I agree that I do not think it is necessary for us to consider the doctrine of relation back in the present case. You have got the fact of the capture; you have got the fact of condemnation; all taking place before the writ was issued. It seems to me the decision of the learned judge in the court below was perfectly right, and must therefore be affirmed.

Appeal dismissed.

Solicitors for the appellant, *Woodhouse* and *Davidson.*

Solicitors for the respondent, *William A. Crump* and *Son.*

END OF VOL. X.